



Commission for
Communications Regulation

Information Notice

ComReg information notice on market analysis and data collection for market reviews of electronic communications networks

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1 Foreword [by the Chairperson]

The majority of the new regulatory framework for electronic communications networks and services must be transposed into Irish Law by 25 July 2003. The Framework requires ComReg to carry out a market review, which entails examination of the competitive environment of electronic communications networks, through the process of market definition and market analysis. ComReg takes the opportunity in this Information Notice to outline the background to this process and its data requirements for examining the Irish market.

The new regulatory framework presents an intricate and complex process of analysis and it is in the interest of all stakeholders to participate and cooperate in market reviews.

With a view to informing the industry as to ComReg's strategy for implementing the market review process, a workshop will be held for stakeholders at the end of January 2003. The purpose of this workshop is to give an overview of ComReg's market review process and it will specifically address data requirements for this purpose. ComReg will outline the methodology to be used for the market definition and the market analysis process.

I trust that all stakeholders will be able to attend and that ComReg will have your assistance in the successful completion of market reviews.

Etain Doyle
Chairperson ComReg.

2 Introduction

In 1999, the European Commission (“the Commission”) undertook a major review of regulation of the telecommunications sector in the European Union. This review resulted in the adoption in March 2002 of a new regulatory framework for electronic communications networks and services, comprising Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services,¹ (“the *Framework Directive*”) and four other Directives (collectively referred to as “the *Specific Directives*”), namely:

Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services,² (“the *Authorisation Directive*”);

Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities,³ (“the *Access Directive*”);

Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services,⁴ (“the *Universal Service Directive*”); and

Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector,⁵ (“the *Telecoms Data Protection Directive*”).

The *Framework Directive*, the *Authorisation Directive*, the *Access Directive* and the *Universal Services Directive* entered into force on 24 April 2002 and must be implemented by EU Member States into national law to take effect on 25 July 2003. The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Directive*.⁶ In

¹ OJ 2002 L 108/33

² OJ 2002 L 108/21

³ OJ 2002 L 108/7

⁴ OJ 2002 L 108/51

⁵ OJ 2002 L 201/37

⁶ Article 15.

addition, ComReg is required to conduct an analysis of the effective competitiveness of the relevant markets. Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Directive* provides that it must identify the undertakings with SMP on that market and impose on such undertakings appropriate specific regulatory obligations or maintain or amend such obligations where they already exist.⁷ Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Directive* obliges ComReg not to impose any new regulatory obligations on any undertaking in that relevant market under Article 16 of the *Framework Directive*. If ComReg has previously imposed sector-specific regulatory obligations on undertakings in that relevant market, it must withdraw such obligations and may not impose new obligations on that undertaking(s).⁸

The *Framework Directive* further requires that the market analysis procedure under Article 16 be carried out as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“the *Relevant Markets Recommendation*”) by the Commission.⁹ The latter document not yet been adopted by the European Commission.

ComReg will require market data to carry out properly well-informed market definition and market analysis procedures and to ensure that these procedures are subject to economic and legal analysis. Thus, it will use its powers under the *Framework Directive* and the *Specific Directives* to collect market data from a variety of internal and external sources, including users, user groups and communications equipment manufacturers.

This document is without prejudice to the legal position or the rights and duties of the Commission for Communications Regulation to regulate the market generally. Any views expressed are not binding and are without prejudice to the final form and content of any decisions the Commission may issue.

⁷ Article 16.

⁸ Article 16 of the *Framework Directive*.

⁹ Article 16.

3 Purpose

The main objective of this document is to provide an outline of ComReg's intentions in relation to the data collection process which involves stakeholders and the rationale behind its information requests. It will also provide a basis for discussion at the Data Collection Workshop. In particular, ComReg outlines below:

- the market definition procedure and its market data requirements;
- the market analysis procedure and its market data requirements;
- the process of collecting market data.

4 Market Definition Procedure Data Requirements

4.1 Overview

The *Framework Directive* requires ComReg to define relevant markets appropriate to national circumstances, in particular the relevant geographic markets within Ireland.¹⁰ This obligation applies to both the relevant markets identified in the *Relevant Markets Recommendation* and additional relevant markets that ComReg may consider (*i.e.*, so-called “Article 7” markets).¹¹ The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that the undertakings involved face, thereby facilitating the subsequent market analysis procedure.

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the user, by reason of the products’ characteristics, prices and intended use(s). A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.

Under the *Framework Directive*¹², the market definition exercise must be carried out in accordance with the principles of competition law taking utmost account of the *Relevant Markets Recommendation*, as well as the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (the “*Market Analysis and SMP Guidelines*”)¹³.

¹⁰ Article 15(3).

¹¹ Article 7 of the *Framework Directive*.

¹² Article 15(3).

¹³ OJ 2002 C 165/6

4.2 Market data requirements: market definition

Market data requested for the market definition procedure will include information necessary to examine:

- the scope of relevant markets with a regard to their product, customer and geographical dimension, including their demand and supply-side substitutability);
- the magnitude of barriers to competition (barriers to entry and barriers to expansion); and
- dynamic aspects that may increase or decrease competition in the future.

Table 1 below provides an overview of the market data that ComReg may request from operators in the context of the market definition procedure. It should be emphasised that this is not an exhaustive list, nor are the criteria cumulative.

Table 1: Market data requirements for market definition procedure

Criteria for defining relevant markets			Type of information that may be requested from operators
1	Definition of market boundaries	Product market definition	<p>Substitutability</p> <p>Service, product and supply characteristics;</p> <p>Churn rates (for retail markets);</p> <p>Porting charges (for retail markets);</p> <p>Switching costs;</p> <p>Price transparency on demand/supply side;</p> <p>Prices and volumes (e.g., minutes) and their development over time.</p>
			<p>Bundling</p> <p>Tariff options for unbundled and bundled products;</p> <p>Turnover of bundled / unbundled products.</p>
		Definition of customer segments	<p>Chain substitutability</p> <p>Service and product characteristics for residential / non-residential customers;</p> <p>Tariff options for residential / non-residential customers.</p>
		Geographical market definition	<p>Chain substitutability</p> <p>Tariffs for different regions/geographic averaging.</p>
	Size of overall market / relevant market segments	<p>Turnover;</p> <p>Number of minutes;</p> <p>Number of customers;</p> <p>Other measures (e.g., Internet).</p>	

Criteria for defining relevant markets			Type of information that may be requested from operators
2	Scale-related barriers to competition	Economies of scale and scope / sunk costs, in particular, leading to control of network infrastructure not easily duplicated	Qualitative information; Type and usage of network infrastructure.
3	Dynamic aspects	Technological developments likely to reduce or increase barriers to competition	Qualitative information

5 Market Analysis Procedure

5.1 Overview

ComReg is obliged under the *Framework Directive* to determine whether a relevant product market is effectively competitive in a given geographic area prior to determining whether to impose, maintain, amend or withdraw obligations on undertakings.¹⁴ While the body of the *Framework Directive* does not contain a definition of “effective competition”, Recital 27 of the Directive states that a relevant market will not be effectively competitive “where there are one or more undertakings with significant market power”.

The *Framework Directive* aligns the current concept of SMP with the concept of dominance under EC competition rules. Specifically, the *Framework Directive* states that “[A]n undertaking shall be deemed to have [SMP] if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers”.¹⁵ ComReg’s analysis of individual dominance and collective dominance will include an assessment of whether the market is prospectively competitive, and thus whether any lack of effective competition is durable.¹⁶ Where an undertaking has SMP on a specific relevant market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.¹⁷

In accordance with the Framework Directive, ComReg’s market analysis procedure must take utmost account of the Market Analysis and SMP Guidelines.¹⁸

5.2 Market data requirements: individual dominance

The assessment of individual dominance by ComReg will focus primarily on an overall analysis of the economic characteristics of the relevant market. Although there are a number of characteristics specific to retail and wholesale markets to be taken into account, the general criteria relevant to the assessment of individual dominance are essentially the same. Such criteria can be categorised according to whether they are structural, behavioural or related to market performance, though the boundaries of each category inevitably overlap in certain instances.

¹⁴ Article 16.

¹⁵ Article 14(2).

¹⁶ Recital 27 of the *Framework Directive*.

¹⁷ Article 14(3) of the *Framework Directive*.

¹⁸ Article 16(1).

Examples of structural criteria include:

- the market share of the leading firm;
- the number of competitors to the leading firm;
- barriers to competition protecting the leading firm, such as barriers to entry, exit and expansion that may be the result of:
 - economies of scale and scope in combination with sunk costs;
 - technological advantages or superiority; and
 - switching costs;
- barriers to competition related to an undertaking's ability to access the capital markets and/or other financial resources; and
- countervailing buying power.

Examples of behavioural criteria include:

- the extent of price competition;
- the extent of product and service innovation; and
- the extent of non-price competition, such as quality of service.

Examples of criteria related to market performance include:

- profitability of leading firm; and
- benchmarking with best practice norms.

The information that may be requested from operators for the purposes of assessing individual dominance is summarised in Table 2 below. It should be emphasised that this is not an exhaustive list, nor are the criteria cumulative.

Table 2: Assessment of individual dominance

Criteria for assessing individual dominance			Information that may be requested from operators
A. Structural criteria			
1	Market share of leading firm	Absolute and relative market share	Turnover; number of minutes; number of calls/short messaging services; number of customers etc.
		Stability / volatility of market share	
2	Number of firms competing with the leading firm	Number of firms	
		Market entry and exit	Date of market entry or exit
3	Barriers to competition related to economies of scale and scope	Control of network infrastructure not easily duplicated	Type and investment costs of network infrastructure
		Control of highly developed distribution and sales network not easily duplicated	Type and usage of distribution and sales network
		Scope of service bundling not easily duplicated	Extent and usage of service bundles
4	Barriers to competition related to technological advantages of leading firm	Technological advantages or superiority	Qualitative information
		Technological developments overcoming or reinforcing strength of leading firm	Qualitative information
5	Barriers to competition related to switching costs	Switching costs	Length of contract; porting charges; equipment standards and deactivation charges for customers (retail markets).
		Churn rates	Total number of customers; number of subscriptions terminated p.a.
		Customers' ability to access and use information	Qualitative information
6	Barriers to competition related to legal constraints	E.g., access deficit as a result of universal service obligations	Access deficit

Criteria for assessing individual dominance			Information that may be requested from operators
7	Barriers to competition related access to capital markets / financial resources	Qualitative information	
8	Countervailing buying power	Share of biggest customer(s) of turnover	Turnover with customers
B. Behavioural criteria			
9	Extent of price competition	Price differential between the leading firm and its competitors	Prices and date of implementation
		Price dynamics (comparative price development)	
10	Extent of product and service Innovation	Introduction of new services and new tariff packages	Service and tariff innovations and date of introduction
		Innovation dynamics	
12	Extent of quality of service competition	Quality of service differentials between the leading firm and its competitors	Quality of service levels
C. Performance criteria			
13	Profitability of leading firm	ROCE	Financial results
14	Excessive pricing	Comparison of prices with FL-LRIC	Prices, cost information
15	Benchmarking	International price comparisons	Prices

5.3 Market data requirements: collective dominance

The *Framework Directive* requires that the assessment of collective dominance be carried out “in accordance with Community law and take utmost account of the [Market Analysis and SMP Guidelines]”¹⁹ and outlines the criteria to be used in making such an assessment in a Annex II, which states that:

“[T]wo or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated effects. Without prejudice to the case law of the Court of Justice on joint dominance, this is likely to be the case where the market satisfies a number of appropriate characteristics, in particular in terms of market concentration, transparency and other characteristics ...”²⁰

Thus, Annex II outlines the use of a collective dominance test centred on whether the structural characteristics of the relevant market encourage parallel or aligned anti-competitive behaviour.²¹

Some examples of structural, behavioural and performance criteria include:

- the overall market share of the leading firms (market concentration);
- the characteristics of the market, in particular its transparency;
- the conduciveness of the market for co-ordinated effects, and the sustainability of such co-ordination (including by reference to punishment mechanisms); and
- the number of competitors outside the group of leading firms (competitive fringe) that might challenge a co-ordinated outcome.

The information that may be requested from operators for the purposes of assessing collective dominance is compiled in Table 3 below. It should be emphasised that this is not an exhaustive list, nor are the criteria cumulative.

¹⁹ Article 14(2), paragraph 2.

²⁰ The “other characteristics” mentioned are: a mature market; stagnant or moderate growth on the demand side; low elasticity of demand; an homogeneous product; similar cost structures; similar market shares; a lack of technical innovation, mature technology; an absence of excess capacity; high barriers to entry; a lack of countervailing buying power; a lack of potential competition; various kinds of informal or other links between the undertakings concerned; retaliatory mechanisms; and a lack or reduced scope for price competition. Annex II clearly provides that this list is by no means exhaustive or cumulative, being rather for illustrative purposes of the sorts of evidence that could be used to support assertions concerning the existence of collective dominance.

²¹ Recital 26 of the *Framework Directive* considers that a relevant market whose structure is conducive to coordinated effects means a relevant market that “encourages parallel or aligned anti-competitive behaviour on the market”. The *Market Analysis and SMP Guidelines* provide a similar clarification (at footnote 106).

Table 3: Assessment of collective dominance

Criteria for assessing collective dominance		Information that may be requested from operators	
A. Structural criteria			
1	Cumulated market share of leading firms (market concentration)	Absolute and relative market share(s) Stability / volatility of market share(s)	Turnover; number of minutes; number of calls/SMS; number of customers etc.
2	Conduciveness to tacit co-ordination; sustainability of co-ordination	Number of firms in group	
		Similarity / dissimilarity of market shares	Turnover; number of minutes; number of calls/SMS; number of customers etc.
		Transparency of pricing on the supply side	Publicly available tariffs
		Homogeneity / heterogeneity of products and services	Characteristics of products and services
		Service and product innovation, technical innovation	Service and product innovations and date of introduction; Technical innovations.
		Elasticity of market demand	Prices; Turnover; number of minutes; number of calls/SMS; number of customers; etc.
		Similarity / dissimilarity of cost structures	Network infrastructure and investment costs
		Market growth / saturation	Turnover; number of minutes; number of calls/SMS; number of customers; etc.
		Market entry and exit	Date of market entry or exit
		Extent of excess capacity	Capacity usage
Various kinds of informal links	Qualitative information		
Retaliatory mechanisms to deter actions that break collective agreements	Qualitative information		
3	Number of firms outside group of leading firms that may challenge a co-ordinated outcome	Number of firms	
		Evidence of market entry and exit	Date of market entry or exit

Criteria for assessing collective dominance			Information that may be requested from operators
4	Barriers to competition related to scale and scope	Control of network infrastructure not easily duplicated	Type and investment costs of network infrastructure
		Control of highly developed distribution and sales network not easily duplicated	Type and usage of distribution and sales network
		Scope of service bundling not easily duplicated	Extent and usage of service bundles
5	Barriers to competition related to technological advantages of leading firm	Technological advantages or superiority	Qualitative information
		Technological developments overcoming or reinforcing strength of leading firms	Qualitative information
6	Barriers to competition related to switching costs	Switching costs	Length of contract, deactivation and porting charges for customers (retail markets)
		Churn rates	Total number of customers; number of subscriptions terminated p.a.
		Customers' ability to access and use information	Qualitative information
7	Barriers to competition related to legal factors	E.g., Capacity constraints as a result of scarce frequencies	Capacity usage
8	Barriers to competition related access to capital markets/financial resources	Qualitative information	
9	Countervailing buying power	Share of biggest customer(s) of turnover	Turnover with customers
B. Behavioural criteria			
10	Extent of price competition	Price differential between the leading firms and their competitors	Prices and date of implementation
		Price dynamics (comparative price development)	
11	Extent of product and service innovation	Introduction of new services and new tariff packages	Service and tariff innovations and date of introduction
		Innovation dynamics	
12	Extent of quality of service competition	Quality of service differentials between the leading firms and their competitors	Quality of service levels

Criteria for assessing collective dominance			Information that may be requested from operators
C. Performance criteria			
13	Profitability of leading firms	ROCE	Financial results
14	Excessive pricing	Comparison of prices with FL-LRIC	Prices, cost information
15	Benchmarking	International price comparisons	Prices

6 Market Data Collection Process

6.1 Powers of ComReg to request market data

The *Framework Directive* makes specific provision for national regulatory authorities (“NRAs”) to request from undertakings providing electronic communications networks and services all the information, including financial information, necessary for them to ensure conformity with the provisions of, or decisions made in accordance with, the *Framework Directive* and the *Specific Directives*.²²

These powers of NRAs to request data for the purposes of market definition and analysis are provisions in the *Framework Directive* which will be transposed in to domestic legislation in advance of its other provisions.²³ The powers of ComReg to request market data will apply to markets referred to in the *Relevant Markets Recommendation* and additional markets which ComReg may consider defining under Article 7 of the *Framework Directive*. Persons requested to provide information will have to do so promptly, according to the timescales and at the level of detail required by ComReg. It should be noted that ComReg also possesses general powers to request information from licensed operators under the terms and conditions of existing licences issued to them by ComReg.²⁴

6.2 Methodological options for market data collection

It is essential to identify the economic and other data necessary to conduct full and proper market definition and market analysis exercises. The market data collection exercise will focus on internal and external sources. Wherever possible, however, ComReg will rely on data from existing sources, including data already made available by operators during previous inquiries. ComReg may notify operators when it intends to use this data for the purposes of the respective market definition and market analysis procedures and may present an opportunity for operators to verify the accuracy of the data.

Although there is a broad base of existing market data at the disposal of ComReg, it will be necessary to seek additional information from the electronic communications sector. This may take the form of supplementary questionnaires and face-to-face interviews.

²² Article 5(1).

²³ To this end, the Department of Communications, Marine and Natural Resources has published draft legislation which when enacted, will empower ComReg to require any person to provide it with all information, including financial information, to enable it to carry out the market definition and analysis required under Article 15 and Article 16 of the *Framework Directive*. <http://www.marine.gov.ie>.

²⁴ See for example condition 3.1 of the pro-forma General Telecommunications Licence and condition 3.1 of the pro-forma Basic Telecommunications Licence. Similar conditions exist in respect of licences issued to mobile operators. These licences can be viewed on ComReg’s website at www.comreg.ie.

The initial collection of external market data will be effected via requests for information in the form of detailed questionnaires. The information requested by ComReg will reflect its need to conduct the effective performance of the market definition and the market analysis procedures, thereby not imposing disproportionate burden on addressees.²⁵ It is envisaged that a single questionnaire will not be sufficient to collate all the necessary information in many instances. Thus, supplementary questionnaires may be addressed to specific respondents following an analysis of the responses to the initial questionnaire(s).

6.3 Time limits

The *Framework Directive* obliges undertakings providing electronic communications networks and services to provide promptly information requested by ComReg, in order to ensure conformity with the provisions of, or decisions made in accordance with the *Framework Directive* and the *Specific Directives*, as well as in accordance with the timescales and level of detail required by it.²⁶ Thus, ComReg will fix time limits within which the information requested is provided by undertakings providing electronic communications networks and services.

The process of defining and analysing markets depends to a large degree on the provision of market information sought and on the reliability and accuracy of the information thereby obtained. Where information is sought and the provision of such information is refused or delayed, ComReg may have to proceed on the basis of information already provided. ComReg may request written confirmation from a person required to provide information (such as a chief financial officer or a board director) verifying that the information provided is accurate and complete.

²⁵ Article 5(1) of the *Framework Directive*.

²⁶ Article 5(1).