



Office of the Director of
**Telecommunications
Regulation**

**Amendment to General Telecommunications Licence:
Additional Provisions relating to the right to use Fixed
Wireless Point to Multi-Point Access for the provision of
Telecommunications Services.**

Decision Notice D 7/99

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1. Introduction

In order to facilitate the licensing of Fixed Wireless Point to Multi-Point Access (“FWPMA”) networks and systems, a notification was issued by the Director of Telecommunications Regulation (“the Director”) on 6 May 1999 entitled “Notification re Proposed Amendment to General Telecommunications Licence: Additional Provisions relating to the right to use Fixed Wireless Point to Multi-Point Access for the provision of Telecommunications services” (ODTR 99/28). The notification was issued in accordance with section 111(10)¹ of the Postal and Telecommunications Act, 1983 (“the Act”) and set out the amendments which the Director proposed to make to the General Telecommunication Licence by means of the addition of a new part, Part 5, to the licence. This Part 5 will only apply to persons appropriately designated by the Director. Designations will be determined by the Director following the conclusion of the current competition for FWPMA licences, and thereafter in accordance with such other procedures as may be established by the Director for the provision of FWPMA. All references to the current competition should be read accordingly in relation to any future provision of FWPMA.

Representations were invited from licensees and interested parties on the proposed amendments. The Director wishes to thank all the organisations that responded to the notification. The comments provided have been considered in detail by the Director in deciding on the amendments contained in this Notice.

Responses to the notification were received from the following organisations:

- ❑ ALTO
- ❑ Broadnet
- ❑ Cable & Wireless
- ❑ Esat Telecom
- ❑ Formus Communications
- ❑ Ocean Communications
- ❑ Telecom Éireann
- ❑ United Pan-Europe Communications (Ireland) Ltd

The remainder of the paper is structured as follows:

- ❑ **Section 2** sets out the substantive issues made in the representations and the views of the Director on these issues;
- ❑ **Section 3** contains the new Part 5 of the General Telecommunications Licence.
- ❑ **Section 4** contains the conclusion.

In accordance with section 111(10)(f) of the Act, the Director wishes to advise holders of, and applicants for, a General Telecommunications Licence of their right to appeal the decision of the Director in relation to the amendments contained in this Notice. The rights to appeal are contained in section 111(10)(g) of the Act.

¹ As inserted by Regulation 5(a)(v) of the European Communities (Telecommunications Licences) Regulations, 1998 (S.I. No. 96 of 1998)

2. Representations received from interested parties

A number of substantive issues were raised in the representations received by the Director. In summary, serious concern was expressed by a number of respondents that the obligations currently on Telecom Éireann as an organisation with Significant Market Power (“SMP”) would not apply to services delivered by Telecom Éireann over FWPMA, should that company be awarded a Licence. It was argued that this could have a serious impact on the development of competition in the market. It is the Director’s intention that the SMP obligations on Telecom Éireann will apply to the services delivered by Telecom Éireann over FWPMA, should that company be awarded a Licence. Appropriate amendments, detailed below, have been made to Conditions 25 and 26 to reflect this.

Concern was also expressed at the absence of content in the Second Schedule of the new Part 5 of the Licence. The Director is mindful that the content of the Second Schedule will reflect the commitments and intentions, as appropriate, of applicants as set out in their tender documents for the FWPMA licences. Accordingly, it is not possible to be prescriptive about these at this stage; rather this will be addressed individually with the highest ranked applicants during the process of finalising the terms of the licences for those applicants. This process will begin after the announcement of the highest ranked applicants.

Condition 25 - Definitions and Interpretations

The term “FWPMA Services” has been changed to "Required Services" and is now defined to mean those Licensed Services that the licensee will be obliged to deliver via FWPMA, as set out in the renamed Part 1 of the Second Schedule. Licensees are free to deliver any other Licensed Services via FWPMA. The term “Licensed Services” is already defined in Section 1.1 of the Licence. This revised definition will ensure that the current obligations on Telecom Éireann will apply to services delivered by it over FWPMA, should it be awarded a Licence. In the light of this revision, Part VI of the Second Schedule has been removed. Required Services will reflect the appropriate material as set out in the Licensee’s application for FWPMA licences.

Condition 26 – Application of Part 5 of Licence

The term "FWPMA Services" has been amended to read "Licensed Services". This will enable Licensees to deliver Licensed Services other than Required Services via FWPMA.

Condition 28 – Rights & Obligations

Condition 28.1

Most respondents had strong reservations concerning the obligation to provide services on a non-discriminatory basis to all persons requesting services. One respondent felt that it was in effect imposing a universal service obligation on FWPMA licensees. Another argued that it was discriminatory in that no such obligation is contained in the generality of the General Telecommunications Licence (with the exception of licensees designated as having SMP). Respondents also raised the issue that for technical or operational reasons, operators would not

be in a position to provide services to all persons requesting such services (e.g. capacity and coverage constraints etc.).

The Director accepts the argument that it may not be possible to provide service via FWPMA to all persons, and that the requirement to provide services via FWPMA on a non-discriminatory basis may be inappropriate. The provision has been revised accordingly and has also been amended to refer to Required Services.

Condition 28.2

One respondent considered that this provision was more appropriate to be included as a matter of contract and not as a licence condition but did not offer a rationale for this view. Another respondent expressed the view that stipulating one circumstance by which a Licensee may refuse to extend or continue the provision of Required Services would imply that there could be no other legitimate reason to refuse to extend or continue the provision of the service. However the Director's view is that the provision does not restrict the Licensee from refusing on other lawful grounds. The Director is not persuaded therefore to remove this provision. However, it has been revised to reflect the potential distinction between Licensed Services and Required Services.

Condition 28.3 (a)

The term FWPMA Services has been amended to Required Services.

Condition 28.4

Clarification was sought on the nature of the 'conditions and obligations' contained in the Second Schedule. As outlined above, these will be considered on the basis of the appropriate material contained in the individual tender applications of the relevant applicants and will vary between the individual licences. The absence of a definition for the word 'direction' was also noted, as was the need to insert a timeframe for compliance with any directions issued by the Director. The provision has been revised to reflect the need to comply with all lawful directions issued by the Director. The procedures and timeframe for compliance are already set down in Condition 4 of the Licence.

Condition 29 - Ownership

All respondents commented adversely on this condition which related, inter alia, to a requirement for the Director's consent to the issue or transfer of shares. In particular, two respondents viewed the provision as unlawful. Telecom Éireann noted that the restrictions contained in the condition would breach company law obligations of a quoted public limited company and would be administratively unworkable where shares are traded on the stock exchange. The restrictions were also thought to be discriminatory by another respondent, who noted that they did not apply to the generality of the General Telecommunications Licences. Other respondents asked, at minimum, for the restrictions to be relaxed, or to be deleted. The Director does not consider it necessary to express an opinion on each of these points.

The successful provision of FWPMA requires that significant resources, both financial and otherwise, be available to Licensees. The Director is concerned to ensure that Licensees continue to have available to them over the course of their Licences resources comparable to those that were available to them at the time those Licences were granted. In many instances, the presence of a particular shareholder, or representatives thereof, will be of significance to the

decision to grant a Licence. The Director believes it is reasonable to seek comfort that a Licensee will not be disadvantaged by the decision of a shareholder to dilute or divest its interest in a licensee.

However, the Director accepts that the condition as originally drafted could potentially have been construed in a manner that may have gone beyond that which was intended. The text has accordingly been amended to capture only movements in shareholdings that would give rise to a change in control of a Licensee, or a material change in the ability of a Licensee to perform the Licence conditions. It continues to be the case that the Director may not unreasonably withhold her consent to any such changes taking place.

Condition 30 – Suspension, Revocation or Expiration

A number of respondents raised the issue that the vesting in the Director of the power to revoke or suspend licences while having a provision stating that no cause of action would lie against the Director or the State in respect of loss or damage suffered by the Licensee was unfair and unconstitutional. While the Director does not accept the arguments put forward, she considers that the proposed wording is superfluous in the Licence as she is obliged to fulfil certain statutory obligations. The condition has been amended accordingly.

Condition 31 – Enforcement and Amendment

Condition 31.1

No detailed comments were provided by respondents. However, one respondent was concerned that this provision should only apply in the event of material non-compliance. The respondent considered that where there was already a sanction in place in the Schedules for a defined event, that sanction should be the sole remedy for any such defined event.

The rights and obligations of individual licensees will be set out in the Second Schedule. Certain measures providing for breaches and non-performance of specific obligations may also be provided for in the Second Schedule. However, circumstances may arise where, notwithstanding such measures, it would be appropriate for sanctions to be imposed. It is the Director's view that Condition 31.1 should apply in such circumstances. Minor modifications have been made to the text of this Condition more accurately to reflect this.

Condition 31.2

One respondent was concerned that the discretionary powers afforded to the Director under this provision should be removed. The respondent believed that where the circumstances for the suspension or revocation of the Licence related solely to the provision of services over FWPMA, then the Director should only be empowered to suspend or revoke Part 5 of the Licence.

The Director is not persuaded by this argument and wishes to retain the discretionary powers in this provision. For example, where a Licensee provides Licensed Services only via FWPMA, the Director may require the revocation or suspension of the full Licence.

Condition 32 – Review of Spectrum

This provision has been amended by the Director to reflect the expectation expressed in the Tender Document that any review of spectrum allocated to FWPMA Licensees would not take place before 2003. The Director considers that the inserted amendment adequately addresses the concerns expressed by some respondents regarding the right of the Director under this provision to revoke or amend the Licence. The provision is now in line with the tender document.

3. Part 5 of General Telecommunications Licence

Part 5: Additional Provisions applying where the Licensee is designated as a person to whom Part 5 shall apply.

25. Definitions and interpretations

25.1 In this Part 5, the expressions set out below have the meanings given to them below (and other grammatical forms of the expressions have corresponding meanings):

“Designated Commencement Date” means the date upon which the Licensee is designated by the Director as a person to whom Part 5 of this Licence shall apply;

“Fixed Wireless Point to Multi-Point Access” or **“FWPMA”** means point to multi-point radio systems operating between terminal equipment at fixed locations and base station(s) at fixed locations and where such base stations may be connected to a telecommunications network;

“FWPMA Network” means a network for the provision of Fixed Wireless Point to Multi-point Access (FWPMA);

“FWPMA Regulations” means the Wireless Telegraphy (Fixed Wireless Point to Multi-Point Access Licence) Regulations, 1999;

“Required Services” means those Licensed Services provided by the Licensee via FWPMA, as set out in Part I of the Second Schedule.

26. Application of Part 5 of Licence

26.1 The provisions of this Part 5, and the rights and obligations contained therein, apply solely to a Licensee who is designated by the Director as a person to whom the said Part 5 shall apply, and to no other Licensee. A Licensee to whom this Part 5 applies has the right to use FWPMA for the provision of Licensed Services.

27. Term

27.1 The provisions of this Part 5 will commence on the Designated Commencement Date and unless revoked or amended shall, subject to the conditions and provisions of the 1983 Act, as amended, and to the 1996 Act, and such other legislation as has been or may be adopted from time to time, continue for a period not exceeding 10 years from the Designated Commencement Date.

28. Rights and Obligations

28.1 The Licensee shall provide the Required Services in accordance with the Second Schedule.

- 28.2 The Licensee may refuse to extend or continue the provision of the Licensed Services to or from particular Network Termination Points and/or terminal equipment if such extension or continuation would, or would be likely to, cause damage or interference to the FWPMA Network, or the Required Services or any other FWPMA Network, Telecommunications Network, or telecommunications services.
- 28.3 Condition 2.2 shall not apply to:
- (a) a mortgage or other transaction entered into with a financial institution for the purpose of securing borrowings of the Licensee or a subsidiary, being borrowings for the purposes of the FWPMA Network and the Required Services or provision thereof or anything incidental thereto; or
 - (b) a transfer, assignment or other disposal of assets that are intended to be, and are, immediately after their transfer, assignment or other disposal, assigned by way of lease to the Licensee.
- 28.4 The Licensee shall comply with any lawful direction issued by the Director including directions for the purposes of protecting the interests of Users. Such directions may include, but not be limited to, directions regarding conditions and obligations contained in the Second Schedule.

29. Ownership

- 29.1 The Licensee shall not issue or transfer or redeem shares such as would give rise to a change in control of the Licensee or a material change in the ability of the Licensee to perform the Licensed Services without the prior consent of the Director (which shall not be unreasonably withheld).
- 29.2 A consent under subparagraph (a) shall be subject to such conditions (if any) as the Director may determine and shall specify in writing to the Licensee, and any such condition shall be deemed to be a condition of this Licence.
- 29.3 The Licensee by itself or through its Board of Directors shall not act to give effect to any change in the beneficial or legal ownership of shares such as would give rise to a change in control of the Licensee or a material change in the ability of the Licensee to perform the Licensed Services without the prior consent of the Director (which shall not be unreasonably withheld).
- 29.4 In this Condition 29 "shares" means shares of any class in the Licensee.

30. Suspension, Revocation or Expiration

- 30.1 Upon the revocation of this Licence, or the revocation or expiration of the licence issued to the Licensee under the FWPMA Regulations, or where the rights and obligations accorded to the Licensee under this Part 5 have been revoked or have expired, the Licensee shall not be entitled as of right, or be deemed to enjoy any equity entitling it to the right to use FWPMA for the provision of Licensed Services.

31. Enforcement and Amendment

- 31.1 Where the Director has served a Warning Notice in accordance with Condition 4.2, and where the specified condition or direction by which the Licensee is failing to comply is solely a condition of or a direction in relation to this Part 5, then the sanctions that may be imposed by the Director under Condition 4.3. shall, in such circumstances, relate solely to the revocation, suspension, or amendment by way of reduction of the term, or imposition of specific measures, as may be decided by the Director, of the rights and obligations of the Licensee under the provisions of this Part 5.
- 31.2 Where the circumstances under which the Director may suspend or revoke the Licence under Condition 4.8 relate solely to this Part 5, the said revocation or suspension may, at the discretion of the Director, refer solely to the rights and obligations accorded to the Licensee under the provisions of this Part 5. In such circumstances, the reference in Condition 4.8 (i) to the Declaration shall be construed to include the Licensee's application for a licence to provide FWPMA.

32. Review of Spectrum

- 32.1 Notwithstanding the rights of the Director under Condition 4.1, the Director may, after the elapse of three years from the Designated Commencement Date, and in accordance with her responsibilities, in particular with regard to the efficient and effective use of the frequency spectrum, conduct a review from time to time of the Licence having regard to such matters as, inter alia, international developments, new technologies and market requirements. Any review may include an examination of the allocation of spectrum and the terms and conditions of the Licence. Following such a review, the Director may supplement, amend or revoke the rights and obligations of the Licensee under this Part 5.

Second Schedule

Part I: Required Services

Second Schedule

Part II: Service Quality, Performance Standards and Obligations

Second Schedule

Part III: Coverage and Roll-Out Targets

Second Schedule

Part IV: Level of Tariffs

Second Schedule

Part V: Performance Guarantees

4. Conclusion

On the basis of the proposals contained in the consultation paper and after considering the representations received from interested parties, the Director has decided to amend the General Telecommunication Licence by the addition of the new Part 5 contained in this Decision Notice. This Part 5 will apply solely to those General Telecommunications Licence holders who are designated in this regard by the Director. A General Licence holder who is so designated will have the right to use FWPMA for the provision of Licensed Services.