



Commission for
Communications Regulation

Submissions to Consultation

Guidelines on the treatment of confidential information

Submissions received from respondents

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Consultation 05/02 - Submissions received from respondents

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NOTE: Although page two of the Eircom submission states that it is confidential, in fact Eircom waived confidentiality in an e-mail to ComReg dated 11th March and supplied this version

Response by *eircom Limited*

to

Commission for Communications Regulation

Documents 05/02

Consultation – The treatment of confidential information Draft Guidelines

DOCUMENT CONTROL

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"Please note that for the purposes of the Freedom of Information Acts, 1997 and 2003, and indeed generally, information supplied by *eircom* to you may contain commercially sensitive information consisting of financial, commercial, technical or other information whose disclosure to a third party could result in financial loss to *eircom*, or could prejudice the competitive position of *eircom* in the conduct of its business, or could otherwise prejudice the conduct or outcome of contractual or other negotiations to which *eircom* is a party.

Accordingly, you are requested to contact a member of *eircom*'s Regulatory Department where there is a request by any party to have access to records which may contain any of the information herein, and not to furnish any information before *eircom* has had an opportunity to consider the matter."

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Executive Summary

The protection of the confidentiality of information provided by *eircom* to ComReg is a very significant issue for *eircom*, and ComReg is subject to considerable obligations to ensure it deals lawfully with all information covered by the laws of confidence.

eircom accordingly welcomes ComReg's consultation on draft Guidelines for the treatment of confidential information since a formal process would provide greater clarity and certainty in the manner that communications would pass between *eircom* and ComReg.

As the telecommunications market in Ireland evolves, greater transparency in the process is beneficial to all concerned stakeholders.

ComReg has proposed Guidelines and a formal process to assess information, which is marked as confidential, for subsequent publication. This formal process includes engaging with the owner of the confidential information. This is crucial to the process, and must be operated in a manner that ensures that the owner of the information concerned is given every opportunity to seek to prevent publication in the event that there is a legitimate disagreement with ComReg's determination to release the information.

Much of the information which *eircom* provides to ComReg is done so on foot of obligations and not in the context of the consultation process. *eircom* would in these circumstances expect that this information would not be disclosed in any circumstance.

eircom is concerned that the Guidelines proposed in the Consultation Document do not offer adequate protection to information providers. The circumstances under which information, marked as confidential, is published by ComReg must be carefully considered. The criteria outlined by ComReg are deficient to ensure the requisite standard of protection. In that regard, the proposal to assess only whether information has the "quality of confidentiality" is overly narrow and does not afford sufficient protection to parties providing information to ComReg.

eircom therefore proposes that ComReg adopts a process that mirrors those applied by other administrative bodies at EU and national level, which we note provides a

transparent framework within which ComReg can effectively discharge obligations imposed on it by law.

In view of the concerns, expressed in this response, *eircom* recommends that ComReg consult further on this matter.

eircom comments

Introduction

ComReg is obliged to keep confidential information provided to it by third parties, including information marked as confidential. *eircom* has in the past expressed its concerns to ComReg with respect to the treatment of confidential information.

eircom therefore welcomes ComReg's consultation on the draft Guidelines for the treatment of confidential information since it would provide greater clarity and certainty in the manner that communications would pass between *eircom* and ComReg, and ultimately how that information would be protected in the event ComReg decided to disclose it without *eircom's* consent.

As the telecommunications market in Ireland evolves, greater transparency in the process is beneficial to all concerned stakeholders.

ComReg has proposed Guidelines, in document number 05/02 published on the 11th of January 2005, for a process to assess information, which is marked as confidential, for subsequent publication. This process – if it is to be effective - must extend to all information provided by third parties to ComReg and in all circumstances.

eircom operates in an extremely competitive telecommunications marketplace. As the incumbent operator with the SMP designation, any information which *eircom* releases to ComReg has the potential to be of great interest and value to our competitors should it come to their notice.

There are many circumstances under which *eircom* passes confidential information to ComReg.

The release of certain information, which has been unilaterally deemed to be non-confidential by ComReg, without consultation with *eircom* beforehand, could prove to

be detrimental to *eircom*'s commercial position in the Irish telecommunications market.

eircom must protect the interests of its customers and shareholders. The release of confidential and/or commercially sensitive information could prove to be share price sensitive, commercially harmful and therefore damaging to those interests.

Legislative background

In support of the proposed Guidelines ComReg cites extracts from the relevant legislation.

eircom does draw attention to particular words and phrases in the relevant legislation governing the obligation of confidentiality on the part of ComReg.

The relevant words and phrases include such legislative provisions as "maintain and accept as confidential any information provided by an undertaking expressed by it to be confidential except where the Regulator has good reason to consider otherwise¹."

The expression "good reason" is a significant threshold, which ComReg must cross before it releases information supplied to it in confidence. "Good reason" or "good reasons" is used in several legislative provisions governing ComReg, and as far as confidential information is concerned is not a subjective standard. Rather, it falls to be determined with reference to accepted principles of law in relation to the protection of confidential information.

The principles of natural justice and fairness should apply to any decision of ComReg where they decide that there is a "good reason" or that there are "good reasons" to deem information, supplied by *eircom*, to be "non-confidential" rather than "confidential." Such re-designation would have to be objectively justifiable in order that the threshold contemplated by the legislation would be met.

The release of confidential information supplied to ComReg by an undertaking mean that there have to be substantial i.e. weighty arguments, advanced by ComReg justifying the release of the information supplied to it in confidence by a company such as *eircom*².

¹ *Regulation 21 of the European Communities (Electronic Communications Network and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003.*

² *While eircom accepts that it is in a different context, i.e. planning legislation, it considers that the dicta of the High Court in Village Residents Association v. An Bord*

When assessing information, claimed by respondents as confidential, **all aspects** of the information must be considered before deciding to publish. Publication must not occur unless there is good reason for doing so.

Pleanála [2000] 1 IR 65 HC and Village Residents Association Ltd v. An Bord Pleanála [2000] 4 IR 321 HC is instructive.

Other supporting legislation

eircom seeks clarify and explanation from ComReg as to the relationship between the draft Guidelines and Freedom of Information Acts, 1997–2003. *eircom* as a public limited company is not subject to the FOI Acts. However, *eircom* understands that ComReg is a designated government body, for the purpose of the legislation, and is therefore subject to the Acts.

ComReg needs to clearly explain in the Guidelines how it intends to comply with, and meet its obligations, under the Acts. ComReg should demonstrate the consultative process to be followed with *eircom*, when it receives a request from any third party, before any information is released under the FOI Acts.

In a recent letter to *eircom*, ComReg quoted three types of information;

- confidential information,
- commercially sensitive information and
- personal information.

In this context, *eircom* requires general explanations from ComReg as to how it deals with requests under the Freedom of Information Acts and specifically requests answers to the following questions:

- Does the term, ‘confidential information’, on which ComReg is consulting also include commercially sensitive information and personal information?
- Is the term ‘confidential information’ sufficiently broad to afford protection to *eircom* for all types of confidential information submitted to ComReg?

It is not clear how ComReg propose to implement the Guidelines in the context of the provisions of the Data Protection Acts.

To enable the proposed Guidelines to have the level of transparency contemplated by clause 1.1 (1) of the Draft Guidelines, *eircom* needs to understand the interaction

between the proposed Guidelines and the agreements between ComReg and the Competition Authority³, and between ComReg and the Director of Consumer Affairs.

In this context, since ComReg is a Government appointed regulator and indirectly empowered by EU Directives which contain certain reporting obligations to the European Commission, *eircom* seek assurances from ComReg that the confidentiality of information will be respected within the confines of ComReg's relationship with government and the EU.

³ http://www.tca.ie/ca_agreements/comreg.pdf

Process issues

In general *eircom* agrees with the treatment of information marked as confidential and the process outlined in the proposed Guidelines.

There are a number of process issues which concern *eircom*. The Guidelines are not clear or are silent on the treatment of these issues and *eircom* urges that ComReg address these in the final Guidelines.

It is a principle of natural justice that, where a public body such as ComReg act, they do so in accordance with a procedure which is published and consistent and in a manner which is certain and transparent.

eircom's concerns in this regard are set against the background of historical examples where information submitted to ComReg which was marked as confidential was divulged to third parties. *eircom* can provide further details of these if ComReg require.

The Guidelines should cover any manner in which information, marked as confidential, or provided in confidence, by the relevant undertaking, is obtained by ComReg. This is implicit in the relevant legislative provisions. The Guidelines should cover more than is stated in paragraph 1.1.1 of the Guidelines which gives an example of information submitted to ComReg "in the course of a consultation process".

Circumstance under which information is submitted

There are many circumstances, not contemplated by the proposed Guidelines, under which *eircom* passes confidential information to ComReg, for example:

- Responses to ComReg public consultations
- Bi-lateral consultations
- Responses to ComReg information requests
- Audits
- Authorised visits

- Letters and e:mails, such as the normal daily communications between eircom and ComReg.

The draft Guidelines do not offer advice if confidential information submitted under **all** circumstances, including those listed above, are included in the draft Guidelines.

Multiple processes

Additionally, ComReg should confirm to undertakings if a single process will be used for confidential information submitted under all circumstances or if multiple process will be used depending on the circumstance under which the confidential information was submitted.

“Normal” circumstance

Paragraph 1.1.1 of the Guidelines states that ComReg “normally follow these Guidelines”.

Guidance is not given as to what the circumstances would be for ComReg to depart from the Guidelines.

Undertakings making submissions require certainty around the implementation of the process. As already stated, eircom considers that the principles of natural justice require certainty from ComReg regarding the manner in which they make decisions which could have a negative impact on the business of eircom or any other undertaking.

“Non-confidential” annex

Paragraph 1.1.12 of the Guidelines permits undertakings “to supply a non-confidential document, with any information for which confidentiality is claimed supplied in a separate annex”.

Under these circumstance it is not clear that ComReg will adhere to limiting publication of information to that supplied in a non-confidential document.

ComReg might consider that insufficient information had been given in a non-confidential document to permit transparency. eircom seeks assurance and clarification from ComReg that information contained in such an annex will be regarded as absolutely confidential and that no publication will ensue.

“Urgent cases”

Paragraph 17 states that if ComReg intends to publish information marked as confidential “it will give the respondent a period of seven days within which to make representations”. Paragraph 18 states that this seven day period may be abridged in “urgent cases”.

With respect, it is submitted by eircom that any abridgement of the seven day notice period as contemplated by paragraph 18 is unreasonable in the commercial telecommunications environment. eircom respectfully seeks the removal of paragraph 18 in the final Guidelines.

If the abridgement contemplated by paragraph 18 is retained, eircom seeks clarification in the Guidelines as to what ComReg would consider as sufficiently urgent to abridge the seven day time limit contemplated in clause 17.

Conclusion

eircom welcomes ComReg's intention to clarify the treatment of information submitted to ComReg which is marked as confidential.

eircom is concerned that the Guidelines proposed in the Consultation Document do not offer adequate comfort to *eircom* to understand how confidential information will be assessed by ComReg, and urges ComReg to take this opportunity to ensure that a comprehensive robust process is put in place that will ensure compliance by ComReg with its obligations, and protection of third party information.

In this context, it is respectfully submitted that the procedures in Consultation Document do not provide sufficient levels of transparency as to how ComReg propose to deal with confidential information submitted to it in the future.

eircom's commercial interests may in the past have been damaged as a result of the release of confidential information, by ComReg.

eircom's commercial position in the marketplace is entitled to protection and *eircom* shareholders are entitled to expect that their interests are not jeopardised through confidential information being released in circumstances where it should clearly have been maintained as confidential.

In view of the concerns, expressed in this response, *eircom* recommends that ComReg consult further on this matter and looks forward to participating in that process.

1 February 2005

Claire Kelly
Commission for Communications Regulation
Irish Life Centre
Abbey Street
Freepost
Dublin 1

Dear Claire,

Esat BT's response to 05/02 – *“Treatment of confidential information”*

Esat BT welcomes the Commission for Communications Regulation's Consultation Paper in relation to the treatment of confidential information. Esat BT is in agreement with the proposals set out in the Draft Guidelines.

Esat BT agrees that confidential information supplied to ComReg should be set out in a separate Annex as a matter of course. Esat BT is of the view that information should only be deemed confidential if it is of a strategic nature, i.e. company strategies and business plans. The assessment should also take into account the obligations of the entity providing the information. For example, SMP Operators should be obliged to provide a greater level of transparency in relation to price etc for example than non-SMP Operators.

To date, Esat BT believes that over the last number of years the Consultation process in general, has not been effective as it could have been as certain information, particularly pricing information, i.e. pricing methodology has been withheld by SMP Operators as “confidential”. The effect has been that the OAO community has been stifled from effectively debating pricing methodology in written Consultations and in Industry Working Groups. The lack of transparency of pricing information, both methodology and level has led to the OAO community having little faith in the process for establishing for instance, interconnect rates, capacity charges, order handling charges etc. It has been particularly difficult for the OAO community with respect to Local Loop Unbundling in relation to the charging. A number of Consultations have taken place whereby feedback is sought on the establishment of the level of charges; however, the OAO community have not been provided with a detailed enough level of data to provide informed feedback. The calculation

and methodology in relation to Number Translation Codes is a case in point. Moreover, the withholding of information in relation to processes/systems has also caused frustration in the OAO community, and slowed progress on the development of products such as Wholesale Line Rental.

Esat BT is of the view that all non-confidential submissions should be available on the ComReg website for inspection.

In conclusion, Esat BT agrees with the proposals as set out by ComReg. Moreover, we believe that a more vigorous assessment should be done of information marked “confidential” to ensure that the information is actually “confidential”. The effect of the pricing methodology of SMP Operators, for example, being confidential, leads to a lack of transparency and an inability of OAOs to engage in effective and informed debate.

Yours sincerely,

Natasha Dawe
Regulatory Affairs
Esat BT

Ms Claire Kelly
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Irish Life Centre
Abbey Street
Freepost
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Our Ref
HK/MQH/LCC

Your Ref

1 February 2005

Dear Ms Kelly

COMREG DOC NO 05/02 - THE TREATMENT OF CONFIDENTIAL INFORMATION DRAFT GUIDELINES

Further to your consultation in respect of the treatment of confidential information by ComReg, we would make the following comments:

1. Prior to publication of any information provided by a respondent to ComReg, whether or not the respondent has highlighted information as confidential or not:
 - (a) ComReg is under a statutory obligation to consider whether or not it contains confidential information.
 - (b) A respondent that has provided ComReg with information that ComReg intends to publish is entitled:
 - (i) to be informed of the outcome of this consideration process;
 - (ii) to be informed of when ComReg intends to publish this information; and
 - (iii) afforded the opportunity to make representations to ComReg in respect of the confidential nature of any such information, if appropriate.
2. Post consideration of representations, pre-publication, ComReg should indicate to a respondent when it proposes to publish the information that it considers not to be confidential. This would provide the respondent with the opportunity to take such remedial action as it believed necessary. As you can appreciate, once information is publicly disclosed it cannot be recovered. Indication by ComReg to the respondent of when it proposes to publish the information that it considers not to be confidential prior to publication would be a fair and just measure to take in the circumstances.

DUBLIN

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PALO ALTO

Should you have any queries or wish to discuss, please do not hesitate to contact either Mark Hughes, Associate, EC, Competition and Regulatory (mark.hughes@mop.ie), or Louise Carpendale, Solicitor, EC, Competition and Regulatory (louise.carpendale@mop.ie).

Yours faithfully

Matheson Ormsby Prentice
MATHESON ORMSBY PRENTICE
2213693.1

1.1 GUIDELINES ON THE TREATMENT OF CONFIDENTIAL INFORMATION

The purpose of the document

1. These Guidelines explain how ComReg will treat claims by respondents that information supplied to it, for example in the course of a consultation process, is confidential. ComReg will normally follow these Guidelines and will give reasons if it departs from them. The Guidelines are intended to assist stakeholders in understanding ComReg's processes and thus aid transparency.

Vodafone Response

It is unclear whether the proposed guidelines refer only to consultations or if it extends to cover all information provided to ComReg. On the assumption that it relates to all information provided by an undertaking to ComReg, then a definition of information must be included.

In this regard, Vodafone submits that “information” should include both written and verbal data, which is communicated in either a formal or informal manner by an undertaking to ComReg.

ComReg's practice with regard to the treatment of claims for confidentiality

12. Respondents who supply information and observations to ComReg are asked to supply a non-confidential document, with any information for which confidentiality is claimed supplied in a separate annex. This is particularly important as ComReg intends to publish respondents' submissions on its website.

Vodafone Response

This should read “Respondents who supply information and observations to ComReg are asked to supply a non-confidential version of the document within seven days”

This alteration is necessary for two reasons. Firstly, from a purely practical perspective, it would be easier to provide one confidential document and one non-confidential document rather than a non-confidential document

(presumably redacted) with an annex of information that fills the gaps therein. Secondly, given the tight deadlines for responses to consultations, especially those with the potential to have grave consequences, organisations need to be allowed spend all the available time allowed concentrating on the quality of their response. An additional seven days must be allowed for the submission of non-confidential versions of information to alleviate the burden of scrutinising submissions for dissection into “confidential” and “non-confidential” documents.

14. In the first place ComReg will request that a non-confidential version be supplied within a particular time period.

Vodafone Response

What time period will be allowed? This should be specified and Vodafone would submit that a further period of seven days is reasonable.

15. If the respondent fails to supply a non-confidential version within the stipulated timescale, ComReg will assess the information supplied to see whether, as a matter of fact and law, the material is confidential.

Vodafone Response

ComReg needs to consider the situation where a non-confidential version is supplied but there is good reason for additional aspects of that version to be made publicly available. In this context, ComReg needs to make it clear that they can apply the test of confidentiality to those additional aspects also.

16. In making its assessment, ComReg will apply the tests laid down by law. These tests are well known. In essence, the material must have the necessary “quality of confidence” for it to be confidential. In this regard, ComReg will assess:

(a) Whether the material is material which the respondent believes would be injurious to him (or advantageous to his competitors or others) if it were released.

(b) Whether the respondent believes the material to be confidential.

(c) Whether that belief is reasonable.

(d) The usages and practices of the communications sector with regard to the material in question.

Vodafone Response

It is unclear how long ComReg will take to make its assessment as to what ought properly to be 'confidential'? Vodafone submits that seven days would be reasonable.

Information supplied by a respondent might be confidential as between that respondent and another undertaking (eg an undertaking that has had dealings with the respondent) and there may be good reason to prevent its disclosure to third parties. However the undertaking in question should have access to that information provided by the respondent and should not be prevented from accessing the information because it is confidential vis-à-vis third parties. In applying the test of confidentiality to any information, ComReg should therefore have regard to the identity of the party seeking the information. It should be possible for a party who has had bilateral relations with a respondent to access information provided by the respondent about those relations, while at the same time restricting its disclosure to third parties. Such information lacks the sufficient degree of secrecy to warrant it being withheld from those parties to whom it relates. The process should be flexible enough to accommodate individual requests from operators for aspects of respondents' submissions to be disclosed to them only.

ComReg should also be obliged to consider whether there are third parties who may be affected by the disclosure of information by it. In certain circumstances disclosure by ComReg may cause a respondent to be in breach of obligations of confidentiality to such third parties.

17. If ComReg concludes that the material is not confidential it will so inform the respondent and give reasons for the conclusion it has reached. If ComReg proposes to publish the material in question, it will give the respondent a period of seven days within which to make representations. (This period of time is the same as that provided for in cases in which the European Commission requests ComReg to provide it with information 4).

Vodafone Response

However, in such circumstances where the practice outlined in paragraph 12 may not be suitable, Vodafone suggests that at a minimum paragraph 17 need to be extended to give the party claiming confidentiality an additional option to withdraw its submission/data entirely:

For example if Vodafone submits data believing it to be confidential but ComReg disagrees. In this scenario, Vodafone will have no option but to apply to the High Court to prevent disclosure of information, which if released into the public domain, could be commercially injurious to Vodafone.

The above scenario is counterproductive and likely to potentially give rise to unnecessary litigation.

Vodafone opines that a sensible alternative would be to provide two options at the "pre-disclosure" stage. Firstly, Vodafone could make representations at why it considers that ComReg shouldn't disclose the perceived confidential information. The alternative at this stage would be to withdraw the submitted data entirely thereby safeguarding the data but relinquishing the opportunity to utilise the data for consultation purposes.

Given the implications of any such decision to withdraw such a decision would not be taken lightly therefore affording ComReg a reasonable degree of protection while still allowing Vodafone discretion over the treatment of its own data.

18. In urgent cases, the period of seven days may be abridged.

Vodafone Response

Vodafone submits that any abridgement of the standard seven-day period should be in exceptional circumstances only and cannot countenance abridgement for urgent cases. ComReg must make the reasons for the exception circumstances clear in writing.

19. Having considered any representations, which the respondent has made, ComReg may publish the material in question if it considers that the case for confidentiality has not been made out.

Vodafone Response

Prior written notice must be given to the respondent before ComReg publishes any material that the respondent considers confidential. ComReg's reasoning must accompany such a written notice. This is necessary to afford the respondent an opportunity to take further steps to protect its rights under law.

20. Where ComReg does publish the material, it will state its reasons for so doing.

Vodafone Response

Prior written notice must be given to the respondent before ComReg publishes any material that the respondent considers confidential. ComReg's reasoning must accompany such notice. This is necessary to afford the respondent an opportunity to take further steps to protect its rights under law.

Therefore this section should read, "Prior to publishing any material that the respondent considers confidential, ComReg will notify the respondent of its intention together with ComReg's reasoning.