



Commission for  
**Communications Regulation**

# **Review of Eir's Regulatory Governance Model**

Publication of correspondence

Information Notice

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**An Coimisiún um Rialáil Cumarsáide**  
**Commission for Communications Regulation**

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# 1 Introduction

1. ComReg Document 16/42 ComReg outlined that:

*"Given the level of interest in this project we plan to publish any substantive written representations that we may receive. We also plan to publish further updates at suitable times. We believe that this will help ensure an appropriate level of transparency."*

2. To date representations have been received from:

- ALTO (Annex 1)
- Vodafone (Ireland) Limited (Annex 2)

# **Annex: 1 ALTO Representations**

**alto**

alternative operators in the communications market

Clifton House  
Fitzwilliam Street  
Dublin 2

2 November 2015

**Jeremy Godfrey**  
Chairperson  
Commission for Communications Regulation  
Irish Life Centre  
Lower Abbey Street  
Dublin 1**Re. Fixed Market Regulation**

Dear Jeremy,

We write in relation to the current state of regulation of the fixed line market in Ireland. As investors in the fixed market we are concerned at the continued inaction by ComReg in response to clear evidence of discriminatory practises by Eir that have emerged in the product forums and comprehensively highlighted following the publication of the *Eir Regulatory Governance Model* report in August 2015 ("Styles Report"). In particular we strongly believe the current regulatory obligations and their enforcement do not go far enough to ensure a level playing field.

It should be noted that Eir had 3 – 4 years of a *Voluntary Wholesale Reform* program and failed to deliver equivalence in the fixed market that it committed to completing in 2013<sup>1</sup>. ComReg will be aware of these failings for some time as well as Eir's poor record in responsiveness to industry requests which currently shows no sign of improvement e.g., SLA negotiations and various product development initiatives.

We believe that the integration of Eir retail and wholesale is a major factor contributing to this unacceptable situation that has resulted in years of unfair discriminatory behaviour. It is clear that Eir retail and wholesale are still fully integrated not just in terms of enhanced systems and processes by comparison to what is on offer to competitors but in terms of pricing strategies. "Open Eir" and its predecessor "Eircom wholesale" have thus been largely exposed to be little more

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<sup>1</sup> See eircom's SIEG presentation of April 2013.

than a 'lick of paint'" that has camouflaged years of discriminatory behaviour. It has been confirmed to us by Eir that Open Eir is not a separate entity but is in fact simply a brand under which both Eir Networks and Eir Wholesale sit under pre-existing management. We believe that this rebranding confuses Eir's operating structures and is unhelpful.

The issues raised in the Styles report are material breaches of regulation with implications for our profitability and the service experience of our customers. Eir has acted as judge and jury in its own review of non-compliance and highlights that an Equivalence of Output – EOO, standard is insufficient to ensure these actions do not happen again – EOO creates scope for engaging in discrimination from both 'act' and 'omission' perspective.

We are therefore calling on ComReg to conduct a comprehensive and full independent investigation of the issues raised in the Styles report and it should be carried out by experts employed by ComReg to verify the extent of the non-compliance. Any such report should be extended to include looking at issues beyond those covered in the Style's report e.g. Eir's retail/wholesale pricing strategizing. In ComReg's Strategy Statement document 14/75 ComReg have anticipated such a review if the voluntary arrangements in place by Eir are not delivering equivalence outcomes.

*If Eircom's own wholesale reforms provide a sufficiently high degree of assurance that it is meeting its non-discrimination obligations, then we may not need to specify so much detail about how those obligations are to be met. At an appropriate time, we will consider conducting a strategic review of the progress of wholesale reform - including reforms undertaken voluntarily by Eircom as well as those that have been required by various regulatory decisions. Such a review could lead to a number of different outcomes. For instance, it might lead us to bring forward to consultations on some of Eircom's obligations, on the way industry forums operate or even on the case for functional separation of Eircom Wholesale.*

We note that the strategy statement envisages that if Eir's Wholesale Regulatory Reform programme was not working, ComReg would consider mandating Functional Separation in Eir. ComReg would not have proposed such a remedy had it not a considered view that it had the power to implement such a measure to address

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market failure. The Style's report alone makes a very strong case on the need for such a mandate. Several other developments in the market compound the pressing need for such an intervention.

The report further highlights that 'voluntary' commitments from Eir alone would be insufficient to address the market failures that have led to the revelations outlined in the report. Furthermore, it is clear that ComReg can no longer regulate on the basis of relying on the 'good faith' of Eir to comply with its regulatory obligations but must seek to eliminate the scope within the existing regulatory model that allows breaches to arise in the first instance (whether they are deliberate or not). Had it not been for Eir bringing this (potentially incomplete) list of issues to light (albeit after years of benefitting from behaving in a discriminatory manner) it is highly probable that neither ComReg nor OAOs would have been aware of these breaches for a further prolonged period of time. A situation where we are effectively relying on Eir to "self-regulate" is simply unacceptable and we would expect ComReg would share such reservations.

Considering the seriousness and urgency of the issue the undersigned CEOs would request a meeting with ComReg to understand what action ComReg will be taking to address these concerns. In the meantime, we the affected operators will be assessing the harm these breaches have had on our business and are considering all options available to us on both an independent and collective basis.

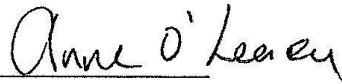
Finally, we would expect ComReg will not engage in any mitigation negotiations with Eir (e.g., as occurred with respect to USO settlements reached last year) as on this occasion we (and our customers) are the affected parties and would reasonably expect to partake in any such dialogue.

Yours sincerely,

*[Faint signature text]*

**Chairman – ALTO**

*[Faint signature text]*



Anne O'Leary – CEO Vodafone



Mark Kellett – CEO Magnet Networks



Seamus Walsh – MD BT Ireland



JD Buckley – CEO Sky Ireland

**Copy to:** Minister Alex White TD, Minister for Communications  
Ms Madeleine Mulrennan – Special Adviser to Minister White  
Ms Katherine Licken – Assistant Secretary, Dept. of Communications

alto

alternative operators in the communications market

Clifton House  
Fitzwilliam Street  
Dublin 2

22 December 2015

**Kevin O'Brien**  
**Commissioner**  
**Commission for Communications Regulation**  
**Irish Life Centre**  
**Lower Abbey Street**  
**Dublin 1**

Dear Kevin

**Re. Fixed Market Regulation – Publication by ComReg of Reference 15/128  
“Eir’s Regulatory Governance - ComReg Announces Review of Eir’s  
Regulatory Governance Model”**

We write in follow-up to our letter of 2 November 2015,<sup>1</sup> and our meeting of 14 December 2015 and we note and welcome the contents of the above publication by ComReg of Reference 15/128 “Eir’s Regulatory Governance – ComReg Announces Review of Eir’s Regulatory Governance Model” in particular:

- That it is clearly recognised that Eir “cannot discriminate in favour of its own retail arm and must meet reasonable requests for access to its network by other operators”.
- That “a function of ComReg is to ensure compliance by undertakings with their obligations”.
- That the issues raised in Eir’s August 2015 report “give ComReg cause for concern”.
- That ComReg recognise that “Eir’s retail arm **did** or potentially could receive superior service compared to other operators together with timelines for remediation” [emphasis added]
- That notwithstanding many of the instances were identified by Eir that “they do raise questions about Eir’s compliance with its obligations”.

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<sup>1</sup> A copy of which has been appended here.



We further note that much of the document refers to Eir's voluntary reform program it committed to undertake in 2011. It is important to recognise that whether or not Eir undertook any such voluntary program, having done so did not grant Eir a hiatus on complying with its regulatory obligations.

We would further note that this publication by ComReg has emerged as a result of Eir's publication of the *Eir Regulatory Governance Model* report some four months after the initial publication in August 2015 ("Styles Report")<sup>2</sup> and a number of bi-laterals with our members and Eir suggest that ComReg may have been aware of many of the breaches for considerably longer than May 2015.

Consequently, ALTO requests the following information from ComReg:

1. Details of the nature of the proposed compliance actions arising from the proposed ComReg review;
2. A fixed and published timetable by which the compliance review and actions will be concluded;
3. Confirmation from ComReg that given that the Styles Report effectively provides ComReg with all of the available Regulatory Governance Model infringement evidence, which will undoubtedly lead to a far less resource intensive, more prescriptive and timely review (see timetable request above at 2.), with a need for remedy supervision only by ComReg,<sup>3</sup>
4. Proposals for modifications to fixed market regulation and engagement with ComReg's Competition powers in the event of an adverse finding by ComReg, requiring the engagement of the Competition and Consumer Protection Commission – CCPC.

<sup>2</sup> We note from the contents of the publication 15/128 at paragraph 4, that ComReg suggests that the Styles Report was published "[A]t ComReg's prompting". Industry had been aware of Eir's intention to publish its Regulatory Governance Model reports from 2013. In fact, this is borne out by reference to Senior Industry Engagement Group – SIEG, slides dated 11 April 2013 that stated that such reports would be made available to industry on an annual or half yearly basis. Page 20, SIEG Slides: 14 April 2013: "An annual report will be submitted to ComReg and a progress report circulated to industry"

<sup>3</sup> It should be noted that within the 20 headline admissions within the Styles Report, some 16 other ancillary issues arises and are problematic for industry.

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While ALTO does welcome the 15/128 publication by ComReg, ALTO believes that it falls short of the kind of swift and material action required to foster regulatory certainty in the market. We also reiterate again that ALTO expects ComReg not to engage in any mitigation negotiations with Eir (e.g., as occurred with respect to USO settlements reached last year) as on this occasion we (and our customers) are the affected parties and would reasonably expect to partake in any such dialogue.

ALTO is anxious to meet with ComReg again in Q. 1 2016, with a view to monitoring activity in respect of the Regulatory Governance Model. We also note that earlier today at the National Broadband Plan tender launch, it appears that the State is clearly prepared to mandate (at a minimum level) the forms of separation, Equivalence Of Input – EOI, and various other undertakings that we had discussed at our meeting on 14 December.<sup>4</sup> This should also logically inform and form the basis of future discussions with ComReg.

We look forward to working with you in 2016.

Yours sincerely,

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**Chairman – ALTO**

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<sup>4</sup> See DCENR Slide 21 “*Non – Discrimination Measures, Requirements, Accounting Separation, Equivalence of Inputs, Separate Legal Entity (Which can be part of group), Contractual Undertakings ...*”



alternative operators in the communications market

Clifton House  
Fitzwilliam Street  
Dublin 2

18 May 2016

**Kevin O'Brien**  
**Commissioner**  
**Commission for Communications Regulation**  
**Irish Life Centre**  
**Lower Abbey Street**  
**Dublin 1**

**Re. Fixed Market Regulation – Publication of 'Styles 2' and ComReg's review of Eir's Regulatory Governance Model – RGM**

Dear Kevin,

We write in follow-up to our previous two letters dated 2 November 2015 and 22 December 2015, and in relation to the imminent publication of the second *Eir Regulatory Governance Model* report today, 18 May 2016 ("**Styles 2**"). Previously we had stated that we strongly believed that the current regulatory obligations and their enforcement, in particular with regard to Eir, do not go far enough to ensure a level playing field, and that remains the ALTO position.

The absence of concrete action by ComReg in respect of Eir's market behaviour is a source of considerable frustration to us. We believe that such inaction combined with a lack of transparency in ComReg's compliance activities is not in the best interests of either the industry as a whole or the consumer.

Firstly, we are acutely aware that the time of drafting this letter, 6 separate non-compliance notices relating to Eir and published by your offices in 2015/2016 remain unresolved. You might note that those 6 compliance notices are routinely queried and reported on by ALTO to its member companies.

Secondly, we note that ComReg has not taken any substantive compliance action or a formal review of the compliance situation within Eir connected with the 22 headline issues outlined in the first Styles report published last August 2015. Given that Eir

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themselves made the compliance breach admissions within the report, providing ComReg with the evidence required to allow ComReg to engage its regulatory powers, we are disappointed at the lack of progress in this area. Representations to the extent that the 22 headline compliance issues have been conclusively resolved, remain lacking in any substance, and are simply announcements to promote an external façade of regulatory compliance within Eir.

There remains little or no transparency surrounding compliance activities within ComReg. Industry is not even aware of what is being considered, or the possible timescales for compliance action. It is nearly a year since the first of the non-compliance notices were published, prior to the first Styles Report, and industry has nothing tangible to rely on from ComReg. We believe these developments are contributing to a culture of ambivalence towards compliance in Eir.

In recent weeks, ALTO members have taken time to meet with ComReg officials on the subject of the RGM review. As a direct result of those meetings, we note that ComReg appears to have failed to take account of compliance in its RGM Governance and Operations reviews of Eir. ALTO members are deeply concerned by this unsettling development as it would appear that compliance issues are therefore neither being addressed as part of the RGM review and very little is known as to what is being done by ComReg compliance. The lack of information means that the industry is not informed as to whether it is necessary for it to submit complaints to address the non-compliances and their consequences.

Furthermore, we note that at the time of this letter that no formal external consultant appointments have been made by ComReg under the two areas within the formal tender. We had been advised that this process would be concluded by the end of quarter 1, 2016. ALTO members are not satisfied that ComReg has acted with due speed and efficiency and arguably not in the best interests of the industry.

We restate that the issues raised in both of the Styles reports are material breaches of regulation with implications for our members' profitability, consumer choice and the service experiences of our customers. As ComReg is aware in some cases the breaches identified in Styles continued well beyond the dates committed for remedy by Eir and this situation is exacerbated by Eir acting as judge and jury in its own review of non-compliance.

*[Faint, illegible text]* 2





09 June 2016

Mr Ronan Lupton  
Chairman - ALTO  
Clifton House  
Fitzwilliam St  
Dublin 2

**Ref: Fixed Market Regulation**

Dear Ronan

I refer to your letter of 18 May 2016.

Thank you for your engagement in relation to ComReg's review of Eircom's Regulatory Governance Model. The review will be strengthened by the active engagement of all relevant stakeholders.

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As you will appreciate, we cannot comment on particular compliance investigations while such investigations are ongoing - in this regard we are simply respecting the right of all players in the market to due process in respect of compliance investigations. ComReg makes decisions on the compliance of Eircom (or indeed other undertakings) with regulatory obligations based on an impartial assessment of evidence, following the various procedures set out in the legislation. We are aware of the legislative provision for functional separation in certain circumstances which would be subject to European Commission approval. Following the review - the completion of which is a strategic priority for ComReg - we will consider appropriate next steps in light of all relevant evidence available.

The RGM review is being scoped in light of all information available to ComReg - including information gathered as part of our compliance activities.

ComReg has appointed external advisors further to required EU procurement process. I refer to our information note (ComReg 16/42) in this regard.

**Commission for Communications Regulation**  
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As noted in our information note, we plan to publish non-confidential representations in respect of this project on our website. As your letter does not appear to contain commercially confidential information, we propose to publish it and this response shortly. If you wish to make representations in this regard, I would be grateful if you would do so by close of business 20 June 2016. In the absence of such representations, we will proceed to publish.

Yours sincerely

*Kevin O'Brien*  
ff **Kevin O'Brien**  
**Commissioner**





# **Annex: 2 Vodafone Representations**



17 May 2016

Mr Jeremy Godfrey  
Chairperson  
ComReg  
Abbey Court  
Abbey Life Centre  
Lower Abbey Street  
Dublin 1

**RE: ComReg's forthcoming review of eir's regulatory governance model**

Dear Jeremy,

Vodafone welcomes the review of eir's regulatory governance model and the imminent appointment of consultants to support ComReg's work. Vodafone believes this review is happening at a critical time for the industry and the future development and competitive growth of the market in Ireland. Vodafone has already engaged with the ComReg regulatory governance team who are managing the forthcoming review of eir. Vodafone will fully support ComReg's regulatory review of eir as much as possible, and to this end will dedicate internal resources and external consultants to gather evidence. We will provide this evidence to ComReg which we believe will confirm our concern that eir, as currently organised, is unable to fulfil its regulatory obligations without a clear separation of functions as between wholesale and retail activities. We are also willing to make our consultants available to meet your consultants, to provide further evidence to highlight eir's failure to comply with its regulatory obligations.

Vodafone believes that since 2011 it has been evident that eir, under the voluntary regulatory compliance mechanism, has been acting in a discriminatory and anti-competitive fashion to the detriment of competitors. To that end ComReg has also noted that historically eir's retail arm did in fact receive a superior service compared to other operators, a point admitted by eir in its Regulatory Governance Model report published in August 2015. ComReg has also noted that this report does raise questions about eir's compliance with its obligations and Vodafone agrees with ComReg that eir's August 2015 update to industry raises a number of questions which give ComReg cause for concern (ComReg 15/128).

**Vodafone Ireland Limited**

MountainView, Leopardstown, Dublin 18, Ireland  
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Vodafone believe that the issues raised in that report are clear evidence of discrimination and point to a culture where the retail arm of eir is preferred over other access seekers as has been the case for a number of years, while eir may have committed to resolving these specific issues we believe that these are but a sample of the discrimination that occurs and cannot be fully resolved without a separation of the wholesale and retail divisions. In addition, Vodafone has raised additional potential discrimination and access issues on VoIP migration and point of sale migration practices by eir retail with ComReg in recent weeks. There also remains limited information on the processes that eir adopts to prioritise regulated access product requests. It is clear that despite repeated assurances from eir Vodafone still has serious concerns that the issues raised in the Regulatory Governance Model report have not been addressed to the satisfaction of ComReg or other market participants and furthermore that there remains serious issues of general governance which go undetected and unrectified by eir

It is Vodafone's view that given this recent history of repeated non-compliance by eir in respect of its regulatory obligations (including six findings of non-compliance made by ComReg against eir in the last nine months and at least twenty admissions of non-compliance in the August 2015 regulatory governance report), the time has come for ComReg to specifically consider the option of compelling the functional separation of eir. ComReg has already committed in its 2014 strategy statement to consider functional separation and Vodafone believes that this is now the opportune time to do so:

*At an appropriate time we will consider conducting a strategic review of the progress of wholesale reform – including reforms that have been undertaken voluntarily by Eircom as well those that have been required by various regulatory decisions. Such a review could lead to a number of different outcomes. For instance it might lead us to bring forward consultations on some of Eircom's obligations, on the way industry forums operate or even on the case for Functional Separation of Eircom Wholesale".(ComReg 14/75)*

Vodafone believes that sufficient evidence already exists to begin preparing a case for functional separation and experience has shown that without such a solution the non-compliance culture evident in eir will continue to the detriment of consumers and the market. Therefore Vodafone requests that the forthcoming review of eir by ComReg and its consultants includes specific consideration of the issue of whether Functional Separation is the most appropriate long-term solution to eir's continued regulatory failures. We ask that you direct your consultants to consider this matter in detail by reference to the obligations and information requirements set out in Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

We believe that specific consideration of this issue in the context of Regulation 14 is well within the parameters of the "Objectives and Scope" of each of the forthcoming Governance and Operational Reviews to be undertaken by you and your consultants and in fact it appears to us as one of the defining queries to be raised and opined on in that review.

In that regard please note that it is Vodafone's expectation that the forthcoming Governance Review of eir by ComReg's consultants shall consider the necessity of Functional Separation by reference to Regulation 14 of the Access Regulations 2011, as a potential remedy which may ultimately be required to bring a permanent and meaningful end to eir's history of repeated abuses of its regulatory obligations.

Kind regards,

Anne O Leary

**CEO, Vodafone Ireland**



Ms. Anne O'Leary  
Chief Executive Officer  
Vodafone Ireland Limited  
MountainView  
Leopardstown  
Dublin 18

23 May 2016

**By Post and email**

**Re: ComReg's review of Eir's Regulatory Governance Model**

Dear Anne

I refer to your letter to Jeremy Godfrey of 17 May 2016.

Thank you for your commitment to engage with the review. The review will be strengthened by the active engagement of all relevant stakeholders. We are aware of the legislative provision for functional separation in certain circumstances which would be subject to European Commission approval. Following the review – the completion of which is a strategic priority for ComReg - we will consider appropriate next steps in light of all relevant evidence available.

We intend to publish non-confidential representations in respect of this project on our website. As your letter does not appear to contain commercially confidential information, we propose to publish it and this response shortly. If you wish to make representations in the regard, I would be grateful if you would do so by close of business 30 May 2016. In the absence of such representations, we will proceed to publish.

Yours sincerely



**Kevin O'Brien**  
Commissioner

**Commission for Communications Regulation**  
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