SPEECH

Address by Etain Doyle
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to the European Parliament, outlining the International Regulators Group (IRG) position on the 1999 Review
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Introduction

I would like to thank ECTA for their initiative in organising today's seminar.

I am particularly glad to have an opportunity to contribute to this debate and to set out the views of the International Regulators' Group on the telecoms' package.

As chair of IRG, I welcome this opportunity to discuss with you our views on the development of the future regulatory framework for the communications sector.

IRG was established in 1997 at the initiative of ART, the French telecoms regulator and is a 'club' of independent NRAs for telecommunications from the 15 EU States and also, Iceland, Liechtenstein, Norway and Switzerland.

The original purpose of IRG was to allow for the exchange of information and experience on matters of mutual interest in order to assist NRAs in their work. This exchange of expertise stimulates and encourages practical measures to achieve market liberalisation and harmonisation.

IRG is an informal structure for the original Directives made no provision for inter-NRA co-operation, but the IRG has sought to fill this role as best it can. It has expanded its role to meet new challenges. Recognising that it had unique insights into the practical implications of the regulatory process, it considered that it had a responsibility to examine and comment

on the practical implications of the 99 review, initially through each Government, and to respond to the consultation process initiated by the Commission and to requests from the European Parliament for views on the new framework and how it would operate in practice. It also developed a programme of PIBS – principles of implementation of best practice – which are designed to develop greater harmonisation in implementation of Directives.

The flexible, informal structure of IRG means the organisation can respond rapidly to change. As we have got to know each other, we have gained considerable insight and understanding as to differences between markets, but also have developed a very strong commitment to finding ways of reaching common positions and harmonised approaches everywhere possible.

Where regulators have a clear legal basis and framework, much progress can be made by IRG members. If I take interconnection rates – these were very far apart when the market opened in 1998 - but they have moved very rapidly close together, helped by the work of IRG in ensuring that NRAs were aware of and could use best practice developed in various NRAs, as applicable in their own markets. The Commission's work in developing standards and benchmarking was also useful in this regard. IRG is also planning a similar exercise on leased lines.

Recently, IRG agreed on arrangements to develop a closer relationship with the Accession Countries, with a meeting arranged at head of NRA level and joint IRG/Commission seminars for Accession NRA staff. The presidency of IRG passes to Germany on 1 July, to Mr Mattias Kurth of RegTP and he is already engaged in forwarding these matters.

Members of IRG have been following the discussions on the 99 review in Council and Parliament very closely. We have had the opportunity to engage in some very useful exchanges with the various parties involved at different stages of the legislative process. Indeed, we have met with Mr. Paasilinna, Mr. Van Velzen and Mr Brunetta in March to discuss the progress of the Directives. In March also, Mr Liikannen met an IRG troika comprising myself, Mr Nils Billinger, the head of the Swedish NRA, and last head of IRG and Mr Kurth, the next one. Mr. Verrue attended our Plenary meeting in May in Ireland. These channels of communication are invaluable to us as regulators and we hope to be able to continue this dialogue in the future and build on these relationships.

Turning to the new legislation, IRG is supportive of the general thrust of the Framework Directive. Having 5 Directives rather than 22 is a major benefit, and no regulator will bemoan the passing of the need to deal with the definition of 'voice telephony' and other concepts no longer suited to the needs of the industry or users. However, some key concerns remain - namely, on articles 6, 13, 14 and 21 - which I now propose to address.

Article 6

The IRG concerns with Article 6 are practical ones. On the one hand, a consultation and transparency mechanism is welcome and indeed NRAs all regularly use such mechanisms in their own countries. On the other, NRAs are under intense pressure to act quickly and effectively in respect of complex issues in their own market, many of which may be litigated by one or more players. They are uniquely placed, and indeed a key *raison d'etre* for NRAs is to know how to push measures through their own markets at the quickest pace possible.

The IRG concern is to see that whatever formula is chosen enables the NRAs to get on with liberalising their markets quickly, and not to have an extra layer of approval which will tie up NRA resources, and also tie up Commission resources in reviewing hundreds, perhaps thousands of decisions every year. This level of bureaucracy is likely to stifle development and discourage the taking of new initiatives – given the heaviness of the process, regulators will tend to stick to a formula that has been successful before rather than risk tying down resources in having to explain its position and handling the uncertainty for the market players and everyone waits to see what Brussels will say, and becoming a potential 'piggy in the middle' between national courts, one or more industry players dissatisfied with either the NRA or the Commission positions, and the Commission itself.

NRAs have been set up under national laws and must respond to litigation in national courts, which may refer issues or from whom issues may be referred to the European Court of Justice. It is not clear what the rights and obligations of the NRA and of anyone aggrieved by the Commission decision overturning an NRA one would be where the NRA had acted in accordance with the national legislation. This uncertainty is likely to cause further difficulty and delay, which will not be to the benefit of end-users.

I would note yet again for those who consider that the NRAs did not do enough under the existing regime to achieve harmonisation, that no provision was made for NRA co-operation in that regime: NRAs were established because there were huge differences between markets, which with State owned monopolies in most of them, very much reflected national ethos.

Under the Council Presidency text, the Commission has the opportunity to express publicly any concerns they have about NRA proposals. Speaking from my own experience, the reality is that NRAs would be reluctant to proceed without trying to resolve any Commission concerns.

We in IRG have started discussions with the Commission to see how to arrange a closer working relationship. We believe that this sort of approach would give a better result for end-users than the formalised procedures that have been proposed. It goes without saying that any such group should be ready to meet the EP should the EP so wish, and to publish the results of its work.

If I may turn to this issue in more detail, the IRG is of the opinion that the concerns of the Commission and indeed Parliament could be met through the establishment of a group comprising the Commission and the Regualtors to deal with very detailed technical implementation matters.

Discussions are purely exploratory at this stage but IRG had the opportunity to discuss the possibility of setting up an advisory group of NRAs to the Commission with Mr. Verrue at the IRG plenary meeting in May.

This group, while similar to IRG, would be more formal in its structure and would deal with technical implementation matters as opposed to policy matters. This group would be better placed to advance this aspect of the objectives of the Commission laid out in their original Article 21 of the Framework Directive. It is certainly a more manageable and workable solution and I await the outcome of these discussions with interest.

Article 13

The issue of Significant Market Power is perhaps the most important of all issues to be considered under the new Framework. There are two aspects to be considered, firstly its role as the on-off switch for regulatory obligations and secondly the markets to which it is applied. On the second issue there is general agreement that the old definitions of fixed line, interconnect, leased line and mobile are no longer appropriate and that a new framework is needed to define markets in line with competition economics concepts and taking account of the dynamism in the market. The first area is more contentious. What are the circumstances under which NRAs may intervene in the market, for the benefit of consumers, placing obligations on certain players?

IRG is not satisfied that the Commission's proposals would meet the objectives of the new Framework. Fundamentally, there remains the question of legal uncertainty about the meaning of the definition. Without it, NRAs will be unsure of the extent of NRA powers and responsibilities, with the consequence that market players will be much more reluctant to invest and innovate.

Although we understand the case for basing definitions on concepts for which the European Courts have provided jurisprudence, the case law is limited and does not provide the appropriate level of legal certainty. It is in no one’s interest least of all the end-user to have the question as to whether regulatory controls should apply to be likely to be the subject of long drawn out litigation, perhaps lasting years. We have seen how the impact of the 1996 Telecommunications Act in the USA was delayed for years by Court actions.

This uncertainty also reflects strongly different views as to where regulatory controls should apply. If you take the view that the telecommunications market is practically competitive and that regulation should be well on the way to being phased out, you may be less concerned that it will be very much more difficult than in the past to determine if the regulatory switch should be turned on to enable active regulation in markets. If, however, you take the view that the market is a substantial distance from being sustainably competitive, and by that I mean a market where sufficient players are making reasonable, sustainable profits and are so well developed that the bottlenecks of interconnect and leased capacity for example have been or are close to being overcome, then the idea of having a starting gun that is very complex to use and which might possibly not go off for years if at all is very worrying indeed.

The Council text is similar to the Commission's proposal with the additional reference to new guidelines on single/joint dominance. Improvements could however be made to the text. I note that Parliament appears very concerned about the absence of legal certainty and has proposed some very detailed amendments to deal with the issue. We will await the outcome of the second reading of the Directive but it is hoped that we can arrive at some legal construction which allows NRAs to presume SMP according to an objective test, without having to go to undue lengths to prove their case.

Article 14

Closely aligned with the article on SMP is article 14 - the market analysis procedure. IRG supports the Council text asking that the Commission

should issue a Recommendation on relevant markets, rather than a Decision. Again, we are drawing on our practical experience as regulators of the markets. The types of boundaries between markets are likely to vary a great deal across the Member States and will vary more when Accession Countries are taken into account. The Irish market is not likely to develop in the same way as the French one for example, because of differences in the structure of the economies which will be reflected in the use and development of telecommunications markets. Likewise the stage of liberalisation and the development of telecommunications services will be reflected in the relevant markets to be used. It would not be reasonable for a small country to have to have the same range of markets as the major ones, nor to devote resources to developing analyses for irrelevant markets. A Decision would have to be very wide-ranging and provide for options to cover all eventualities – in other words it should be a recommendation.

The communications industry is subject to unpredictable developments that require regulation to be flexible. This, in turn, points to the need to define relevant markets more dynamically and not in primary legislation. IRG has drafted an indicative list of relevant product and service markets that might be appropriate for inclusion in a Commission Recommendation under Article 14.

While the purpose of the IRG in formulating the indicative list is to contribute to harmonisation, the list is designed to cover the entire electronic communications industry to allow for the possibility that differing national circumstances may necessitate the flexibility for some NRAs to define relevant markets that are different to those identified by the indicative list. The relevance of markets on this indicative list will be

determined, in part, by the evolution of and new technological developments within the electronic communications industry. Moreover, markets will be defined and reviewed periodically in accordance with the principles of competition law.

We await the Commission's comments on this list but we firmly believe that market definition should be the responsibility of NRAs and that regulators will, on the basis of a-priori knowledge, additional information such as market studies, and information submitted by undertakings or customers, usually be in a position to make a first assessment on a relevant market in its geographic and product dimension.

Conclusion

Overall, I consider that the directives' package will help encourage innovation and market competition within the telecoms sector. As in the past, this dynamic will create new opportunities and challenges for industry and regulators alike. For their part, the NRAs must continue to anticipate and respond to changing market conditions so as to facilitate competition. I believe that, by approaching our regulative task with flexibility and imagination, we can together substantively advance our national and European mandates progressively to achieve market harmonisation. Our task will however be greatly facilitated by the achievement in the forthcoming negotiations of the maximum legal clarity and certainty.

I believe that the IRG has responded well to the novel challenges it has faced over the past four years. On the basis of its unique market perspective, the IRG has been able to provide a distinct and valuable input into policy formation within the European institutions. The NRAs

market expertise, developed over the past four years, drives our strong views on Articles 6 and 13 of the framework directive. Overall, I believe that IRG's growing expertise explains the mutually beneficial growth in exchanges between IRG and the EU institutions. For example, my predecessor as IRG chair commented that IRG had become a "speaking partner" with the Commission. The ongoing contacts with the Commission regarding a new form of consultation point to the general willingness to respond flexibly and pragmatically to an ever-evolving situation.

Over the past four years, the independence of the national NRAs has been of great importance. I am pleased to note that the draft legislation again underlines this issue. The Council common position, for example, stresses that NRAs must be legally distinct and independent from organisations providing electronic communications networks, equipment or services. For their part, the NRAs must carry out their responsibilities impartially and transparently. The Council authorisation common position also recognises that administrative charges may be imposed to finance NRA activities. Once again, the principles of impartiality and transparency must be applied by the NRAs.

As regulators we appreciate the vision and determination of all the parties involved in updating the Framework. For our part, the IRG will continue to contribute its perspective to key areas of the draft legislation. The present meeting has provided an opportunity to outline our approach. If required, IRG is willing to make available its expertise where it can assist in resolving or clarifying particular issues.

I have greatly appreciated having this opportunity to talk to you about the work of the IRG and our views on the new regulatory framework. As noted already, this is not the first contact with the EP, but I would like to

underline the IRG's satisfaction in being requested for our views and our willingness to brief MEPs on the issues.

As the club of bodies charged with implementing the regulatory framework initiated by the Commission and decided on between the Council and Parliament, we would be happy to come before you again at your convenience to describe any aspect of implementing telecoms regulation in more detail, to assist in your review and consideration of the issues.

Thank you