



Commission for
Communications Regulation

Final Determination in a dispute between (i) four parties represented by Towerhouse LLP and (ii) Eircom Ltd

Clarification request and response in relation
to ComReg Document No 17/08

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1: Clarification request letter from Eircom Limited



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Non –Confidential Version

Ms Samantha Mooney
Commission for Communications Regulation
Irish Life Centre
Abbey Court
Lower Abbey Street
Dublin 1

13th February 2017

Without Prejudice

Dear Ms Mooney

Re: D17/08 Final Determination in a dispute between (i) BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited and (ii) Eircom Limited

I refer to ComReg Document D17/08 which was published on 31st January 2017. eir has a number of fundamental concerns with the Final Determination and is considering its position in that regard.

Without prejudice to any other action eir may take there are a number of important points of clarification that eir needs in relation to the Final Determination. The clarifications we are seeking from ComReg are as follows:

1. Definition of working days / fault duration

Paragraph 4.1 (ii) (a) of the Final Determination states

“that all faults extant in excess of two (2) working days shall attract a service credit per line per working day, until such time as that fault is cleared”

In the worked example in Annex 1 Fault Duration is defined as

“Fault Duration’ is the number of working days from the day an individual fault on a line was logged to the day that fault was cleared.

- *A fault logged and cleared on the same working day has a Fault Duration of 1 working day”*

This term is not defined in the actual Decision. In the Table accompanying the examples provided, ComReg suggests that if a fault is reported and cleared on the same working day this is counted as one working day for the purposes of SLA measurement. On this basis, it would appear that if a fault was logged at, for example, 2pm on a Tuesday and cleared at 11am on Thursday the fault duration is three working days.

Although different language is used, the actual decision appears to say the same thing¹ as it defines a ‘working day’ as one from 9am to 5pm, so in the case of the above example the third working day would be the Thursday.

This is a material deviation from the existing SLA which defines the repair time in the published SB-WLR SLA as:

“Repair Time: the duration between the **time** a fault is received and accepted by open air in accordance with the fault reporting procedure and the **time** the fault is closed by open air with the SB-WLR Operator identified as the last unconfirmed clear, less parked time” (emphasis added)

Similar text is contained in the published LLU SLA document.

In ComReg Decision D05/11 in Annex 1 states for all products in scope

“*SB-WLR Fault Repair Time means the duration from the **instant** of a SB-WLR Fault Report to the **instant** of SB-WLR Fault Repair”* (emphasis added)

The way that the existing SLAs apply (and have done for many years) is that air has 16 working hours (which is the total number of hours in 2 working days) to repair the line before it is considered has not met the SLA. Therefore, in the example above, based on our understanding of ComReg’s interpretation, air would have missed the SLA by one working day and a penalty would be payable. However, based on how the SLA has been applied, the fault would have been fixed in 13 working hours (< two working days) and would therefore have met the SLA.

Could ComReg clarify as a matter of urgency whether its intention was to amend the existing time after which a fault become eligible for an SLA service credit. We understand from the decision that ComReg intended to prevent the averaging of durations of different faults but not to change the method of computation of a single fault duration. If

ComReg has not intended to amend the computation of the fault duration, and there is an error in the worked example, could ComReg please clarify this matter?

2. Effective date of the Determination

In the Determination, paragraph 4.1 (i) ComReg states

“within three months of the Effective Date of the this Determination, Eircom shall offer the Referring Parties an SLA in respect of each of the services listed at Section 3.4 above”

eir wishes to clarify whether it is ComReg’s intention that

1. eir makes a best and final SLA offer (BAFO) to Industry, following a period of Industry negotiation, by 30th April 2017, and that eir should subsequently notify and publish the SLAs in accordance with our transparency obligations

or

2. eir is expected to have concluded Industry negotiations and also to have notified, published and implemented a final offer SLA by 30th April 2017.

If ComReg’s view is the latter, it appears neither reasonable nor achievable. Notwithstanding the challenge to try to get Industry agreement within a three month period, our transparency obligations require us to provide three months’ notice of a change to the published SLA. This would of course have required that an SLA was ready for notification by 31st January 2017, which is the date the Final Determination was issued. Therefore, eir assumes that the former scenario is the correct interpretation and the BAFO must be provided to Industry by 30th April 2017, and that the formal notification and publication process follows thereafter. Could ComReg please clarify this?

3. SLA Exclusions

In the Determination paragraph 4.1 (ii) (c) provides that eir must offer an SLA which, inter alia, provides

“a comprehensive set of terms and condition governing the circumstances and the process by which faults are exclude from the payment of SCs due to force majeure”.

In paragraph 14 of the Executive Summary ComReg states

¹ “...all faults extant in excess of two (2) working days shall attract a service credit per line per working day,...”

*“ComReg is of the view that faults which are specifically and incrementally caused by force majeure events may be excluded from the calculation of SCs. Having reviewed the latest versions of the SLAs in scope, **ComReg considers that the existing SLA provisions operate in a manner consistent with this principle and therefore there is no need to intervene at this stage**” (emphasis added)*

There are a number of exclusions that currently apply to the existing published SLAs (see attached SB-WLR SLA Appendix 1 Exclusions and ULMP, Line Share and GLUMP SLA Appendix 1 Exclusions). These exclusions would not generally be regarded by a lawyer as a “force majeure event”. We assume that when ComReg states “existing arrangements continue” ComReg are referring to the exclusions listed in the existing published SLAs which include but are not limited to what would be regarded as a force majeure event. We would welcome clarification of this matter.

Given the tight timetable imposed by ComReg, we ask that ComReg reply no later than Friday 17th February.

Yours sincerely,


Martin Giffney
Head of Regulatory Compliance

2: Commission for Communications Regulation's ('ComReg') response to Eircom Limited's clarification request letter



Mr. Martin Giffney
Head of Regulatory Compliance
Eircom Limited,
1 Heuston South Quarter,
St John's Road,
Dublin 8.

17 February 2017

Re: Final Determination in a dispute between (i) BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited and (ii) Eircom Limited

Dear Mr. Giffney,

Thank you for your letter of 13 February 2017 regarding the Final Determination in a dispute between (i) BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited and (ii) Eircom Limited. (hereafter 'the Final Determination')¹.

Please see the responses to the three points on which Eircom Limited ('Eircom') sought clarification.

1. Definition of working days / fault duration

It was not the intention of the Commission for Communications Regulation ('ComReg') to amend the computation of fault duration in the Final Determination. This computation, in terms of the number of hours, should remain the same as currently practiced under existing Service Level Agreements ('SLAs').

In addition, the example provided in Annex 1 of the Final Determination was provided for illustrative purposes only. ComReg has used the same definition of "working day" as is provided in Section 2 of the "Open Eir Service Level Agreement for Single Billing through Wholesale Line Rental"² ('the SB-WLR SLA') and the "Service Level Agreement: Provision and Repair of Unbundled Local Metallic Path (ULMP), Line Sharing (LS) and Combined GNP and ULMP (GLUMP)" ('the LLU SLA') which references Eircom's Access Reference Offer. The definition of 'working day' in the SB-WLR SLA matches the definition in Determination, both referencing the Second Schedule of the Working Time Act 1997.

¹ ComReg Document 17/08.

² Please see <http://www.openeir.ie>

2. Effective date of the Determination

The effective date of the Final Determination is 31 January 2017 (as noted in section 7 of the Final Determination at Annex 2). For the avoidance of doubt, three months after the effective date is 30 April 2017.

Paragraph 4.1(ii) of Annex 2 of the Final Determination requires that:

“Within three months of the Effective Date of the this Determination, Eircom shall offer the Referring Parties an SLA in respect of each of the services listed at Section 3.4 above reflecting:

- (a) that all faults extant in excess of two (2) working days shall attract a service credit per line per working day, until such time as that fault is cleared; and*
- (b) payment of service credits shall be made on a periodic basis for each monthly or quarterly period, such period to be agreed between the parties within the 3 month period from the Effective Date of this Determination; and*
- (c) a comprehensive set of terms and conditions governing the circumstances and the process by which faults are excluded from the payment of SCs due to force majeure.”*

ComReg expects that all negotiations would be concluded by 30 April 2017 and that a service level agreement meeting the requirements of the Final Determination should be notified to ComReg by 30 April 2017.

Once the requirements of the Final Determination have been complied with, ComReg may then allow Eircom to derogate from its notification requirements under the Wholesale Fixed Voice Call Origination and Transit Decision (the ‘FACO SMP Decision’)³ and the Wholesale (Physical) Network Infrastructure Access Decision (the ‘WPNIA SMP Decision’).⁴ This will allow the new service level agreements, which comply with the Final Determination, to be offered by Eircom (after the three months allocated for negotiation in the Final Determination) in accordance with the relevant transparency obligations imposed under the FACO and WPNIA SMP decisions.

3. Service Level Agreement Exclusions

The exclusions at Appendix 1 of the version of the SB-WLR SLA and the LLU SLA which accompanied the letter of 13 February 2017 have been quoted for reference, at Annex 1 and 2 of this letter.

ComReg agrees with Eircom’s comment on force majeure. The use of the term force majeure, within the context of the Final Determination, was intended to include occurrences such as the exclusions listed at Appendix 1 of the SB-WLR SLA and the LLU SLA.

³ FACO SMP Decision which can be found at http://www.comreg.ie/publications/market_review_-_wholesale_fixed_voice_call_origination_and_transit_markets.583.104910.p.html

⁴ WPNIA SMP Decision which can be found at http://www.comreg.ie/publications/response_to_consultation_-_market_review_wholesale_physical_network_infrastructure_access_market_4_further_response_to_comreg_document_no_08_104_response_to_comreg_document_no_09_42_and_decision_the_decision_document_.583.103625.p.html

ComReg notes that the Final Determination, Annex 2, paragraph 4.1 (ii) (c) provides that Eircom Limited must offer a service level agreement which provides “a *comprehensive set of terms and conditions governing the circumstances and the process by which faults are excluded from the payment of SCs [Service Credits] due to force majeure.*”

It is ComReg’s position that listing the exclusions (as is currently the case with Appendix 1 of the SB-WLR SLA and the LLU SLA) is not sufficient in that it does not meet Annex 2, paragraph 4.1 (ii) (c) which requires that Eircom provide a “*comprehensive set of terms and conditions governing the circumstances and the process by which faults are excluded...*” [Emphasis added].

ComReg expects that, to meet the requirements of Annex 2, paragraph 4.1 (ii) (c) of the Final Determination, Eircom will provide greater transparency on these circumstances and processes, firstly to provide the Referring Parties⁵ with information required to understand the assessment criteria and the process followed by Eircom when excluding faults and secondly, to allow the Referring Parties monitor that faults are appropriately being excluded from the requirement that each fault, extant in excess of two (2) working days, will attract a service credit until such time as the fault is cleared.

Please note that ComReg intends to publish this letter as well as a non-confidential version of the letter of 13 February 2017⁶ on the ComReg website on Tuesday 21 February 2017. ComReg therefore requests that Eircom forwards a non-confidential version of the letter of 13 February 2017 suitable for publication, by 5pm on Monday 20 February 2017.

ComReg is available to discuss any further clarifications if required.

Yours sincerely,



Michael Patterson
Senior Manager
Head of Wholesale Compliance and Operations

⁵ BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited are together ‘the Referring Parties’.

⁶ Please see ComReg’s guidelines on the treatment of Confidential Information at: https://www.comreg.ie/publications/?date_from=2005-01-01&date_to=2005-12-01&orderby=date_desc&limit=10&query=05%2F24&start-month=01&start-year=2005&end-month=12&end-year=2005

Annex: 1 Exclusions listed in Appendix 1 of the SB-WLR SLA

Exclusions

"The circuit will be deemed available to the SB-WLR Operator and is therefore excluded for the purposes of calculating credits if the non-availability arises from or is otherwise caused or contributed to by the following circumstances:

- *Where the fault is caused by, third party activities such as cable damage, or gunshot.*
- *Where the fault is caused by severe weather conditions such as storms, flooding, fire or lightning*
- *Where a fault occurrence is due to changes in Customer provided apparatus*
- *Where the fault is related to customer premises equipment dialling 13xxx codes*
- *Where a fault is reported without following the Fault Reporting Checklist, as per the IPM.*
- *Where the fault is not in the open eir network i.e. SB-WLR Operator non-fault*
- *Where a fault is reported and no fault is detected when the service is tested from end to end.*
- *A failure of the SB-WLR Operator to pass on all the fault details provided by the SB-WLR Operator's customer*
- *A failure by the SB-WLR Operator or its customer to allow access to premises or equipment when requested*
- *The SB-WLR Operator or its customer failing to operate the service in accordance with open eir terms and conditions for the provision of the service*
- *A failure of the customer to report the fault in accordance with the fault reporting procedures"*

Annex: 2 Exclusions listed in Appendix 1 of the LLU SLA

Exclusions

"The circuit will be deemed available to the Access Seeker and is therefore excluded for the purposes of calculating credits if the non-availability arises from or is otherwise caused or contributed to by the following circumstances:

- Where the fault is caused by, third party activities such as cable damage, or gunshot*
- Where the fault is caused by severe weather conditions such as storms, flooding, fire or lightning*
- Where a fault occurrence is due to changes in Customer provided apparatus*
- Where the fault is not in the open eir network i.e. Access Seeker non-fault*
- Where a fault is reported and no fault is detected when the service is tested from end to end*
- Any period of scheduled outages notified to the Access Seeker in accordance with the planned works procedure A failure by the Access Seeker or its customer to allow access to premises or equipment when requested*
- The Access Seeker or its customer failing to operate the service in accordance with open eir terms and conditions for the provision of the service*
- A failure of the customer to report the fault in accordance with the fault reporting procedures"*