



Response to Consultation and Direction

Extension of April 2009 Direction requiring Eircom to refrain from launching proposed 1MB and 3MB Family "free calls to meteor" TalkTime bundles

(Response to consultation document 09/43)

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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.

ComReg confirmed its initial assessment in relation to the April 2009 Bundles, i.e., that in launching the April 2009 Bundles Eircom was not likely to be compliant with its obligation not to unreasonably bundle. On 19 May 2009, ComReg published Document 09/43 “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” (the “Consultation and Draft Direction”) seeking industry’s 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 was satisfied that the April 2009 Bundles would not amount to unreasonably bundling, if launched, whichever was the earlier.

There were seven respondents to the Consultation. All, except Eircom, generally welcomed an extension of the April 2009 Direction. The Consultation and Draft Direction were made available to the European Commission and other National Regulatory Authorities (“NRAs”) on 4 June 2009. By way of letter dated 3 July 2009, the European Commission confirmed that it had no comments on the proposed direction. No comments were received from other NRAs.

On the basis of its own compliance assessment, having regard to the views of respondents and taking utmost account of the response of the European Commission, ComReg has decided to 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. The nine-month period is designed to take account of anticipated changes in market conditions, including revised allocations of retail costs to retail calls by Eircom¹ which will be available for ComReg’s review from January 2010 and the revision of mobile termination rates on 1 April 2010.

¹ Following publication of Eircom’s separated accounts for 2008/09

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 31 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. On 2 April 2009, ComReg informed Eircom of its opinion that Eircom was not in compliance with its regulatory obligation not to unreasonably bundle² in respect of the October 2008 Bundles. Eircom claims that this opinion may be the subject of an appeal under the Framework Regulations and has lodged an appeal in this regard. ComReg also published an Information Notice 09/25 ‘Opinion of Non-compliance by Eircom Limited with its obligations not to unreasonably bundle’. ComReg arrived at its opinion 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 harmful effect on competition in the market for retail narrowband access and other markets.
- 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:
- 2.5.1 The April 2009 Bundles appeared to fail the net revenue test, as referred to in ComReg Document No. 07/26³ and ComReg Document No 09/08⁴. The net

² The legal basis for this obligation is set out at Section 3.

³ Document No. 07/26 “Market Analysis: - Retail Fixed Narrowband Access Markets” dated 4th May 2007.

revenue test is also described in Section 4 of this Response to 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 appropriate 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. ComReg was of the view that 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 was of the view that claims in respect of retail efficiencies and increased customer lifetime 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 Eircom has lodged an appeal against the April 2009 Direction which is pending before the High Court.
- 2.8 Subsequent to issuing the April 2009 Direction, ComReg further analysed the information provided by Eircom for the proposed April 2009 Bundles and confirmed its initial assessment, i.e., that in launching the April 2009 Bundles Eircom was not likely to be compliant with its obligation not to unreasonably bundle. Consequently,

⁴ “Information Notice – Notification of non-compliance to Eircom in relation to its obligation not to unreasonably bundle pursuant to ComReg Decision D07/61” dated 11 February 2009.

ComReg decided to consult as to whether or not it would be appropriate to extend the April 2009 Direction and therefore on 19 May 2009 published the Consultation and Draft Direction (Document No. 09/43).

- 2.9 As this was 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, the deadline for receipt of submissions was 2 June 2009. Responses were received from seven interested parties: Eircom, BT Ireland, Vodafone, Association of Licensed Telecom Operators (ALTO), Magnet Networks, Smart Telecom and Digiweb.
- 2.10 The details of the operator responses as well as ComReg's consideration of those responses are included in the sections below.

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). The extension of the April 2009 Direction is also adopted pursuant to Regulation 31 of the Universal Service Regulations and having regard to the requirements of Regulation 20(10) of the Framework Regulations. 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. The European Commission responded on 3 July 2009 with no comments and no comments were received from other NRAs.

4 Net revenue test – Analysis carried out by ComReg

4.1 ComReg 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 Responses to Consultation 09/43 and ComReg's position

- 5.1 In consultation 09/43, ComReg sought respondents' views in order to assist it in its deliberations as to whether it should extend its April 2009 Direction.
- 5.2 As noted in consultation 09/43, ComReg's preliminary view was that it was 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 believed 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 was 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 had 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 was for ComReg to allow Eircom to launch the bundles and subsequently initiate compliance proceedings. That course would allow Eircom to continue to offer the products for a period of time before effective compliance measures could be taken.
- 5.3 The following are the issues in relation to which ComReg sought respondents' views in order to determine whether it should extend its April 2009 Direction.

09/43 Consultation 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.

Views of Respondents

- 5.4 Five respondents agree with ComReg's reasoning behind its initial compliance assessment. One respondent does not and another respondent does not explicitly state an opinion but offers an alternative compliance assessment for consideration.
- 5.5 **Eircom** disagrees with the reasoning behind ComReg's initial compliance assessment. Eircom does not accept that the obligation not to unreasonably bundle as set out in ComReg Decision D07/61 requires Eircom to pass a net revenue test. In

addition, Eircom maintains that if the obligation included a requirement to pass such a test, then a net revenue test in the few instances where it has been used has been taken to refer to a form of incremental analysis relating to the introduction of new products; Eircom does not accept that the test set out in section 4 of document 09/43 is a net revenue test. In addition, Eircom claims that ComReg's assessment of Eircom's costs is not adequate. Eircom maintains that the use of Average Total Cost sets an unreasonable threshold where there is factual evidence of replicability in the marketplace and Eircom is seeking to meet that competition. Also, Eircom points out that the test ComReg seeks to rely on includes an *ex post* assessment of the anti competitive effects of bundles, which Eircom claims ComReg has obviously not been able to carry out. In addition, Eircom claims that ComReg has provided no reasons why it had taken the view that there was a potential for detriment to competition and consumers. Furthermore, Eircom entirely disagrees with the suggestion that ComReg is entitled to refuse to use the latest audited separated accounts of Eircom. Finally, Eircom notes that ComReg should have provided details of its further compliance assessment following the April 2009 Direction.

- 5.6 **BT Ireland** fully agrees with ComReg's initial compliance assessment which was made over the period of the initial offer and BT Ireland considers that ComReg would have been sufficiently informed by the actual volume and usage data.
- 5.7 **Vodafone** strongly agrees with the reasoning underlying ComReg's initial compliance assessment in relation to Eircom's bundled offers. Vodafone claims that ComReg's view of the October 2008 Bundles is consistent with Vodafone's own estimates using the imputation test for the October 2008 Bundles on the basis of less complete information than that available to ComReg. Vodafone notes that it has no reason to believe that the conclusions of ComReg's assessment are in error in any respect given that the underlying methodology used by ComReg is in Vodafone's view sound and robust, and per Vodafone, appears to be based on very detailed and extensive cost and product information. Vodafone is in agreement with ComReg's initial compliance assessment which informed the April 2009 Direction.
- 5.8 **ALTO** notes that it fully supports ComReg's initial compliance assessment. ALTO notes that the compliance assessment was made over the period of the initial offer and ALTO further considers that ComReg would have been sufficiently informed by the actual volume and usage data learned. ALTO further notes that certain ALTO members supported ComReg's efforts in ascertaining relevant and necessary evidence in order to support the compliance findings.
- 5.9 **Smart Telecom** and **Magnet Networks** agree with ComReg's reasoning behind the initial compliance assessment.
- 5.10 **Digiweb** suggests that, amongst other measures, ComReg could also use the Reasonably Efficient Operator (REO) test in order to determine the exact level of margin squeeze which would result from the implementation of Eircom's "April 2009" bundle packages.

ComReg's position

- 5.11 ComReg notes that the majority of respondents agree with the reasoning behind the initial compliance assessment.
- 5.12 In relation to Eircom's views, ComReg's position is as follows:

5.12.1 The term “net revenue” is simply a short-hand for the concern that a firm is not covering its costs. This test is set out in both this document (section 4) and section 4 of the Consultation and is the format of test used by Eircom to demonstrate that its bundles are above cost. Moreover ComReg Document No. 07/26 specifically refers at Paragraph 6.234 to bundles passing a net revenue test. Furthermore ComReg Document No. 07/26, which is to be construed together with the SMP Decision⁵, sets out in considerable detail the analysis of the basis for and content of the SMP obligation not to unreasonably to bundle services (see paragraphs 6.216-6.234). In particular Paragraph 6.218 explains the detailed competition concerns in the case of bundling practices:

“...There may be the potential for operators, notably dominant operators, to leverage strong market and branding positions and to use bundling strategies for anti-competitive reasons. This may allow an operator already dominant in one market to leverage its dominance into closely related markets. Bundling could also be used to potentially protect and indeed enhance a position of dominance in the retail narrowband access markets. The inability of new entrants to compete profitably with the dominant operator’s bundled offerings may increase entry barriers in these markets. For instance, eircom might offer access bundled with a package of free, or heavily discounted, call minutes (including both fixed and mobile calls). In that context, and where alternative suppliers were constrained in offering the same kind of bundles as the incumbent operator, the bundling of retail products could potentially distort competition by leveraging into closely related markets and by distorting pricing in such markets...”

Paragraph 6.219 sets out the concern about competitors’ ability profitably to replicate Eircom’s bundled pricing:

“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.”

5.12.2 In relation to Eircom’s point that the test as presented in section 4 of ComReg document 09/43 is not a net revenue test, ComReg notes that the net revenue test is the test that has been used by ComReg and Eircom for some time to assess whether Eircom’s bundles are above cost. Eircom has presented data on the basis of this test (average revenue and average total cost)⁶ to demonstrate that bundles are not being sold below cost. Therefore ComReg maintains that

⁵ Section 1.1v of the SMP Decision.

⁶ Since December 2008, Eircom has proposed using Average Avoidable Costs instead of Average Total Costs when a bundle is a response to competition.

the test set out in paragraph 6.234 of ComReg document 07/26 and set out for industry's information in ComReg document 09/08 and in section 4 of ComReg document 09/43 is the net revenue test and is known and understood by Eircom. Except for an adjustment made by ComReg to the retail costs associated with retail line rental, this is the basis on which Eircom demonstrated that its bundles were covering its costs. Again, ComReg would note that the net revenue test simply shows whether or not Eircom is covering its costs.

- 5.12.3 In relation to the use of average total cost ('ATC'), ComReg's position is as follows: In the first place, ATC is the correct cost input for the net revenue test in light of ComReg's statutory objectives under Section 12 of the Communications Regulation Act 2002 to promote competition and protect the interests of end-users. In the context of an *ex ante* regulatory tool to be applied by ComReg, the use of another cost basis, such as average avoidable costs ("AAC"), as suggested by Eircom could significantly constrain the potential for entry by efficient entrants. This is because telecom networks not only require significant upfront investment, but they also enable a wide range of services to be provided. Telecom networks are therefore characterised as having high fixed costs and significant common costs across services. Therefore the use of AAC would not support ComReg's objectives. If entrants knew that the incumbent could respond to entry by dropping prices to AAC, this would increase the risk that the entrant would not be able to recover their fixed costs, and might therefore preclude (efficient) entry. Secondly, up to December 2008, ATC was the basis on which Eircom itself submitted its costs and revenues to demonstrate that bundles were above cost. ComReg has never used AAC for this purpose. The net revenue test has a simple underlying logic: if Eircom's pricing does not cover its ATC it is reasonable to assume that an efficient rival would also not be covering its full costs since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match. Other operators' ability to compete with Eircom would therefore be constrained, their incentives to enter would be weakened, and their ability to establish themselves as sustainable retail competitors in the longer term could also be hampered. Applying a different cost basis when a bundle is meeting competition would also give rise to perverse consequences. If accepted, the legality of Eircom's pricing would depend on the happenstance of there being another offering already in the market. Moreover, Eircom could clearly skew the analysis by slightly delaying its offering to follow another operator's launch. It would also lead to odd results. If, by pricing below cost, Eircom succeeded in eliminating the other operator from the market, in Eircom's view, their conduct (i.e. dropping prices to AAC) would nevertheless be legal, given that they were pricing to meet competition. If there was no competitor left on the market, Eircom's pricing would at that moment become illegal, since there would be no competition to "meet". All of this shows how inappropriate a meeting competition defence would be in a regulatory context.
- 5.12.4 Therefore, ComReg maintains that the obligation not to unreasonably bundle under D07/61 includes the requirement to pass a net revenue test and that ATC is the appropriate cost basis.
- 5.12.5 In relation to the anti-competitive effects of bundles that are sold below cost, these possible anti-competitive effects were clearly set out in Document No.

D07/26. In assessing the anti-competitive effects of the April 2009 Bundles ComReg was informed by the actual information of the similar October 2008 Bundles. ComReg also considered information presented by Other Authorised Operators (“OAOs”) at the time and also considered information regarding DSL net additions. Eircom presented forecast information that showed that the April 2009 Bundles were forecast to be sold below cost and, cognisant of the impact of the October 2008 Bundles, ComReg acted to safeguard the interests of consumers and other operators/new entrants.

- 5.12.6 ComReg has used Eircom’s 2006/07 Regulatory Accounts as the basis for assessing Eircom’s costs. ComReg has not used Eircom’s latest Regulatory Accounts because it has a number of queries on the allocations to retail calls within those accounts and continues to work with Eircom in this regard. For this reason, ComReg considers it appropriate to rely upon the figures from 2006/07. Furthermore, the 2006/07 allocations have been subject to detailed reviews by ComReg and its advisors in the context of the revised pricing for Single Billing –Wholesale Line Rental (‘SB-WLR’) and Wholesale Broadband Access (‘WBA’) conducted in 2008. However, ComReg nonetheless for information purposes carried out the net revenue test using the 2007/08 cost data provided by Eircom and the other forecast data provided by Eircom and the bundles in question still did not pass the net revenue test, that is, they were forecast to be sold below cost even when using the 2007/08 cost allocations to retail calls.
- 5.12.7 Finally, in relation to further assessment following the April 2009 Bundles, as no further information was provided by Eircom in relation to same and since ComReg’s queries on the 2007/08 allocations to retail calls remained unresolved by Eircom, ComReg utilised the information provided by Eircom for the initial compliance assessment and re-confirmed that assessment.
- 5.13 ComReg welcomes other respondents’ statements that they support and agree with ComReg’s initial compliance assessment. In relation to Digiweb’s observation that a Reasonably Efficient Operator test could be used, ComReg notes that it currently uses the net revenue test to determine whether a proposed bundle is being sold above cost. The net revenue test considers the position of other efficient operators by ensuring that the retail costs as derived from the relevant SB-WLR and WBA retail minus price controls are utilised. To date, ComReg is satisfied that the test is appropriate to ensure that a bundle is profitably replicable by operators/new entrants as efficient as Eircom.

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.

Views of Respondents

- 5.14 All respondents except Eircom consider that there would have been negative effects if the proposed April 2009 Bundles had launched.
- 5.15 **Eircom** believes that the April 2009 Bundles would have had a positive effect on consumer interests and competition. Eircom states that all of its narrowband access products are, in accordance with section 7.9 of Decision No. D07/61, available as stand-alone products and that the price for the April 2009 Bundles was well above the costs of the wholesale regulated elements. Eircom maintains that the bundles are replicable by OAOs as the components are available as stand alone products and well above the cost of wholesale regulated elements; Eircom claims this is consistent with paragraphs 6.223 and 6.227 of ComReg document 07/26. Eircom states that ComReg has not explained the specific anti-competitive effects and concludes that it is Eircom's strong view that preventing Eircom alone from competing impairs rather than promotes or protects the competitive process to the detriment of consumer interests.
- 5.16 **BT Ireland** considers that the October 2008 Bundles had a significant negative impact on the market and BT Ireland claims that many customers leaving BT Ireland claimed that the Eircom October 2008 Bundles were the reason. BT Ireland considers that the April 2009 Bundles were basically a continuation of the October 2008 Bundles and therefore considers that the harm to the market would have continued. Whilst BT Ireland does not object in principle to the launch by Eircom of bundles, it does object to bundles which are unreasonable and damage competition. BT Ireland notes that such damage can be caused through a variety of means including pricing.
- 5.17 **Vodafone** notes that it does not have visibility of the exact details of the April 2009 Bundles. However, Vodafone notes that as it is ComReg's view on the basis of detailed information that the April 2009 Bundles fail the net revenue test, Vodafone believes that their introduction would have had a deleterious affect on competition in the relevant retail product markets. Vodafone notes that its own analysis of the October 2008 Bundles showed that the offer could not be replicated by an efficient operator using the current wholesale inputs while also earning a competitive rate of return. Vodafone believes that without substantial changes in the makeup and pricing of the April 2009 Bundles this must continue to be the case. Vodafone claims that the potential damage to consumer interest arising from the introduction of the April 2009 Bundles cannot be underestimated and notes that the areas most likely to be affected are:

5.17.1 New market entrants

Vodafone believes that potential entrants into the retail markets for broadband and/or fixed calls services face serious competitive obstacles arising from the October 2008 Bundles and on the basis of ComReg's analysis of the April 2009 Bundles. Vodafone believes any attempt to replicate the Eircom bundle (regardless of how efficient the potential entrant may be) given the current regulated prices of the necessary wholesale inputs will simply mean unsustainable ongoing losses for alternative operators. Vodafone believes that even entrants planning to introduce a fixed call only product will be severely impacted by the existence of an Eircom bundled product which for a relatively small additional charge provides broadband and free fixed to mobile calls. It is Vodafone's belief that the Eircom bundled

offers as currently constructed do act as a serious obstacle to strong and sustainable competition in this market and are therefore to the detriment of consumer welfare in the longer term.

5.17.2 Dynamic efficiency

Vodafone notes that it does not object to the bundling of communications services in principle, indeed it recognises the significant potential for product bundling to be consumer welfare enhancing. However Vodafone believes that the ongoing inability of alternative operators to earn a competitive rate if Eircom prices below efficient cost is not a sustainable situation. In the longer term, Vodafone believes that this will mean not only fewer competitors in the market but also a marked reduction in the introduction of innovative products and services.

5.18 **ALTO** cautions against the principle of bundled packages. ALTO notes that bundled packages enhance the market both for the consumer and for competition but that the April 2009 Bundles were a continuation of the October 2008 Bundles and therefore would have resulted in harm. While ALTO does not object in principle to the launch of the April 2009 Bundles it does object to pricing which makes it unsustainable for competitors to compete. ALTO therefore considers that whilst the offer may benefit consumers in the short term, value and choice will be removed.

5.19 **Magnet Networks** believes that in relation to:

5.19.1 Consumer Interest

Consumer gain may be short term. Magnet notes that this strategy is well documented by competition experts as a strategy used to ensure competitors leave the market and allowing the incumbent to revert to its monopoly position.

5.19.2 Fixed Retail Narrowband Access Market

Magnet maintains that this market will be foreclosed. It is a market in which it is extremely difficult to compete in that in the majority of cases a competitor is purely reselling an Eircom product. If a competitor is not providing narrowband voice it is providing voice services over IP utilising broadband. Magnet maintains there is effectively very little competition in this area due to Eircom's SMP.

5.19.3 Other Markets

Magnet believes that several markets are suffering due to bundled products (this is based on the October 2008 Bundles). The first market is the LLU market. Bundles such as the October 2008 Bundles focus on price which appeal to a price conscious population. Magnet notes that LLU providers have large investment costs and currently a limited footprint. Magnet maintains that LLU providers have been unable to replicate this product at a similar price to Eircom. Though the LLU provider has a superior product few customers are discerning on their broadband when they see what is perceived as a better valued product. Thus, Magnet calls on ComReg to redefine the market to include both bitstream and LLU. Currently, there is no linkage and this allows an uneven playing field to emerge. Magnet also believes that with regard to mobile, alternative mobile providers are unable to offer a similar bundle as they do not have a close relationship with a national telecommunications provider and those that may have a fixed arm are mere resellers of Eircom.

- 5.20 **Smart Telecom** in its non-confidential version of its response simply notes that there are several effects. In its confidential response it sets out what it considers these negative effects to be.
- 5.21 **Digiweb** notes that Eircom will be pricing this bundle in such a way that OAOs which are not vertically integrated will not be in a position to compete any longer in the market.

ComReg's position

- 5.22 ComReg notes that with the exception of Eircom, the detailed views of respondents are that the April 2009 Bundles would have had negative effects. This confirms ComReg's preliminary analysis.
- 5.23 In relation to Eircom's comments, ComReg's position is as follows: Firstly with regard to the point about Eircom's narrowband access products being available as stand-alone products, in accordance with section 7.9 of the SMP Decision, ComReg notes that Section 7.9 of the SMP decision is preceded by Section 7.8 which states that Eircom must not unreasonably bundle and much of the reasoning relating to the obligation not to unreasonably bundle services and which is contained in Document 07/26⁷ is concerned with ensuring that bundles are not anti-competitive. For example, paragraph 6.232 of ComReg Document 07/26 concludes on the nub of the regulatory concern in respect of retail bundling, reinforcing Eircom's SMP in retail narrowband and leveraging that SMP into other related markets:

“However, there is a need for some obligation to prevent bundling being used for anti-competitive purposes, in particular where it may be used to disguise a possible margin squeeze in respect of the retail narrowband access element of the bundle and thereby potentially reinforce eircom's dominance in the retail narrowband access markets and providing scope for leveraging into related markets. As a result, ComReg proposes to impose an obligation on an ex post-basis on the SMP operator 'not to unreasonably bundle'”

In essence, Eircom appears to claim that the meaning of the term 'unreasonable bundling' is restricted to the practice of tying, that is, where one service is not available for purchase unless another service is also bought. It is clear from ComReg documents 07/26 and the SMP Decision that Eircom is incorrect in this regard. Tying, while problematic, is only one example of unreasonable bundling of services.

In relation to Eircom's comments on it being precluded from competing, ComReg notes that Eircom is fully entitled to respond to competition so long as it is compliant with all of its regulatory obligations including its obligation not to unreasonably bundle services. As the operator with SMP in the markets for higher and lower level retail narrowband access from a fixed location, Eircom has a regulatory obligation to ensure that it does not unreasonably bundle services. The finding that Eircom was pricing below cost means that as efficient rivals would not be able to profitably replicate Eircom's bundles. This is the key competitive harm and ComReg must consider the situation of the market as a whole, including new entrants.

⁷ Which is to be construed with D07/61 under Section 1.1v of the SMP Decision.

- 5.24 ComReg notes Magnet's comments on the definition of the market but considers that these are concerned with a matter that is outside the scope of the present consultation.

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.

Views of Respondents

- 5.25 All respondents, with the exception of Eircom, consider that the proposed bundles would have a potential for competitive harm and this would last longer than the proposed promotional sign up period.
- 5.26 In relation to the proposed promotional sign up period, ComReg was advised by Eircom that the April 2009 Bundles would be offered only for a promotional six month period. However, other bundles that were launched by Eircom in April 2009 were offered on a permanent basis; therefore it is not clear whether the April 2009 Bundles would have been offered on a permanent basis. That said, affidavits from Eircom in the current legal proceedings indicate that the April 2009 Bundles were intended only to be offered on sale for a promotional period of six months.
- 5.27 **Eircom** does not consider that the April 2009 Bundles have any potential for competitive harm.
- 5.28 **BT Ireland** and **ALTO** believe that the April 2009 Bundles do have potential for competitive harm and such harm would not cease on the expiry of the proposed promotional period. BT Ireland and ALTO agree with ComReg that by the promotion offering sign-up for "life" the benefit to the customer and to Eircom will extend beyond the promotion period hence the impact to the market is also extended beyond the promotion period. BT Ireland and ALTO believe at a minimum Eircom will benefit for one full year given that twelve month contracts are being signed. BT Ireland and ALTO note that Eircom tends to run promotions continuously and would expect, as has been proposed by Eircom in this case, to run one promotion into another. In this proposed case the promotions are each six months long hence BT Ireland and ALTO note that the promotions become the product. BT Ireland and ALTO are of the view that Eircom appears to be using the promotion route to make a product offer that it can adjust at six month intervals rather than making this a full product offering and being subject fully to price controls and ex-ante regulation. It is BT Ireland's and ALTO's view that this is not the purpose of promotions and that Eircom is attempting to use promotions to circumvent regulation and regulatory controls.
- 5.29 **Vodafone** does not believe that the 'promotional' nature of these offers in any way mitigates the negative effects on sustainable competition. Vodafone agrees with ComReg that the removal of the offer once the promotion has expired still means those customers who availed of the promotion will remain on the bundled tariff.

Vodafone notes that these customers will also be subject to a minimum contract period of 12 months which effectively removes them from the market in terms of inter-operator migration for this period of time. In addition, Vodafone believes there is nothing to prevent Eircom introducing serial promotions in quick succession, or continuously extending the existing ‘promotional’ bundled offers for an indefinite period. Vodafone concludes that there is nothing exceptional about a promotional bundled product offer which abrogates any of Eircom’s obligations in relation to regulatory compliance.

- 5.30 **Smart Telecom** does not believe that there is any way that the family bundles proposed could be launched without competitive harm.
- 5.31 **Magnet** believes that the competitive harm would not cease when the promotion of the April 2009 Bundles would have ceased. Magnet notes that the April 2009 Bundles would have been offered on a lifetime basis, thus the subscribers would be given free Meteor calls until such time as they churn from Eircom. Magnet believes that the April 2009 Bundles would also have had an effect on mobile switching, as a customer signing up to the April 2009 Bundles may potentially move his/her mobile subscriptions to Meteor in order to maximise savings by having free calls to Meteor. Magnet believes that both these aspects are evidence that the effect of the April 2009 Bundles would last significantly longer than the promotion period. Magnet believes that the effect of this would be to foreclose competitors.
- 5.32 **Digiweb** believes that Eircom would have gained a significant first-mover advantage in capturing additional customers to its base. It states that if the April 2009 Bundles were to be purchased by its own customers, the resultant reduction in transaction costs and marketing economies of scale could also be significant. Digiweb believes that the impact of these, especially the marketing messages, would be felt for much longer than the original promotional period. Thus Digiweb believes this “limited period” offer would have a lasting effect that would increase Eircom’s SMP, further lock a captive customer base, and weaken already fragile competition.

ComReg’s position

- 5.33 ComReg notes that all respondents, with the exception of Eircom, consider that the April 2009 Bundles would have a potential for competitive harm and that this would last longer than the proposed promotional sign up period.
- 5.34 ComReg believes that the potential for competitive harm would last longer than the proposed promotional sign up period, since the benefits of the April 2009 Bundles would accrue to customers who remain on contract with Eircom for the duration of their contracts (i.e., potentially permanently), so long as they signed up before the deadline. It follows that while the proposed duration of the offer in terms of sign-up period may be less than six months, the effects of the April 2009 Bundles would not be limited in time. The fact that they form part of a “promotional” offer does not affect their potential harm or ComReg’s conclusions on their reasonableness. There is a risk that the April 2009 Bundles, which were forecast to be below cost and not to be compliant with the obligation not to unreasonably bundle services, would result in more customers moving to the 1MB and 3MB Family bundles and being locked in for the period of their contract, which is 12 months (renewable). The locking in of customers may therefore lead to foreclosure and operator exit since customers would

be locked in on below-cost bundles. At best, OAOs will have to spend considerable sums of money on customer acquisition costs such as advertising to counter the offers of Eircom. If the ongoing revenue versus cost on a monthly basis is unprofitable these upfront costs to stay in business simply make no sense.

- 5.35 In relation to respondents' views on promotions, ComReg wishes to note that promotions are subject to full regulatory controls. ComReg does appreciate that ongoing and repeat promotions can result in those promotions becoming in essence the standard product.

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

Views of Respondents

- 5.36 **Eircom** believes that actual evidence of replication in the market place must be taken into account and that ComReg has not allowed for "ex post case by case basis" assessment of whether any bundles have anti-competitive effects.
- 5.37 **BT Ireland** and **ALTO** are of the view that Eircom is using the promotions process to circumvent regulatory controls of its products and thus ComReg should review the promotion rules. BT Ireland would expect promotions to be short duration events (1 to 3 months) with the financial benefit then spread across the year. BT Ireland notes that Eircom's promotions appear to last for an initial period of six months with a continuation for the full year, and queries therefore how these costs are built into the process of setting wholesale prices in a forward looking way.
- 5.38 **Vodafone** has no further issues that it believed should be considered.
- 5.39 **Smart Telecom** notes that ComReg has not published its response to consultation on the treatment of regulated wholesale components within bundles.
- 5.40 **Magnet** notes that ComReg should consider redefining markets to include both bitstream and LLU. Magnet believes that as bitstream is defined in a different market to LLU, Eircom is allowed margin squeeze LLU providers. Magnet claims that Eircom is dropping the price of wholesale bitstream which directly impacts LLU providers and that there is very little ComReg can do to stop Eircom. Magnet believes that redefining the market would ensure consistency across the broadband market place.
- 5.41 **Digiweb** believes that ComReg should possibly review the poor development to date of mobile virtual network operators ("MVNOs"). Digiweb believes that Eircom's ability to include mobile service in its package will not be replicated at the same cost base by any alternative operator. Digiweb believes that the conditions are not yet adequate for the introduction of new MVNOs in Ireland despite the high Average Revenue Per User seen in the market.

ComReg's position

- 5.42 In relation to Eircom's points, ComReg notes that a competitive assessment was conducted at the time of Eircom's SMP designation. ComReg's concern is that a bundle should be profitably replicable. ComReg maintains that the April 2009 Bundles will be anti-competitive as they are forecast by Eircom to be sold below cost. This is the key competitive harm and ComReg must consider the market as a whole, including new entrants, and cannot rely solely on the situation of operators with similar bundles. Indeed, following on from this, there is a sound case in a regulated market for saying that other operators will, in order to succeed, need to be able to undercut the incumbent and not simply meet its prices. Because of an incumbent's brand advantages its activities in multiple markets, and high levels of fixed sunk costs, other operators will need to price lower to be able to induce customers to switch. Finally, in assessing the anti-competitive effects of the April 2009 Bundles ComReg was informed by the actual information of the similar October 2008 Bundles. ComReg also considered information presented by OAOs at the time and also considered information regarding DSL net additions. Eircom presented forecast information that showed that the April 2009 Bundles were forecast to be sold below cost and, cognisant of the impact of the October 2008 Bundles, ComReg acted to safeguard the interests of consumers and other operators/new entrants.
- 5.43 In relation to BT Ireland's and ALTO's points, ComReg appreciates that ongoing promotions may be causing concern that such promoted prices are becoming a permanent price point and the impact this may have on associated wholesale pricing. As noted above, ComReg wishes to note that promotions are subject to full regulatory controls.
- 5.44 In relation to Smart's concern that the consultation on the treatment of regulated wholesale components within retail bundles⁸ has still not progressed, ComReg notes that it is progressing this consultation. However it should be noted that the obligation at issue is a retail obligation whereas Consultation 08/05 that Smart refers to is concerned with the related but different issue of wholesale pricing in a retail minus environment where bundled services are offered. These are two different issues.
- 5.45 ComReg notes Magnet's comments but is of the view that they are concerned with a matter that is outside the scope of this consultation process.
- 5.46 In relation to Digiweb's comments, ComReg has ensured that the net revenue test takes the full cost of mobile termination so that any operator should be able to profitably replicate the bundles. However ComReg does appreciate the difference between the cash payment for a non-mobile operator as compared to an internal charge for an integrated fixed mobile entity.

⁸ Document No. D08/05 "Treatment of Regulated Services within Bundled Retail Offers" ("Consultation 08/05").

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.

Views of Respondents

- 5.47 All respondents, with the exception of Eircom, consider that it is appropriate to extend the April 2009 Direction.
- 5.48 **Eircom** considers that it is inappropriate to extend the April 2009 Direction when the validity and the lawfulness of the April 2009 Direction are the subject of pending High Court proceedings. Additionally, Eircom states that it is unclear what further assessment has been undertaken and what are the results of that assessment. Eircom believes that ComReg has misunderstood the purpose of consultations under Regulation 19(3) and Regulation 20(10) of the Framework Regulations. Eircom believes that the requirement for consultation aims at ensuring the clarity and the transparency of the rules being proposed, and that it is not a mechanism which can be used to confirm provisional decisions and extend their duration without explaining the substantive rules on which the decision is based. Eircom makes the point the ComReg has not yet concluded the consultation process it opened 15 months ago with the view to specifying Eircom's obligation not to unreasonably bundle by setting out the rules for the treatment of regulated inputs in retail bundles. It states that ComReg should seek to conclude that consultation rather than attempting to address these issues by the back door.
- 5.49 **BT Ireland** considers that it is appropriate to extend the April 2009 Direction for a minimum of nine months but ideally believes that such bundles should be blanket banned until such time as SMP is lifted from Eircom. BT Ireland and **ALTO** appreciate that part of the regulatory test for the April 2009 Bundles will be the initial provision of forecast and estimate data by Eircom concerning the take up and usage of the proposed package. BT Ireland believes that it is likely to be in the interest of the party proposing such bundles to underestimate the take up and usage of the product at the outset to improve their chance of meeting the net revenue test. It considers that once launched the April 2009 Bundles could have had a significant negative impact on the market and damage competition over the period of the offer. BT Ireland and ALTO believe that experience of the October 2008 Bundles highlighted that even with operators raising formal complaints shortly after these were launched, ComReg was not able to take any action over the entire period of the offer, highlighting the ineffectiveness of ex-post regulation. BT Ireland and ALTO note that this lack of action was very frustrating to the industry during which time they believe Eircom was unfairly taking their customers. BT Ireland and ALTO are aware that ComReg was collating information about the impact of the Eircom bundle over the period and are not surprised that ComReg has now made an initial assessment that the October 2008 Bundles were non-compliant. BT Ireland and ALTO believe therefore that it appears correct and proportionate that given the above process and the finding of non-compliance of the October 2008 Bundles that the very similar April 2009 Bundles are delayed until such a time as ComReg is satisfied with their compliance. Given a non-compliance finding BT Ireland and ALTO agree that ComReg should be allowed to have sufficient information to

support its view of non-compliance. BT Ireland and ALTO would support ComReg having sufficient time to analyse this issue for the benefit of the industry and the consumer and is of the view that nine months appears short.

- 5.50 **Vodafone** believes that the nine-month extension proposed by ComReg is appropriate. If in the intervening period or after its expiry, Eircom can demonstrate to ComReg's satisfaction that any offering it is proposing to launch does not constitute unreasonable bundling then Vodafone believes that ComReg should sanction the product release. Vodafone believes that prior to the expiry of the extended period and absent any evidence which would support an early ending of this period, ComReg should be minded to consult on seeking further extensions.
- 5.51 **Smart Telecom** considers that it is not possible to launch the April 2009 Bundles such that they are compliant. As opposed to extending the April 2009 Direction, it is of the view that it should be made permanent.
- 5.52 **Magnet Networks** agrees with the proposed extension to the April 2009 Direction. Magnet Networks believes that ComReg needs as much time as possible to ensure that the April 2009 Bundles do not affect competition.
- 5.53 **Digiweb** considers that it is appropriate to extend the April 2009 Direction for at least 9 months. It states as its reasoning that it has been almost 9 months since the October 2008 Bundles were launched by Eircom and operators have already suffered in this timeframe. It states that for fairness purposes, the same timeframe should be provided to OAOs to compete without interference from Eircom. It states that a longer period could be argued for on the basis of competition promotion given the smaller size of competitors and their need to manage advertising campaigns at smaller increments over longer periods of time. Digiweb also considers that it may be appropriate to make any introduction of the April 2009 Bundles conditional on a decrease of the wholesale rates offered to OAOs.

ComReg's position

- 5.54 In relation to Eircom's comments, ComReg notes that the Consultation and Draft Direction have been brought to the attention of the High Court and that ComReg will respect any ruling of the High Court in relation to the April 2009 Bundles.
- 5.55 In relation to Eircom's point that ComReg has not provided details of its further compliance assessment, ComReg notes that no further information was provided by Eircom in relation to the April 2009 Bundles. Since issuing the April 2009 Direction, ComReg has sought further information from Eircom in relation to the 2007/2008 Separated Accounts and in particular in relation to the cost allocation to retail calls. Those queries on the 2007/2008 allocations to retail calls remained unresolved by Eircom. Accordingly, ComReg utilised the information provided by Eircom for the initial compliance assessment of the April 2009 Bundles and re-confirmed that assessment.
- 5.56 With regard to Eircom's argument that ComReg has misunderstood Regulation 19(3) and Regulation 20(10) of the Framework Regulations, ComReg considers that the reasoning behind the obligation not to unreasonably bundle services has been set out in ComReg Document 07/26, which specifically refers at paragraph 6.234 to bundles passing a net revenue test. In addition, Regulation 20(10) of the Framework

Regulations specifically refers to the extension of directions adopted on an urgent basis.

- 5.57 ComReg notes that it is progressing with a response to consultation in relation to Consultation 08/05. Consultation 08/05 is concerned with different albeit related regulatory matters: Consultation 08/05 is not a clarification of the retail regulatory obligations but is concerned with wholesale regulatory obligations where bundled services are offered.
- 5.58 In relation to BT Ireland's comment relating to a blanket ban on bundles, ComReg assumes BT Ireland means bundles that include retail fixed narrowband access. ComReg notes that it does not object to bundles per se: ComReg's concern always has been and remains to ensure that any bundle offered by Eircom complies with its regulatory obligations. A blanket ban would not, in ComReg's view, be proportionate or justified.
- 5.59 In relation to BT Ireland's and ALTO's comments, ComReg notes that the compliance assessment has been made and that ComReg believes that this non-compliance may last no longer than nine months when revised retail cost allocations to retail calls by Eircom will be available for ComReg's review from January 2010⁹ and revised Mobile Termination Rates ("MTRs") will be in effect from 1 April 2010. With the free calls to Meteor in the April 2009 Bundles, MTRs are a significant input into the net revenue test and the proposed reduction in MTRs on 1 April 2010 may result in the April 2009 Bundles passing the net revenue test depending on the average number of free Meteor minutes forecast to be used¹⁰ and how the MTR reduction is made by Day/Evening/Weekend rate. These are not the only elements in the net revenue test that could change over the nine month period: there may be other revised cost inputs to be considered at that time, for example, if the SB-WLR price was to change with, say, a revised retail line rental price. At any stage before the expiry of the nine months, ComReg will revoke the Direction if it forms the view that any new information demonstrates that Eircom would be compliant with its obligation not to unreasonably bundle services in respect of the April 2009 Bundles. It is for these reasons that ComReg proposes to extend the Direction for a period of nine months and does not propose to make the Direction permanent as requested by Smart Telecom.
- 5.60 In relation to Digiweb's comments, ComReg notes that its Direction will only last for as long as Eircom remains non-compliant. No allowance is made in the Direction to compensate OAOs for the period of non-compliance. ComReg agrees with Digiweb that Eircom could make its bundles compliant by reducing the wholesale input prices by an appropriate amount.
- 5.61 ComReg will extend the April 2009 Direction for a period of nine months. If at any time Eircom becomes compliant the Direction will be revoked. For example, Eircom may become compliant by demonstrating to ComReg's satisfaction that the April 2009 Bundles pass a net revenue test by increasing the retail price of the bundle, changing the retail terms of the bundle, by reducing the wholesale input costs or by a combination of all of the above. It is also worth remembering that the Direction is in

⁹ Following the publication of Eircom's 2008/09 Separated Accounts

¹⁰ This would likely be informed by the actual usage by customers on the October 2008 bundles and the April 2009 bundles that did launch

respect of the April 2009 Bundles and Eircom remains free to propose similar new bundles provided that they do not constitute an unreasonable bundling of services within the meaning of ComReg Decision D07/61.

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.

Views of Respondents

- 5.62 The majority of respondents, with the exception of Eircom, consider that ComReg should extend the April 2009 Direction as proposed.
- 5.63 **Eircom** believes it is inappropriate to extend the April 2009 Direction when the validity and the lawfulness of the April 2009 Direction is the subject of pending proceedings.
- 5.64 **BT Ireland** and **ALTO** agree that the timeframe should be extended as required based on the fact that ComReg has already captured significant information and has made a non-compliance assessment. **BT Ireland** and **ALTO** believe that if during its work that ComReg reaches a final conclusion of non-compliance then the product in its current form should not be permitted indefinitely.
- 5.65 **Vodafone** believes that ComReg should extend the April 2009 Direction as proposed.
- 5.66 **Smart Telecom** does not see any possible potential for the proposed bundles to launch with compliance granted.
- 5.67 **Magnet** agrees that the April 2009 Direction should be extended as proposed.
- 5.68 **Digiweb** notes that ComReg has the responsibility to ensure that Eircom complies with the obligation not to unreasonably bundle services. As the majority of the services included in the bundles have their wholesale prices determined by ComReg, Digiweb believes that ComReg should be in position to impose the lowering of Eircom's upstream rate in order to facilitate the development of the competition. Digiweb believes that ComReg should extend the April 2009 service "ban" as long as OAOs are not in a position to compete effectively in the market.

ComReg's position

- 5.69 Following consideration of respondents' views, ComReg does not propose to alter the Draft Direction as set out in the Consultation and Draft Direction.
- 5.70 Eircom's comments are addressed in response to question 5.
- 5.71 In relation to Digiweb's comments, ComReg notes that the aim of Consultation 08/05 was to introduce a mechanism for altering wholesale input prices when a bundle was found to be unreasonable. Nevertheless, pending a decision in relation to consultation 08/05, Eircom may reduce its wholesale input prices if it so wishes subject to compliance with regulatory obligations. Finally, ComReg again notes that the Direction only applies as long as the bundles constitute an unreasonable bundling

of services. ComReg does not “ban” Eircom bundles that meet its regulatory obligation not to unreasonably bundle services and notes that there are currently other “free calls to Meteor” bundles that launched April 2009 and are currently on offer for sale by Eircom.

6 Conclusion

- 6.1 Based on the views of respondents and absent any further information from Eircom regarding the reasonableness of the April 2009 Bundles, ComReg has decided to issue the Direction as set out in Section 7 to Eircom in relation to refraining from launching the April 2009 Bundles for a period of nine months from the date of this document or until such time as ComReg considers that the April 2009 Bundles do not amount to an unreasonable bundling of services, whichever is earlier.
- 6.2 As per Regulation 4 of the Framework Regulations, Eircom has 28 days in which to appeal this Direction.
- 6.3 ComReg will respect any ruling of the High Court in relation to the April 2009 Bundles arising from the Appeal Proceedings pending in relation to the April 2009 Direction.

7 Direction

Pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations¹¹;

Pursuant to Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations¹²;

Pursuant to the functions and objectives of the Commission for Communications Regulation (hereinafter the "Commission") as set out in Sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended; and

Pursuant to the obligation on Eircom Limited 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 consultation¹³;

Having taken utmost account of the views of the European Commission and other National Regulatory Authorities, where appropriate¹⁴;

The Commission hereby directs Eircom Limited to refrain from launching the bundles the subject of the Commission'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.

**JOHN DOHERTY
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 7TH DAY OF JULY 2009**

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ 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.