



Office of the Director of
**Telecommunications
Regulation**

Market Regulators: Governance and Accountability

Response to the Minister for Public Enterprise

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FOREWORD

1. Regulators – their role

- 1.1 The Minister for Public Enterprise's consultation process on key issues in respect of regulation of the utilities is timely. While regulation is not a new form of public service in Ireland, the independent market regulators for telecommunications, electricity, shortly for aviation (and in time others) are new phenomena.
- 1.2 We have commissioned a report from NERA, carried out by Dr. John Fingleton, a noted expert in the field covering the broader context of regulation. We trust that this may form a useful contribution to the debate.
- 1.3 Market regulation is about fundamentally upsetting the status quo in a sector... and ensuring that no new status quo cements itself into place. It involves liberalising the provision of services and ensuring that such parts as remain monopolistic are required to meet competitive standards while competition develops.
- 1.4 Market regulators have a key role to play in ensuring Irish consumers can benefit from the liberalisation of markets in sectors which were previously closed. This is critical if we are to maintain the competitive advantages so essential to continued prosperity and employment into the next century. It is essential that a regulator be independent, be strongly backed by legislation, be well resourced so as to be able to move quickly and effectively to fulfil its mandate. It is important that the key relationships, objectives and structures are clear and firm.
- 1.5 Legislation, both EU and national, set up market regulation. The legislative framework defines the role, range of responsibilities of the regulator and key relationships, together with enforcement powers and appeal mechanisms. To review these just over two years after the establishment of the first market regulator may seem too soon. However, since the 1996 Act provided for the ODTR, there has been a substantial shift in national policy on liberalisation, towards opening markets earlier, and a substantial growth in interest and activity in operating in these markets in Ireland. The short experience of the ODTR provides some useful pointers for review.

2. The ODTR – conflicting criticisms

- 2.1 Since it started, there have been concerns expressed that as an independent regulator, the ODTR
 - may not be accountable *and* was insufficiently independent in its actions
 - is moving too fast *and* is moving too slowly
 - is too powerful *and* its enforcement powers are almost non-existent and its procedures and appeal mechanisms too cumbersome
 - is imposing too much control on incumbents *and* is not pushing them hard enough.

3. Independence, Accountability and Transparency

- 3.1 Every democracy has personnel in institutions that are appointed by Government but that are independent of Government once appointed. The Director of Public Prosecutions, for example, is independent of the Department of Justice in our democracy. We reserve this delicate space for those institutions where independence *and perceived independence* are paramount. Such independent bodies are free from the pressures of lobbying. They are mandated to take a long-term view and must do so with confidence.
- 3.2 Such perceived independence is particularly necessary in the new liberalising telecommunications market in Ireland. Consumers and investors alike must see that the regulator has the strength of character not to be buffeted off course by vested interests.
- 3.3 While the “accountability” of long established institutions is occasionally debated there is no strong sense of democratic deficit. This is because – despite the complexity of their work - there is a fairly clear public understanding of what these institutions are trying to do. They are “accountable” to the public through their demonstrable pursuit of their stated aims.
- 3.4 The same relationship with the public does not *yet* apply to the two year old ODTR.
- Its business is an entirely new domain in Irish public policy. There has not been the time - or the necessary level of public debate – for the wider public to “sign onto” a deregulated telecommunications market.
 - Given the speed of technological change this is almost inevitably somewhat remote from general public discourse. The players engage in intense and well-informed debate but this largely passes over the heads of the consumers -whom the ODTR ultimately serves.
 - The EU plays a major role in shaping the telecommunications regulatory framework and regulator's work programme, and key debates take place in Brussels rather than in Dublin.
- 3.5 This said, the ODTR *is* accountable and it operates within a legal framework debated and agreed by the Oireachtas. This point could be underlined by a legal provision on attendance at Oireachtas Committees.
- 3.6 With the passage of time and with greater understanding of the driving force behind the work of the ODTR, any apparent “democratic deficit” will be reduced. When the wider public become used to enjoying the benefits of deregulation in more practical terms, the role of the Office of Telecommunications Regulation will become clearer.

- 3.7 The ODTR has taken steps beyond the statutory requirements of providing information to the market. Within the constraints of respecting confidentiality obligations of other parties, it has sought to be open in its decision-making. That is why the office has developed published guidelines for its main categories of licences and has published the texts of the licences themselves. The ODTR has established a policy of consultation on a very wide range of key issues, while working to maintain its entitlement to act more quickly where necessary in the interests of the consumer and the market. Its reports outline the responses expressed and reasons for the decisions taken on key issues. To the extent acceptable to all parties, it is moving towards making available all responses to consultations.
- 3.8 For a number of issues, the ODTR has established working parties involving both industry and consumer representatives to assist it in developing the market framework. With some 40 consultations since inception (approximately 1.5 a month) and 150 papers (over one a week), a published indicative work programme, the ODTR has radically changed the level of external understanding of Irish telecommunications regulation. If consultation is to become more formalised it is important that the ground rules are clear so that it does not provide a fertile ground for litigation.

4. Speed

- 4.1 The ODTR has responded to the change of pace on liberalisation as enshrined in the liberalisation SI 180 of 1998, but the basic legislative framework in the 1996 Act and other Statutory Instruments constitute in some ways, clothes that are too small and tight for the liberalised market of today and the future.
- 4.2 The current legislation provides for suspension of decisions until the outcome of all appeals to the Courts, and very wide grounds for appeal: these favour delay and the parties who benefit most from delay, and can tend to substitute the courts for the regulator.
- 4.3 The process towards liberalisation of telecommunications in Ireland thereby suffers as
- with the door open for any decision to be challenged in the Courts, the process can suffer delays totally out of keeping with the speed of change within the telecommunications industry
 - existing operators have a vested interest in lodging an appeal to the Courts. Current legislation favours any party who will benefit from a delay in implementing a decision.
- 4.4 Novelty in the appeals system is giving rise to difficulty and delays: the best remedy may be to provide simply for judicial review, the well tested method by which administrative decisions generally are subjected to review by the Courts.

- 4.5 The fundamental change that is required is that decisions stand until successfully appealed (as, say Departmental decisions stand). This is the surest protection against having a system that is a “delayer’s charter”.
- 4.6 The suspension of decisions pending appeal does not apply to the Director of Consumer Affairs nor to the Electricity Commissioner, nor to administrative decisions generally.
- 4.7 There is a trade-off between speed and process.

5. Responsibility

- 5.1 The development of market regulation has shifted responsibilities in several directions.
- The responsibility for developing the central elements of the policy framework for regulation moves to the EU rather than national Governments. Full liberalisation marks the point at which the whole of the EU framework becomes operative in Ireland as for other Member States.
 - Detailed implementation goes to independent regulators. The regulator must implement the EU generated framework, having regard to the specific requirements set out in the national legislation.
 - Through national legislation, Ministers and national legislators have a decisive and critically important impact on the character and effectiveness of regulation.
- 5.2 The overall framework within which the regulator works - the relationship between the EU and the national Governments - is fixed in other fora. There is no reason to change the current position whereby the Minister is responsible for setting the framework for regulation. Also, it is in the public interest that the Minister should continue to give consent for licensing that valuable (and finite) national asset... spectrum. It is also appropriate that public interest conditions and universal service be subject to Ministerial involvement.
- 5.3 It is also demonstrably in the public interest that regulators should keep Ministers and the Oireachtas informed of their work, explaining how they are fulfilling their mandate.

6. Enforcement

- 6.1 If liberalisation is to succeed, the regulatory framework needs to provide for immediate implementation of regulatory decisions, for very substantial fines for non-compliance, for clarity in the relationships between regulatory agencies. As some of the relevant provisions are in statutory instruments, perhaps this last change could be effected quickly.

7. Structures

- 7.1 There are many ways in which regulatory bodies can be structured: decisions should reflect the key objective to be achieved. If rapid change is to be achieved, highly focussed single, sectoral regulators offer the best option. Ireland has started on the road of separate sector regulators and the costs of changing now to another approach should not be underestimated. There are consequences for effective decision making arising out of whether there is a single regulator or a board.

8. These proposals

- 8.1 These proposals are made to meet the stated national objective of enabling Ireland to catch up internationally in respect of telecommunications. Over the past year Ireland has climbed up the league of liberalised telecommunications markets. They seek to strengthen the hand of the regulator in its key role of upsetting the old certainties - and ensuring that a new cosy circle does not have the opportunity to develop – so that Ireland and the Irish user benefit from the best services available anywhere.

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Director

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