



Office of the Director of
**Telecommunications
Regulation**

**Response to the outline legislative proposals in relation to the
regulation of the communications sector published by the
Department of Public Enterprise**

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Introduction

This document sets out the response of the Director of Telecommunications Regulation to the outline legislative proposals published by the Minister for Public Enterprise in September 2000. Those proposals followed an earlier public consultation carried out by the Minister in November 1999. The Director's response to the 1999 consultation is set out in Document ODTR 99/67 and is available on the ODTR website www.odtr.ie.

The Director welcomes the opportunity afforded by the Minister for Public Enterprise to comment on the implications for the operation of the ODTR of the draft legislative proposals for the communications sector. As the Minister indicates in her consultation paper, Ireland needs an effective regime that will allow the Regulator to act as speedily as possible so as to bring about effective competition in the communications sector in Ireland. The key role to be played by regulation in ensuring the effective liberalisation and development of competition in this sector to date is also noted.

Technology Neutrality and Convergence

The approach taken to converging technologies and markets in the proposals is very welcome and will allow the Irish regime to be more flexible and responsive to national conditions and to ensure effective competition in new emerging markets. In this area the Minister's legislation is designed to put Ireland among the early adopters of the new European framework.

This proposal broadens the Regulator's responsibilities to encompass the regulation of a wide range of network access mechanisms including full physical unbundling of the local loop. This will allow effective regulation to contribute to developments that have been identified as underpinning the progress of e-commerce and broadband communications within European telecommunications markets.

The ODTR welcomes the introduction through the Bill of a new approach motivated by recent EU Framework proposals. This proposal will update and strengthen the regulatory system, setting out a "toolkit" that the Regulator can use to deliver on the objectives set out in legislation. Like the similar measures envisaged in the new EU policy framework, the proposal will help the Regulator take account of recent developments in the market, evolution in technology and changes in user demand.

Accountability

The bill provides a useful clarification of the Regulator's relationship with the Oireachtas, reflecting the current practice. It sets out explicitly a broad statement of objectives, filling a vacuum in the definition of the Regulator's purpose and setting out a statutory policy framework within which it is to operate. It makes provision for strategy statements and a published programme on consultations that will formalise

and bring together elements of current practice as statutory obligations. These can be helpful in increasing understanding and clarity in respect of the Regulator's activities, an important aspect of accountability.

These proposals follow up on the intention set out in the earlier consultation to create a three-person commission to replace the current single regulator. The position of the Director on this matter has been set out in ODTR 99/67 in the first instance and is accompanied by an independent paper on this matter prepared by NERA for ODTR (ODTR 99/67a).

The Director believes that speedy, effective decisions and actions have been the key to the success of Ireland's regulatory regime, allowing Ireland to catch up with its European neighbours in the telecommunications field. This success shows that the existing structure, with a single sectoral regulator, has proven efficient and effective. Decisions are made with reference to the best advice and understanding of the viewpoints of interested parties. The ODTR comprises a wide range of specialists in all fields of regulatory work, and has also set up a system for consultation that regularly affords interested parties the opportunity to put their views before decisions are made. The current arrangements focus accountability clearly and it is not evident in what way the new proposal would improve this. The change proposed would involve a significant overhead in efficiency and effectiveness.

Policy Directions

Responsibility for policy for the communications sector lies with the Minister and the Government. In recent years however, the focus of policy making in relation to communications regulation has moved to the EU. The Minister, in her capacity as Ireland's policy maker, has a fundamental and essential role in shaping the framework at EU level and also in adapting and translating it into an Irish context. That framework is designed to set out clearly the policies that are to be implemented, thus providing certainty to the telecommunications market. Independent regulation enables rapid progress to be made in implementing the framework, with the regulators taking the necessary long-term view with confidence that they can develop and bring their work to conclusion.

In this context, it is not clear what the current proposal for "**general** policy directions" set out in head 30, and cross referenced in a number of other areas is intended to achieve. It is inconsistent with the objective of clarity and certainty in the regime and could give rise to delays in decision making or perceived influence on decisions of the regulator as interested parties seek to have regulatory decisions overturned or influenced by the Minister. There is a potential for increased litigation - involving both the Department of Public Enterprise and the ODTR - arising from the uncertainty engendered in the prospect of double channels of decision making on all issues (other than decisions on the persons to whom licences may be granted or the exercise of functions relating to individual undertakings or persons), including the allocation of spectrum in respect of particular bands to specific categories of services and use of the national numbering resource.

Given the framework derived from EU law, and the inclusion of a statement of objectives in the legislation, if there are fundamental issues of communications policy that the regulator might ignore to the detriment of “the proper and effective regulation of the electronic communications market and the management of the radio frequency spectrum”, the legislation should specify clearly the nature and scope of the policy directions and those areas where such directions can be made. The Director would welcome such clarity. Without this specific detail, the regulatory regime could suffer from either real or perceived pressures from short term interests that would damage progress made to date.

Enforcement of decisions

One weakness identified in the existing regulatory framework is the lack of transparent, proportionate civil remedies. Such remedies are vital in cases where operators may derive substantial commercial benefits (or cause significant harm to consumers or competitors) by failing to comply with licence conditions or other legal requirements. The need for significant civil remedies for this kind of behaviour arises not alone in telecoms regulation, but in many sectors and so has implications for the regulatory regime for other utilities and public services.

The Director notes that the only proposed action in this area is to increase the maximum fines that a court may impose following a conviction on indictment and does not consider that this limited amendment addresses this problem effectively. The level of fine remains very low, even in relation to breaches of law by unlicensed users of spectrum.

In the case of summary prosecution, the existing level of fines (£1,500) for conviction of summary offences is retained in the proposed bill. This is clearly not proportionate to the commercial significance of many possible breaches of telecommunications law where the financial amounts at stake are very considerable.

The Director understands that there must be a limit on the level of fines arising from summary offences, but believes that the £1,500 level should be reviewed to take account of current income levels and the value of money, while remaining consistent with Irish judicial and legislative principles. This would at least make summary prosecutions more useful in relation to breaches of law with more minor implications than the major telecoms cases.

With regard to criminal conviction (conviction on indictment), this is a lengthy process and not in line with the need to make fast enforcement decisions that apply appropriate redress where licence conditions or requirements of legislation are breached. Therefore the Director suggests that the legislation include a civil remedy which allows for proportionate remedies to be imposed by the ODTR without the requirement for criminal prosecutions. The provision for compliance notices might be developed to provide a basis for this approach.

Funding of the Regulator's office

The Telecommunications (Miscellaneous Provisions) Act, 1996 (Section 6) Levy Order, 1998 (the Levy Order) came into force on 1 April. Those liable to pay the levy are providers of telecommunications services licensed under Section 111 of the Postal and Telecommunications Services Act 1983. The purpose of this levy is to meet expenses properly incurred by the ODTR in the discharge of its functions. At present, any surplus which exceeds the expenditure incurred by the ODTR is to be refunded to the telecommunications industry. Under the new regulatory framework it would appear that any such surplus should be paid into the Central Fund. If this were the intention, such treatment would be inconsistent with the original objective and spirit of the levy provisions of the 1996 Act and the Levy Order and would appear to be unconstitutional. The Director believes that the existing arrangements should stand in relation to any surpluses arising from the levy.

Wireless Telegraphy Act, 1926

The Minister proposes some useful amendments to the 1926 Wireless Telegraphy Act in this proposed legislation. These would benefit from some minor technical amendments, and we would be happy to discuss these with the Department. However, the Director considers that this legislation will require further substantial revision to bring it into line with a modern telecommunications environment.

Technical Drafting points

There are a number of technical drafting points in the proposed legislation. These are included in the Annexes below.

Conclusion

The Director considers that new legislation is timely and very much needed in the fast paced communications environment in which we operate. The commitment of the Minister to progress this quickly is very welcome. If the remaining matters are addressed appropriately, the Director believes that Ireland can have clear and effective legislation to underpin a strong leading edge regulatory regime for communications in Ireland.

/END

Annex A

Suggested Amendments to the General Scheme of the Communications Regulation Bill

Head 8 *Dissolution of the ODTR*

In order to ensure that all contracts concluded by the ODTR remain valid after the ODTR is formally dissolved (e.g. lease on premises), the following text is suggested for inclusion at the end of the text in Head 8(3):

"Any contract to which the Director is a party shall continue in force after the establishment day, and any rights or obligations of the Director thereunder shall attach to the Commission."

With regard to transfer of functions, the substitution of the Director's name in pleadings is ambiguous at paragraph 5 and should be clarified. Also it should be clarified that proceedings already instituted against the Minister should remain with the Minister. We suggest the insertion of text similar to 1996 Act Section 4. Paragraph 5, for example;

"Where, immediately before the commencement of this section, any legal proceedings are pending to which the Minister is a defendant and the proceedings have reference to any functions transferred to the Commission by this section, the Commission shall not be substituted for the Minister in those proceedings notwithstanding the transfer of functions under this Act."

Head 10 *Appointment*

In paragraph 3 the Director notes the suggestion that the term of office should be five years. This is inconsistent with the term of office in similar public service appointments, e.g. the term of appointment for Secretary General is seven years. A term of five years could provide less certainty in implementation due to the disruption that would be caused by regular and frequent changes in the members of the Commission. It is suggested therefore that the period of seven years be used. (This would also equate with the full length of appointments of the current Director.)

Head 16 *Disclosure of Interests*

This section allows for Commissioners to have certain interests in regulated firms and provides a procedure whereby they should defer from relevant decisions that involve such firms. This appears to be impractical. The decisions made by the Regulator are complex in nature and highly inter-related. An interest in any regulated firm is therefore likely to impinge on a very wide range of decisions, with the effect that a Commissioner could be precluded from many such decisions.

An alternative approach would be to provide in the legislation that the Regulator implements and publishes a code of practice approved by the Minister in relation to interests of Commissioners. This would address the concerns associated with this head and would allow the flexibility to deal with the changing market as well as providing for transparency and accountability.

Head 21 Levies

Licence Fees and Levies are two separate and distinct payments to the Office and are dealt with in an entirely different manner. Paragraph 5 should be clarified to highlight that it refers to licence fee income rather than levy for the reasons explained in the body of this paper. The proposed text would read as follows:

“5. The Minister may, with the consent of the Minister for Finance, direct the Commission to pay into the Central Fund or the growing produce thereof such sum as he or she may specify being a sum that represents the amount by which the gross licence fee income received by the Commission in each financial year exceeds the gross expenditure incurred in the administration of its office in that year, less any interim payments made in accordance with paragraph 6.”

Head 23 Annual Reports and Accounts

In paragraph b. the period of fourteen days for presentation of the accounts to the Minister should be replaced by *six weeks* to allow adequate time to arrange printing.

Head 33 Authorised Officers

Some suggested amendments are set out in Annex B. The ODTR currently exercises its powers relating to Authorised Officers under the Telecommunications (Miscellaneous Provisions) Act 1996 and various other enactments. While the existing legislation provides for a wide range of powers, the ODTR considers it sensible to collate and refine these functions to provide a more practicable and workable framework for appointment of authorised officers.

Head 35 Establishing Markets

The ODTR proposes that paragraph 2 of this Head be amended to include definition of *geographic markets* and to allow for *supply-side substitutability* in the market definition process. The proposed text would read as follows:

“2. For the purposes of this Act, a Relevant Market shall consist of those electronic communications products or services which, having regard to the conditions of supply and demand for such products or services and the geographic area in which they are created and supplied, have such similar characteristics that

(a) one product or service within the same Relevant Market is the same as, or substitutable for, another product or service within the same Relevant Market, and

(b) the products or service within any Relevant Market are distinguishable from other products or services outside that Relevant Market.”

Head 38 Procedures to be followed by the Commission

In paragraph 1 (c) the word *participant* is used which is not common under Competition law. This should be reviewed.

Head 39 Co-operation between Commission and Competition Authority

Since this question was first raised, the telecommunications industry has advanced considerably and there are a number of instances of companies showing themselves able and willing to take their competition law cases directly to the Courts. The issues that the Regulator can deal with effectively are clearer to the industry also.

In that context the arrangements proposed for co-operation between the Commission and the Competition Authority are helpful, but they fall short of the more useful re-organisation of responsibilities proposed in ODTR 67/99.

Head 43 Right of Action

This Head deals with the regulator's right to take actions against licensed operators and has been expanded to cover unlicensed operators where immediate action may sometimes be necessary for example to halt interference in spectrum used by the emergency services. Some suggested text is set out below:

“1. The Commission shall have a right of action for relief by way of injunction or declaration from the High Court against any undertaking to restrain

(a) any non-compliance or direct any compliance in accordance with the terms of any authorisation, licence or compliance notice, or

(b) any breach of any obligation imposed by or pursuant to this Act or by or pursuant to any other Act or any statutory instrument or any requirement of a licence or authorisation which falls to be enforced by the Commission,

and the Court may grant such order as it sees fit.”

Annex B

Possible Textual Amendments to Outline Legislative Proposals in relation to the Regulation of the Communications Sector

Draft Proposal for Head 33

Subsections 3 & 6 of the suggested text clarify the means by which an authorised officer may obtain information. The ODTR recommends for clarity that an authorisation identifies the nature and purpose/s of the authorisation so that these may be communicated to the recipient of the Commission's action under this Head.

The text has also been expanded to ensure that the Regulator will retain power to seize and retain documentation, records or apparatus, for bringing prosecutions under the Act and enactments in schedule 2 to the Act.

If property seized then provision should be made for retaining and forfeiting of same. The onus of returning property will therefore be moved from the Regulator to the putative owner requiring the putative owner to ensure that the property is licensed prior to seeking its return. Text is suggested in subsection 7 to address this.

- 1. The Commission may appoint persons to be authorised officers for the purpose of obtaining information necessary for the exercise by the Commission of its functions under the Act or under the enactments set out in the Second Schedule.*
- 2. Appointment of authorised officers shall be by way of a certificate of authorisation, issued by the Commission, which shall indicate the purpose or purposes for which he or she may act and the period for which the authorisation stands.*
- 3. An authorised officer may, for the purposes of obtaining information necessary for the exercise by the Commission of its functions, on production of a certificate of authorisation, do any or all of the following;*
 - (a) enter and inspect any premises or any vehicle or vessel, where any activity in connection with the provision or operation of an electronic communications network or electronic communications services, is believed to have been, is or will take place.*

- (b) require the production of any books, records or other documents, howsoever stored or recorded, relating to the provision or operation of an electronic communications network or electronic communications services*
 - (c) inspect and copy or take extracts from any such books, records or other documents, howsoever stored or recorded.*
 - (d) require the production of any information relating to the provision or operation of an electronic communications network or electronic communications services*
 - (e) make such inspections, tests and measurements of machinery, apparatus and other equipment on or at the premises, or in any specified vehicle or vessel, relating to the provision or operation of an electronic communications network or electronic communications services*
 - (f) take photographs or make any visual recording of anything relating to the provision or operation of an electronic communications network or electronic communications services.*
- 4. An authorised officer shall not, other than with the consent of the occupier, enter a private dwelling unless he or she has obtained a warrant from the District Court under paragraph 6*
- 5. An authorised officer, where he or she considers it necessary, may be accompanied by a member or members of the Garda Síochána when performing any powers conferred on an authorised officer by this Section.*
- 6. If a Judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for suspecting that –*
- (a) An offence under this Act or any other Act or statutory instrument, which falls to be enforced by the Commission, has been or is being committed on or at any premises or in any specified vehicle or vessel, and*
 - (b) evidence that the offence has been or is being committed is located on or at those premises or in any specified vehicle or vessel*

the Judge may issue a warrant authorising an authorised officer or member of the Garda Síochána, accompanied, if appropriate, by other authorised officers or by a member or members of the Garda Síochána at any time or times within one month from the date of the warrant, on production of the warrant if so requested, to enter those premises or any such vehicle or vessel, if need be by reasonable force, and there to search for and seize all such books, records, or other documents howsoever stored or recorded and any apparatus, machinery and other equipment which appears to the authorised

officer or member of the Garda Síochána to amount to evidence that an offence, under this Act or any other Act or statutory instrument, which falls to be enforced by the Commission, has been or is being committed.

7. *An authorised officer may retain anything seized under this section which he believes to be evidence of an offence under this Act or by or pursuant to any other Act or statutory instrument, which falls to be enforced by the Commission*
- (a) *Anything seized under this section, may be retained for a reasonable period or, if within that period there are commenced any such proceedings under this Act or by or pursuant to any other Act or statutory instrument, which falls to be enforced by the Commission, until the conclusion of such proceedings.*
- (b) *Where a person is convicted on indictment of an offence under this Act, the interest of the person, whether as owner or otherwise, in the property seized shall stand forfeited as a statutory consequence of conviction.*
- (c) *The Commission may apply to the District Court for forfeiture of anything seized under this section which remains in the possession of the Commission two years after the date of seizure,*
- (d) *Any person claiming to own anything seized under this Section may, subject to subsection (a) above, apply for its return to the District Court, unless it is apparatus for wireless telegraphy and the said person does not hold a licence from the Commission for the possession or operation of the said equipment.*
8. *A person who –*
- (a) *without reasonable excuse fails to comply with any request or requirement made by an authorised officer under this Head, or*
- (b) *obstructs or interferes with an authorised officer in the exercise of his or her powers under this Head or gives an authorised officer information which is false or misleading*
- shall be guilty of an offence.*