



Submissions to Consultation

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

Submissions received from respondents

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1 Eircom (Arthur Cox instructed to respond on its behalf)

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2 June 2009

BY EMAIL AND BY POST

Mr Stephen Brogan
Commission for Communications Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1

**Re: Submission re ComReg 09/43
Our client: eircom Limited**

Dear Mr Brogan

We refer to ComReg Consultation Document No. 09/43 published on 19 May 2009 proposing to extend ComReg's Direction of 9 April 2009 requiring eircom to refrain from launching certain Family TalkTime Bundles including free calls to Meteor and 1MB or 3MB broadband access. We have been instructed by eircom to respond on its behalf.

As ComReg is well aware, the Direction of 9 April 2009 is the subject of an appeal in the Commercial Court. As explained to your solicitors in our letter of 29 May, we believe it is entirely inappropriate that ComReg should now be proposing to extend a Direction the validity and lawfulness of which is the subject of pending proceedings before the Court. ComReg should accordingly close the consultation and refrain from adopting the proposed extension.

Our comments below, in response to Doc. 09/43, are without prejudice to this position.

Q1. 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.

The reasoning behind ComReg's initial compliance assessment as set out in section 2 of Doc. 09/43 appears to be limited to the fact that "the April 2009 Bundles appeared to fail the net revenue test as referred to in ComReg Document No. 07/26 and ComReg Document No. 09/08". For reasons previously exposed by us and by our client in detail, eircom does not accept that the obligation not to unreasonably bundle set out in Decision D07/61 requires that eircom passes a "net revenue test". In addition, even if the obligation not to unreasonably bundle included a requirement to pass such a test (which is not the case), as also explained before, the 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

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accept that the test set out in section 4 of Doc. 09/43 is a “net revenue test” and that ComReg’s assessment of eircom’s costs is adequate.

In addition, extensive arguments and evidence have been put to ComReg to explain why the use of Average Total Cost sets an unreasonable threshold in situations where eircom is seeking to meet competition and where accordingly there is factual evidence of replicability in the marketplace. It is incomprehensible that ComReg in such circumstances “*did not consider it likely that OAOs could profitably replicate the April 2009 Bundles*” or that the fact that eircom was responding to competition was relevant. As also previously pointed to ComReg, the test set out in Doc. 07/26 which ComReg seeks to rely upon includes an ex post assessment of the anti-competitive effects of bundles, which ComReg has obviously not been able to carry out. In addition, ComReg has provided no reasons whatsoever why it had taken the view that there was “*a potential for detriment to competition and consumers*” despite evidence of strong competition in the marketplace. It is ComReg’s obligation to take into account factual evidence in the exercise of its functions, which ComReg has not done.

Furthermore eircom entirely disagrees with the suggestion in section 4 of Doc. 09/43 that ComReg is entitled to refuse to use the latest audited Separated Accounts of eircom before they have been “*reviewed and approved by ComReg*”. The review and approval of eircom’s Separated Accounts is done by way of an audit carried out by independent auditors.

Question 1 further suggests that the reasons as summarised in section 2 of Doc. 09/43 for ComReg’s initial assessment are sufficient in and of themselves to justify an extension of the Direction. In particular, it is entirely unclear what further assessment has in fact been undertaken by ComReg and what the detailed results of that assessment may be. ComReg should have provided details of that assessment.

Q2. 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.

eircom has already provided ample evidence to ComReg to demonstrate that the proposed bundles would have a positive effect on consumer interests and competition. In particular, eircom has made submissions to ComReg which showed that eircom is seeking to meet competition from other operators, including Vodafone and Perlico, who have similar, but lower priced, bundles on the market. The replicability of eircom’s proposed bundles is accordingly established and there is no basis for any regulatory concern.

In this regard, all of eircom’s narrowband access products are, in accordance with section 7.9 of D07/61, available as stand-alone products and the price for the proposed bundles was well above the costs of the wholesale regulated elements. The availability of line rental products on a stand-alone basis “*enable[s] alternative operators to compete on one aspect of a bundle rather than the bundle as a whole and thus help facilitate new entry in relation, in particular, to the retail narrowband access markets and adjacent market such as retail calls*”, as per paragraph 6.223 of Doc. 07/26. In addition, eircom’s price levels for the bundles, according to ComReg at paragraph 6.227 of Doc. 07/26, “*leave competitors with a sufficient margin for profitable entry with a similar service*”. ComReg has not given any explanation whatsoever to justify departing from this position and has not in particular explained the specific anti-competitive effects the proposed bundles could have in its opinion or on which markets such effects would take place.

It is eircom’s strong view that the proposed bundles would have pro-competitive effects in the marketplace and that the Direction of 9 April 2009 has the result of preventing eircom alone from competing, thereby impairing rather than promoting or protecting the competitive process, to the detriment of consumer interests.

- Q3. 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.**

Please see response to Question 2 above. eircom does not consider that the proposed bundles have any potential for competitive harm.

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

Please see response to Question 1 above. Actual evidence of replication in the marketplace must be taken into account by ComReg.

eircom notes further in this regard that the test set out in Doc. 07/26 which ComReg seeks to rely upon includes an “*ex post case-by-case basis*” assessment of whether any bundles has anti-competitive effects. This the existing Direction, and the proposed extension, do not allow.

- Q.5 and Q.6 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. 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.**

eircom believes that it is entirely inappropriate to extend the April 2009 Direction, for a period of nine months or for any other period, when the validity and the lawfulness of the Direction is the subject of pending proceedings before the Court.

The proposed extension is all the more inappropriate in that it purports to be based on some further, unspecified, assessment carried out by ComReg of the April 2009 Bundles’ compliance with eircom’s obligation not to unreasonably bundle which, according to Doc. 09/43, has confirmed ComReg’s “*initial assessment*” that eircom is “*not likely to be compliant*” with that obligation. It is entirely unclear what further assessment has in fact been undertaken by ComReg and what the detailed results of that assessment may be. What seems clear, however, is that ComReg has decided that, in its view, the April 2009 Bundles are non-compliant. This means that a fundamental element of the rationale for making the Direction in the first place – that of permitting ComReg to consider the Bundles further – has disappeared.

Furthermore, the basis for ComReg’s proposed extension, less than half way through the term of the Direction of 9 April, for a further 9 months is incomprehensible and amounts to an unwarranted attempt by ComReg to impose on eircom a long term prohibition for which no justification has been provided by it.

In this regard, ComReg appears to misunderstand the purpose of consultations under Regulation 19(3) and Regulation 20(10) of the Framework regulations. The requirement for consultation aims at ensuring the clarity and the transparency of the rules being proposed. The consultation process 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. In particular, it is not possible for ComReg to lawfully extend the duration of a provisional direction under Regulation 31 of the Universal Service Regulations without consulting on the substance of the obligation which is supposedly being specified. This, Consultation Doc. 09/43 does not do and it is in this regard entirely inadequate for the purpose of discharging ComReg’s obligations under Regulations 19(3) and 20(10). ComReg opened a consultation process more than 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, which ComReg has yet to conclude. ComReg should seek to conclude that consultation rather than attempting to address these issues by the back door.

ARTHUR COX

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Yours faithfully


ARTHUR COX

LB364484.2

2 BT Communications Ireland Ltd



**BT Communications Ireland Ltd response to the
ComReg consultation 09/43 titled:**

**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**

**Some Aspects of this Submission are
Confidential to BT/ ComReg**

**BT does not give permission for this information to be
passed to any third party for any reason without its prior
written consent.**

1.0 Introduction

BT has and continues to invest in Ireland in order to make a commercial return. Such investment in products and services for the benefit of consumers in the creation of a more competitive market is in the main dependent on the degree of confidence that we can place in the regulatory environment.

With regards to eircom and its approach to bundling we fully agree with the approach ComReg has taken requiring eircom to refrain from launching its proposed 1Mbit/s and 3Mbit/s family “free calls to meteor” TalkTime bundles. Eircom has SMP and we believe that its proposal constitutes “unreasonable bundling”.

Sections 7.8 and 7.9 of the ComReg SMP Decision Instrument for eircom, 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.”

We note and agree that 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;...”

We note and agree that 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.”

We note and agree that 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). We further note and agree that 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. In addition there is a window following publication of a decision to challenge the decision of ComReg. No challenge was made within the appropriate window of time to the above regulations following their publication.

It is important that industry has regulatory certainty to enable investment decisions to be planned and made, and BT considers the due process that ComReg has to perform to update regulations is clear and offers both transparency and regulatory certainty. Therefore once the regulations were established through due process, BT rightly had and has an expectation that eircom would not be permitted to unreasonably bundle. However, we believe that eircom have unreasonably bundled products in the recent past and would do so in the future should ComReg not bring to full force the legal obligations on eircom not to do so.

2.0 BT Overall conclusions

2.1 The eircom Meteor Bundles has had a detrimental impact on BT in terms of increasing the numbers of customers lost by BT.

2.2 BT has incurred additional cost through customer retention activity, including a loyalty promotion campaign to reduce the impact of the eircom offer on BT's business.

2.3 BT would not be able to offer the eircom bundle and make an adequate commercial return and a loss would be incurred for the 1Mbit/s bundle. The 3Mbit/s bundle was not analysed due to shortage of time. BT therefore concludes, based on its own figures, that eircom would fail the net revenue test.

2.4 BT concludes that Meteor itself has not offered to BT any discounts on calls to their network hence BT is not able to avail of any reduced wholesale rates that eircom maybe enjoying from its own subsidiary company.

2.5 BT notes that the offers made by eircom, such as the free calls to Meteor are only available to the customer when purchased in the bundle hence customers will have to purchase components that they do not necessary require. BT therefore agrees with ComReg's view that eircom is unreasonably bundling.

2.6 BT also concludes that eircom is attempting to change regulation to suit its own ends and to achieve what would be an unfair advantage in the market. Regulatory certainty is essential in markets to enable companies to make investment decisions and for market stability. BT is of the view that ComReg put in place, in a transparent way, the regulatory remedies using due process required by both European and Irish legislation and no party

sought within the appropriate opportunity to challenge those rules, hence the rules are their to be obeyed.

2.1 3.0 Detailed Comments

For clarity purposes BT has provided both the questions and answers in its response.

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.

BT Response 1

BT fully agrees with ComReg's initial compliance assessment which was made over the period of the initial offer and BT considers that ComReg would have been sufficiently informed by the actual volume and usage data.

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.

BT Response 2

BT considers that the bundles launched by eircom in 6th October 2008 had a significant negative impact on the market and indeed many customers leaving BT gave the reason for leaving as the eircom bundle. BT provides a detail view of the impact in Annex A.

BT considers that the April 2009 bundles were basically a continuation of the October 2008 bundles and therefore considers the harm to the market would have continued.

Whilst BT does not object in principle to the launch by eircom of bundles it does object to such bundles which are unreasonable and damage competition. Such damage can be caused through a variety of ways including pricing.

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.

BT Response 3

BT believes that the proposed bundles do have potential for competitive harm and such harm would not cease on the expiry of the proposed promotional period:

1. BT agrees 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. As a minimum eircom will benefit for one full year given that twelve month contracts are being signed.
2. BT is aware that eircom tend to run promotions continuously and BT would expect, as has been proposed by eircom in this case, to run one promotion into another. In this case the promotions are each six months long hence the promotions become the product. BT is of the view that eircom appear to be using the promotion route to make a product offer that they can adjust at six month intervals rather than making this a full product offering and being subject fully subject to price controls and ex-Anti regulation. It is BT’s view that this is not the purpose of promotions and that eircom are attempting to use promotions to circumvent regulation and regulatory controls.

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

BT Response 4

As discussed in question 3 item 2, BT is of the view that eircom are using the promotions process to circumvent regulatory controls of its products and thus ComReg should review the promotion rules. BT would expect promotions to be short duration events (1 to 3 months) with the financial benefit then spread across the year. eircoms promotions appear to initially be six months with a continuation for the full year, hence how are these costs built into the process of setting wholesale prices in a forward looking way.

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.

BT Response 5

BT considers that it is appropriate to extend the direction for a minimum of nine months but ideally it should blanket ban such bundles until such time as SMP is lifted from eircom.

BT appreciates that part of the regulatory test for the eircom proposed bundle will be the initial provision of forecast and estimate data by eircom concerning the take up and usage of the proposed package. 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 compliance test.

Once launched the proposed bundle could have a significant negative impact on the market and damage competition over the period of the offer. Experience of the October to March bundle highlighted that even with operators such as BT raising formal complaints shortly after the bundle was launched, ComReg were not able to take any action over the entire period of the offer, highlighting the ineffectiveness of ex-Post regulation. This lack of action was very frustrating to the industry during which time we believe eircom were unfairly taking our customers.

We are aware from requests for information that ComReg were collating information about the impact of the eircom bundle over the period and are not surprised that ComReg have now made an initial assessment that the October to March bundle was non-compliant.

It therefore appears correct and proportional that given the above process and the initial finding of non-compliance for the October 08 to end March 09 bundle that the very similar April eircom Bundles offer is delayed until such a time that ComReg is satisfied with its compliance. Given an initial non-compliance finding BT agrees that ComReg should be allowed to have sufficient information to support its view of non-compliance.

Time period

Given the time it has taken to resolve disputes with eircom which is nearing two years, an extension for nine months actually seems relatively short in the scheme of things to resolve this complex yet very important issue. BT would support sufficient time for ComReg to analyse this issue for the benefit of the industry and the consumer and nine months seems short.

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.

BT Response 6

As discussed in our BT Response to question 5 BT agrees that the timeframe should be extended as required based on the fact that ComReg has already captured significant information and has made an initial non-compliance assessment. 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.

3 Vodafone



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

Introduction

Vodafone welcomes the opportunity to respond to the consultation and draft direction on extending a ComReg direction of April 2009 requiring eircom to refrain from launching specified bundled offerings. Our views in relation to the issues raised by this consultation are set out fully in response to the consultation questions below.

Response to 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.

Vodafone strongly agreed with the reasoning underlying ComReg's initial compliance assessment in relation to eircom's bundled offers. ComReg's view on 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 does not have visibility of the elements of, and costs associated with, the 'April 2009' bundles proposed to be launched by eircom. However Vodafone 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 our view sound and robust, and appears to be based on very detailed and extensive cost and product information. ComReg has confirmed that these bundles are in breach of eircom's obligation not to unreasonably bundle and Vodafone is therefore in agreement with ComReg's initial compliance assessment which informed the April 2009 Direction.

Q2. 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.

Vodafone does not have visibility of the exact details of the proposed 'April 2009' eircom bundled offers that are the subject of the present consultation and draft direction. However, as ComReg's view on the basis of detailed information is that the new bundles also fail the net revenue test, Vodafone believes that their introduction would have a deleterious affect on competition in the relevant retail product markets.

Vodafone's 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. Without substantial changes in the makeup and pricing of the new bundles, Vodafone believes that this must continue to be the case. Absent these fundamental structural and pricing changes, it is imperative that eircom supply ComReg with compelling supporting evidence in relation to any claimed retail efficiencies, expected customer lifetimes and usage profiles, to establish that they could be feasibly replicated by an efficient operator, before the launch of proposed bundled offers could be sanctioned. It is clear that ComReg believes that such evidence has not been provided to date.

The potential damage to consumer interest arising from the introduction of the proposed bundles cannot be underestimated. Amongst the areas most likely to be affected are;

- New market entrants: Potential entrants into the retail markets for broadband and/or fixed calls services face serious competitive obstacles arising from the previous 'October 2008' bundled offer and on the basis of ComReg's current view also arising from the proposed new 'April 2009' bundles. 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. 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.
- **[Confidential]**
- Dynamic efficiency: Vodafone does not object to the bundling of communications services in principle, indeed we recognise the significant potential for product bundling to be consumer welfare enhancing. However the ongoing inability of alternative operators to earn a competitive rate of return as a result of the offering of the identified eircom bundles below efficient cost is not a sustainable situation. In the longer term. This will mean not only fewer competitors in the market but also a marked reduction in the introduction of innovative products and services.

Q3. 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.

Vodafone does not believe that the 'promotional' nature of these offers in any way mitigates the negative effects on sustainable competition. As ComReg has pointed out, 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. 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, there is nothing to prevent eircom introducing serial promotions in quick succession, or continuously extending the existing 'promotional' bundled offers for an indefinite period. Finally there is nothing exceptional about a promotional bundled product offer which abrogates any of eircom's obligations in relation to regulatory compliance.

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

Vodafone has no further issues that it believes should be considered.

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.

Vodafone believe that the nine month extension period proposed by ComReg is appropriate. If in the intervening period or after the expiry of the extended Direction, eircom can demonstrate to ComReg's satisfaction that any offering it is proposing to launch does not constitute unreasonable bundling then ComReg should sanction the product release.

Vodafone believes that prior to the expiry of the extended Direction and absent any evidence which would support an early ending of the extended Direction, ComReg should be minded to consult on seeking further Direction extensions.

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.

Yes, Vodafone believe that ComReg should extend the April 2009 Direction as proposed for the reasons set out previously in this consultation submission

4 ALTO



**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**

ComReq 09/43

ALTO response to the ComReg consultation 09/43:

ALTO welcomes this consultation on extending a Direction of April 2009 requiring Eircom to refrain from launching proposed 1MB and 3MB Family “free calls to meteor” TalkTime bundles.

1. Introduction

ALTO considers the Direction’s issued by ComReg as critical to the facilitation of competition in the Communications market in Ireland. Under the Communications Framework ComReg has a duty to take *ex ante* measures in rectifying abuses and pressures exerted within markets which are subject to regulation and in particular which have been subject to the Article 7 process for Market Analysis and where a designation of Significant Market Power – SMP, has been found and approved by the European Commission.

ALTO highlights the USO Directive 2002/22/EC and SI 308 of 2003 which states under Regulation 14: *Regulatory controls on retail markets* and in particular that an undertaking whose services are subject to regulation or a designation of Significant Market Power – SMP, does not undertake the following practices:

- (a) charge excessive prices,
- (b) inhibit market entry or restrict competition by setting predatory prices,
- (c) show undue preference to specific end-users, or
- (d) unreasonably bundle services.

These conditions need to be read in line with the 2002 Communications Regulation Act. Below we set out detailed comments and responses to the ComReg consultation.

2.0 Detailed Comments

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.

ALTO Response 1

ALTO fully supports ComReg’s initial compliance assessment. 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. Certain ALTO members supported ComReg’s efforts in ascertaining relevant and necessary evidence in order to support the compliance findings.

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.

ALTO Response 2

ALTO cautions against the principle of bundled packages considering the backdrop of the Communications Framework, and in particular the USO Directive, which specifically deals with elements of, bundled offerings, which may damage or interfere with the market for communications services. It is important that such packages enhance the market both for the consumer and for competition. ALTO considers that the April 2009 bundles were a continuation of the October 2008 bundles and therefore considers that the potential and notified harm to the market would have continued.

While ALTO does not object in principle to the launch of the bundles it does object to such bundles priced in ways where competition cannot compete fairly and competition is not sustainable. ALTO therefore considers that whilst the offer may benefit consumers in the short term, the driving out of competition will have the effect of removing competition, value and choice. It is clear to ALTO that the regulatory market defined by ComReg as the market Fixed Retail Narrowband Access Market under the decision D07/26 and subsequent decisions should not form a component part of a bundled offering, subsidised or not.

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.

ALTO Response 3

ALTO would like to raise the following issues.

1. ALTO agrees 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. As a minimum eircom will benefit for one full year given that twelve month contracts are being signed.
2. ALTO is aware that eircom tend to run promotions continuously and ALTO would expect, as has been proposed by eircom in this case, to run one promotion into another. In this case the promotions are each six months long hence the promotions become the product. ALTO is of the view that eircom appear to be using the promotion route to make a product offer that they can tweak at six month intervals rather than making this a full product offering and being subject fully subject to

price controls and *ex ante* regulation. It is ALTO's view that this is not the purpose of promotions and that eircom are attempting to use promotions to circumvent regulation and regulatory controls.

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

ALTO Response 4

As discussed in question 3 item 2, ALTO is of the view that eircom are using the promotions process to circumvent regulatory controls of its products and thus ComReg should review the promotion rules. ALTO would expect promotions to be short duration events (1 to 3 months) with the financial benefit then spread across the year. eircoms promotions appear to initially be six months with a continuation for the full year, hence how are these costs built into the process of setting wholesale prices in a forward looking way.

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.

ALTO Response 5

ALTO appreciates that part of the regulatory test for the eircom proposed bundle will be the initial provision of forecast and estimate data by eircom concerning the take up and usage of the proposed package. 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 compliance test.

Once launched the proposed bundle could have a significant negative impact on the market and damage competition over the period of the offer. Experience of the October to March bundle highlighted that even with operators and ALTO members raising formal complaints shortly after the bundle was launched, ComReg were not able to take any action over the entire period of the offer, highlighting the ineffectiveness of *ex post* regulation. This lack of action was very frustrating to the industry during which time we believe eircom were unfairly taking our customers.

We are aware from requests for information that ComReg were collating information about the impact of the eircom bundle over the period and are not surprised that ComReg have now made an initial assessment that the October to March bundle was non-compliant.

It therefore appears correct and proportional that given the above process and the initial finding of non-compliance for the October 08 to end March 09 bundle that the very similar April eircom Bundles offer is delayed until such a time that ComReg is satisfied with its compliance. Given an initial non-

compliance finding ALTO agrees that ComReg should be allowed to have sufficient information to support its view of non-compliance.

Time period

Given the time it has taken to resolve disputes with eircom which is nearing two years, an extension for nine months actually seems relatively short in the scheme of things to resolve this complex yet very important issue. ALTO would support sufficient time for ComReg to analyse this issue for the benefit of the industry and the consumer and nine months seems short.

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.

ALTO Response 6

As discussed in our ALTO Response to question 5, ALTO agrees that the timeframe should be extended as required based on the fact that ComReg has already captured significant information and has made an initial non-compliance assessment. 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.

3.0 Comments on Regulatory Obligations

The EU Framework Directive acknowledges that: *“There is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market.”* (Recital 25) As such, ComReg must intervene where suspected compliance breaches or minor abuses are apparent or suspected in regulated markets.

Many telecom markets in Ireland remain uncompetitive due to:

1. Structural problems related to incumbency, dynamics of access and interconnection;
2. Distortions in the state of competition; and
3. Evolving market developments resulting from economic pressures and technological change.

Without effective *ex ante* regulation, key telecom markets will not develop effective and sustainable competition.

Ex ante regulation is needed when there is a noted lack of effective competition is due to structural problems that make development of normal market dynamics impossible.

High and potentially insurmountable barriers to market entry, Asymmetric cost structures and dominance or control over bottleneck facilities

There is potential for those with market power to implement multiple forms of abuse, usually involving behaviour that is difficult to detect:

1. Exclusionary abuses (price squeeze, discrimination, raising rivals' costs, refusal to interconnect, predatory pricing, Bundling etc.)
2. Exploitative abuses (excessive pricing, application of unfair trade conditions, etc.)

Problems with *ex post* or Competition Law based enforcement

Several aspects of competition law enforcement make "*ex post*" regulation an unsuitable default regulatory regime for telecoms:

1. Efficiency;
2. Remedies;
3. Timing; and
4. Specialisation & Harmonisation

Exclusive *ex post* competition law enforcement in the telecom sector is not efficient or effective because Competition law is not designed to address structural problems or situations of entrenched market power (removes the effect rather than the cause). Competition law can only be applied once an abuse has been implemented or found and, therefore, the anti-competitive objective has been achieved – "the operation was successful but the patient died."

Decisions under Competition Law are binding only on parties to the action. Lack of 3rd party/wider effect leads to proliferation of legal proceedings on narrow issues and uneven application of rules.

Competition Law actions generally require an individual complaint: high financial burden for challengers and exposure to commercial retaliation.

Suitability of Competition Law Remedies

Competition remedies are limited in scope – mainly fines, orders to cease the abuse, and structural remedies. There have been limited excessive pricing cases in the history of Irish competition law jurisprudence. Remedies do not produce prompt financial relief for wronged party: fines go to Government and there are no retroactive payments.

Court action is required to claim damages in competition law cases which invariably are difficult to prove.

Forward-looking remedies (e.g. cost orientation, technical interconnection obligations, QoS standards) are difficult/impossible for non-specialist authorities (or courts) to devise, monitor and enforce (see United Brands and Guidelines on Merger Remedies).

Competition authorities do not have sufficient staff to monitor effective implementation of behavioural remedies. Those remedies generally produce effects only among the parties to the proceeding, which can lead to distorted industry impact and confusion in the marketplace. Competition law is slow to respond to failure to implement remedies, and renewed proceedings are required in case of failure to comply. Also problematic: “loophole” effect. “Landmark precedent” approach is not well suited to an industry where anticompetitive abuses often involve minute infractions in massive volumes

Timing issues

Competition law requires proof of market power abuses, in addition to dominance. This requirement imposes a higher burden of proof and increases the length of proceedings compared with *ex ante* regulation. Court backlogs, procedural issues and delaying tactics by the respondent can extend competition law proceedings. Competition law does not generally impose binding deadlines for decision-making on abuse cases; *ex ante* regulation sets timeframes. Appeals generally suspend validity of competition law decisions (where appeal is against the imposition/amount of a penalty), whereas under the new Framework, appeals do not generally suspend regulators’ *ex ante* decisions.

4.0 Conclusion

ALTO considers ComReg’s activity and Direction to eircom as proportionate and correct in the context of the Irish communications market. Substitution of *ex ante* regulation by competition law enforcement depends on the effective resolution of structural problems currently affecting the sector. As mentioned in detail above, Competition law, as opposed to Regulatory remedies can only be successfully applied to “normalised” markets that are not predisposed to anticompetitive behaviour and effects. Roll back of *ex ante* regulation is not simply a matter of time but a question of sustainable dynamic changes in the industry.

ALTO – Alternative Telecom Operators

29 June 2009

5 Magnet Networks

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.

Magnet Networks agree with ComReg's reasoning behind their initial compliance assessment. Magnet Networks in October utilised ComReg's Net Revenue Test in relation to the 1MB and 3MB products that were the October 2008 bundles.

1MB Bundle Costs:

Line Rental: (Non Wholesale as Magnet in October were not a SBWLR provider) €20.96

Mailbox cost: €1.07

Local & National Calls: €2.00 (Averaged Cost)

Wholesale Broadband: €9.48

Meteor Minutes (500 minutes based on 30% calls at peak, 30% at off peak and 40% at weekends) €53.29

Total 1MB bundle cost: - €86.80 excluding VAT

3MB Bundle Costs:

Line Rental: (Non Wholesale as Magnet in October were not a SBWLR provider) €20.96

Mailbox cost: €1.07

Local & National Calls: €2.00

Wholesale Broadband: €11.55

Meteor Minutes (500 minutes based on 30% calls at peak, 30% at off peak and 40% at weekends) €53.29

Total 3MB bundle cost: - €88.87 excluding VAT

With Magnet Networks high investment cost in unbundling exchanges any price difference between the products is an unfair reflection of a margin. Also, Magnet Networks can only offer the equivalent product in our exchange footprint, which currently is 40 exchanges in the main metropolitan areas of Ireland. Eircom can offer their service nationwide which gives them an advantage over any other LLU provider in Ireland.

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.

i) Consumer Interest

In the short term it may be seen that the customers interest in being served by offering them good value for money bundle product. In these financially constrained times people are looking at all their costs and telephone, broadband and mobile calls are seen as an easy target. However, with the launch of this eircom bundled product, the average consumer believes it to be value for money and will

sign up irrespective of the quality of the service. Fundamentally the customer nowadays is looking for the cheapest.

This may be a short term gain because when competitors are being pushed out of the market it allows prices to creep up until such time as a monopoly has re-established itself and thus allowing eircom free reign to charge whatever they like due to the lack of competition. 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.

ii) Fixed Retail Narrowband Access Market

There is very little that can be said here except that this market will be foreclosed. Eircom have been designated as having SMP in that market. It is a market that is extremely difficult to compete in as the majority of the times a competitor is purely reselling an eircom product. If a competitor is not providing narrowband voice they are providing voice services over IP utilising broadband. There is effectively very little competition in this area due to eircom's SMP.

iii) Other Markets

Several markets are suffering due to these bundles products (this is based on the October 2008 bundle products). The first market is the LLU market. Bundles like those offered in October 2008 focus on price and with a price conscious population such offers appeal. LLU providers have large investment costs and currently a limited footprint. LLU providers have been unable to replicate this product at a similar price as eircom. Though the LLU provider has a superior product few customer 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. This failure to have bitstream and LLU in the same market is putting off competitors investing in Ireland. This can be further evidence by the difficulties that Smart are having. They have the largest LLU customer numbers yet are unable to find a buyer.

Another market that is affected in the mobile market. Like the LLU providers, alternative mobile providers are unable to offer a similar bundle as they do not have a close relationship with a national telecommunications provider. Those that may have a fixed arm are mere resellers of eircom.

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.

The competitive harm would not cease when the offer ceases. The first thing is that the offer is a lifetime offer. Thus the subscriber will be given free Meteor calls until such time as they churn from eircom. ComReg informed Magnet the average churn time for a customer of eircom is 4.5 years. Thus, this offer's effects would last for a minimum of 4 years after the offer expires.

There is another affect that this offer will have which is on mobile switching. The bundle customer may potentially decide to move their mobile subscriptions to Meteor in order to maximise their money saving by having free calls to Meteor. If the whole family has a Meteor phone this cuts down the family mobile call bills.

Fixed to mobile calls fees are a matter of contention in every household and switching to Meteor eliminates this problem.

This is evidence that the effect of this bundle will last significantly longer than the bundle offer. Once a customer who has free calls to Meteor for life stays with eircom and Meteor they are tied in with these two providers and is very unlikely to move. This leads to a stagnating market with little movement between providers in the residential market. Thus eircom's competitors will have to leave the residential market as it will have been foreclosed.

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

Magnet believe ComReg should consider the following

1. Redefining markets to include both bitstream and LLU.
As bitstream is defined in a different market to LLU eircom are allowed margin squeeze LLU providers. Eircom's products are competing directly with LLU provider products and thus the market should be redefined to ensure fairness in this market. Eircom are dropping the price of wholesale bitstream which directly impacts LLU providers and there is very little ComReg can do to stop eircom. Redefining the market would ensure consistency across the broadband market place.

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.

Magnet Networks agree with ComReg's direction. Magnet Networks feel that ComReg need as much time as possible to ensure that this bundle does not affect competition.

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..

Magnet Networks agree with ComReg's draft direction. Magnet Networks feel that ComReg draft direction fulfils ComReg's requirements.

6 Smart Telecom

John Quinn
Director of regulatory affairs
Smart Telecom Holdings Ltd
3300 Lake Drive
Citywest Business Campus
Dublin 24

Mr. Stephen Brogan
Commission for Communications regulation
Lower Abbey St
Dublin 1

May 2009

ComReg 09/43 – Smart Telecom response (PUBLIC VERSION)

Dear Stephen,

Smart Telecom welcomes Comreg's above mentioned consultation and draft decision.

- **We look forward to Comreg's decision and future direction on this matter.**

Kindest Regards,

John Quinn

Answers to 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

We are fully in agreement with ComReg's reasoning and compliance assessment with regards the family bundles in question.

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

There are several impacts this product would have if launched and continued.

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.

We do not believe that there is any way that the current family bundles proposed and the price points proposed could be launched without competitive harm being caused.

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

We are concerned that after almost a year and a half that ComReg has not published its response to consultation on the treatment of bundles. This has compounded the difficulties faced by OAOs in the WBA and narrow band markets.

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.

In light of what we have said to this point, we do not see any possible potential for the proposed bundles to launch with compliance granted.

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.

Please see our response to Question 5.

7 Digiweb

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.

Digiweb would suggest that amongst other measures, ComReg could also use the Reasonably Efficient Operator (REO)¹ test in order to determine the exact level of margin squeeze which will result from the implementation of Eircom’s “April 2009” bundle packages. This model would require the Regulator to obtain statistical information on the Alternative Operators’s upstream cost as well as downstream cost.

$$P - r - wAO \geq dAO$$

P = retail price of the SMP’s downstream service;

r = regulated price of the regulated wholesale service needed by alternative operators to provide such downstream service;

wAO = Alternative Operator’s other upstream costs

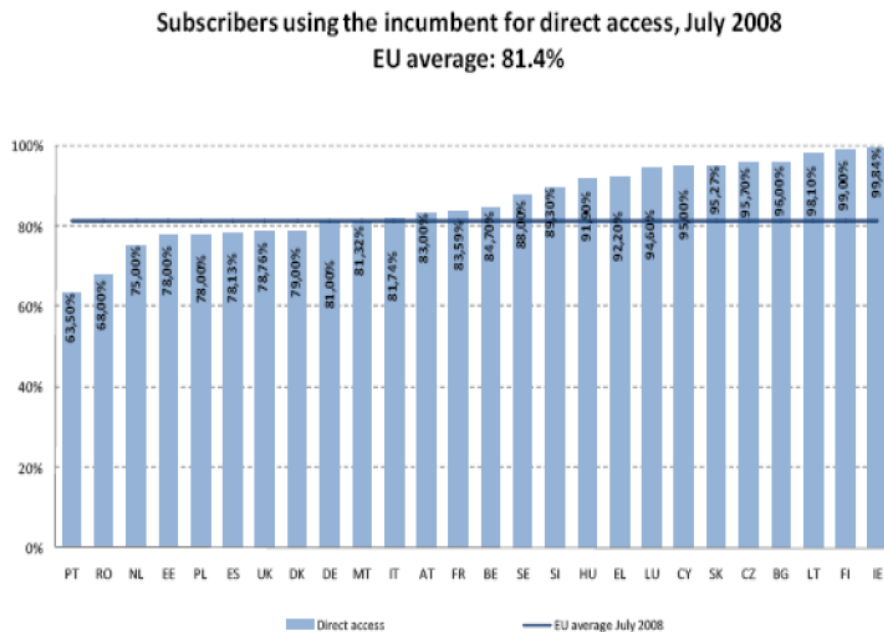
dAO = Alternative Operator’s downstream costs

The Broadband and Voice markets can be characterized as mature, and the level of Innovation and Investment involved in the introduction of those new bundles cannot be considered as sizeable. Therefore, ComReg should use a model aiming at intensifying the competition. Digiweb is willing to provide the required information in order for ComReg to carry out the REO approach.

¹ « Report on the Discussion on the application of margin squeeze tests to bundles », European Regulators Group, March 2009.

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.

Eircom will be pricing this bundle in such a way that non-vertically integrated alternative operators won't be in a position to compete any longer in the market. This will reinforce the SMP pre-dominance in the market. The recently published 14th Implementation Report on the Single European Communications Market stated that the Irish SMP **gained** market share in the Fixed Telephony market between Dec '06 and Dec '07 (from 68% to 69%). Its dominance in the Direct Access activity is complete with 99.8% market share, making it the most monopolistic market in the EU!



The situation of over-reliance on the SMP network and its policy of below cost selling will undoubtedly strengthen Eircom's position in the market.

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.

The SMP will gain a significant first-mover advantage in capturing additional customers to its base. Even though this bundle was to be purchased by its own customers, the reduction in transaction costs and marketing economies of scale could also be significant. The impact of these, especially the marketing messages, would be felt for much longer than the original promotional period. The likelihood of this occurring (i.e. blanket advertising) has already been evidenced by the campaigns that eircom ran prior to Christmas 2008 across all media. No other operator is in a position to sustain such advertising in order to convey alternative messages to the market. Thus this “limited period” offer would have therefore a lasting effect that will increase the SMP dominance, lock further a captive customer base, and weaken an already fragile competition.

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

ComReg should possibly review the poor development to date of Mobile Virtual Network Operator's. Eircom's ability to include Mobile service in its package will not be replicated at the same cost base by any alternative operator. This respondent feels that the conditions are not yet adequate for the introduction of new MVNO entrants in Ireland despite the high ARPU seen in the market.

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.

Digiweb considers it appropriate to extend the April 2009 Direction for at least 9 months. The reasoning for this is that it has been almost 9 months since the original bundled offer of phone+mobile+BB was launched by eircom and operators have already suffered in this timeframe. For fairness, the same timeframe should be provided to alternative operators to compete without interference from eircom. 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 condition the introduction of the bundles to a decrease of the wholesale rates offered to the alternative operators.

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.

ComReg has the responsibility to ensure that the SMP comply with the obligation not to unreasonably bundle retails services. As the majority of the services included in the bundles have their wholesale prices determined by ComReg, the Regulator should be in position to impose the lowering of its upstream rate in order to facilitate the development of the competition. ComReg should extend the April 2009 service “ban” as long as the alternative operators are not in condition to effectively compete in the market.