



Commission for
Communications Regulation

Information Notice

ComReg Response to Draft Ministerial Direction of 2/12/2002

Document No:	03/04
Date:	10th January 2002

1. Introduction

The Commission for Communications Regulation (ComReg) welcomes the opportunity to comment on Minister Ahern's recent draft Policy Directive, which offers a general overview of current Government policy in the telecommunications and postal sectors. The draft Policy Direction highlights the Minister's key objectives and priorities. The Commission notes the challenging nature of the Government's goals and believes that such ambitions are critical if Ireland is to achieve its key economic objective of becoming a leading knowledge economy. In particular the nature of the challenge involved needs to be assessed in the light of:-

- the current difficulties facing communications companies in all major economies;
- the current difficulties facing Irish businesses due inter alia, to the international economic downturn and inflationary pressures within the economy;
- the fact that the Irish telecoms fixed line incumbent has been relatively slow to introduce new products, in particular in relation to the lower capacity end for internet/data services, and is still significantly inefficient in particular in the access network including the last mile to homes and business. In contrast, the mobile operators have more efficient networks and are quicker to introduce new services: with 3G on the way, the opportunities for Government and other users to develop their services on mobile can be further exploited, although not in respect of the largest capacity broadband uses;
- the fact that several of the larger OLOs in Ireland are facing varying constraints on investment and therefore are seeking substantial gross margins to maintain and develop their businesses;
- the fact that the level of fixed infrastructure build completed in Ireland before the investment downturn was limited and is being added to at a slow pace, and in particular that the cable operators are not offering widespread triple play services;
- the fact that the level of R&D resulting in the development of new cost efficient products adapted for the networks in Ireland (and equivalent terrain/demographics in other countries) seems very limited: it is noted that such development is part of the strategic objectives;
- the fact that there remains much scope for continued improvements in the efficiency of postal services, particularly within An Post.

However, whilst many challenges still remain, it is also fair to say that the industry has changed radically for the better since liberalisation and the introduction of competition. There is now a much greater choice of providers offering a whole range of communication services and the general basket of price capped services is 20% cheaper in real terms than in 1999. We do, therefore, have a basis to build on to meet the challenges.

But more still needs to be done and we need to consider, amongst other things, the implications of: the need to achieve a balance between returns for communications companies and continued if not better pricing to encourage take-up of innovative services among business and residential users; increasing

the rate of efficiency gains within the incumbent operators; improving and increasing the effectiveness of the legislative and regulatory system.

In addition it is also important to bear in mind the critical role played by demand and the potential for all parties to assist in stimulating demand and thereby ensure the continued development of a viable, sustainable communications market.

ComReg notes that its role as regulator is to facilitate/enable development and that there are many players involved in achieving key results. The Commission will continue to work towards these goals and hopes that they can be achieved with the full co-operation and commitment of the Government, the industry and end-users.

2. Communications Objectives

The draft Policy Direction outlines a number of target objectives in the electronic communications market and also, more specifically, in the broadband market. These objectives set challenging targets for the Irish telecoms sector and reflect in part the need for Ireland to attain and maintain a competitive position amongst the top EU and OECD countries. The Commission notes these proposed objectives and believes they are in line with the previous work program of the ODTR and the current work programme of ComReg and intends to have regard to them, and the other objectives already set out in both national and European legislation.

The Commission welcomes the Minister's policy directive in respect of setting objectives for the postal market. The Commission believe that these objectives are in line with the previous work programme of the ODTR and the current work programme of ComReg, particularly in relation to decisions taken to date on quality of service and tariffs. The Commission intends to have regard to the objectives in the exercise of its statutory functions.

2.1 Access to the Internet at Flat Rate Charges

The Commission notes that it is the Minister's intention that the policy direction focus on a number of key priorities in the short to medium term, including the introduction of flat-rate Internet access. Following several months of private commercial negotiations between two interested parties and *eircom*, in November 2002 the ODTR established a forum to expedite the process and culminate in the delivery of the wholesale product. Given the increasing demand from users for a flat rate offering and in light of technical and commercial constraints contained within the *eircom* proposed product description, ComReg considered it more practical and expedient and in the interests of users to intervene and mandate the introduction of a wholesale offering on a phased basis. As a consequence of Decision Notice D1/03, ComReg have set out a detailed timescale to be met so that operators can order a wholesale FRIACO (Flat Rate Internet Access Call Origination) product by end February 2003. It is hoped that this will enable the provision of a retail offering by operators no later than the end of June 2003. From that date, operators, including *eircom*, who wish to supply a flat rate internet access offering to the public should be in a position to do so, as the full arrangements including network, processes and costs of availing of the wholesale product are expected to be in place.

The Commission welcomes the opportunity, should it encounter difficulties in introducing FRIACO, to raise with the Minister any recommendations it considers appropriate for further action.

2.2 Broadband Electronic Communications Networks

The Commission welcomes the Minister's proposed policy direction on the national objective for broadband rollouts and believes that its activities, both as the ODTR and as ComReg, are consistent and contribute to the national broadband strategy. In particular, the Commission would highlight its work activities across a range of broadband related areas including:

- the establishment and introduction of local loop unbundling
- the underpinning of competition in the DSL market
- the licensing of spectrum in the fixed wireless market
- the issuing of licenses for 3G services
- the development of one of the most advanced regulatory regimes for WLANs and in particular the provision of services in the 5.8GHz band.

2.3 Industry Sustainability

As highlighted in the introduction to this submission, the Commission is acutely aware of the recent downturn in the telecoms business environment and how this slowdown has impacted upon the development of the Irish telecoms market. The Commission believes that it is critical for the development of a knowledge economy that we maintain our competitiveness. The dramatic fall in investment in the sector has precipitated a sharp decline in competitive activity, as all operators have struggled to maintain and improve profitability to the levels now expected by investors. New network builds have been postponed, costs have been reduced and jobs have been lost as the industry seeks to come to terms with the downturn in many areas following the large increases in investment during the dot.com boom. This increased emphasis on 'the bottom line' has renewed interest in boosting efficiency, which the Commission stresses is particularly important in respect of the incumbent. High incumbent costs impact negatively on Irish competitiveness as this highly important industry is critical to economic development generally. They result in either higher prices for users relative to users in other countries, and/or lower investment as revenue that should be available for investment is absorbed in the higher costs.

The Commission notes that these and other issues have a bearing on the formulation of regulatory policy and as such it appreciates the need for regulation to be administered with an understanding of its impact upon investment, innovation and enterprise and similarly its effect on the sustainability of the industry as a whole.

The Commission believes it is important to highlight the key policy objectives that are to be pursued by national regulatory authorities and outlined in Article 8 of the Framework Directive and referred to in the draft of the European Communities (Electronic Communications) (Framework) Regulations 2003 as recently published by the Department of Communications, Marine and Natural Resources. These objectives, which can be broadly grouped under three headings: the promotion of competition, the development of the internal market and the promotion of the interests of consumers, form the *raison d'être*

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for the establishment of the regulatory system and remain central to its overall strategy.

In working toward these objectives, the Commission appreciates the need to take cognisance of a range of both industry and general economic issues including those listed above and it hopes to continue working with Government, the Industry, Consumer Interests and all other relevant parties to ensure that the right balance is struck.

2.4 Regulation only when necessary

The Commission notes the Minister's proposed direction requiring it to examine the effectiveness of imposing regulatory obligations before initiating any such actions in the telecoms marketplace. The Commission consider such practice to be eminently sensible and believe it is consistent with the Office's existing 'light-handed' approach to regulation. This approach seeks to promote effective competition with the minimum intervention necessary and is based on the rationale that the best possible deal for end-users is most efficiently provided through the operation of free and competitive markets.

However, whilst the Commission recognises the pre-eminence of competitive markets, it would also note that in markets which are not yet effectively competitive, that it is critical that regulation exists to promote and protect the interests of consumers. Since liberalisation, the communications consumer in Ireland has benefited considerably from regulatory action that has underpinned fledgling competition in new and emerging marketplaces. Although this competition has developed quite rapidly, it still remains vulnerable and the Commission is not yet convinced that it is strong enough to survive unsupported.

In particular, the Commission has found it necessary to issue detailed directions on a number of measures, as general directions tend not to be followed up with sufficient speed or rigour.

2.5 Regulatory Impact Assessment

The Commission is keenly aware of the importance of the role of Regulatory Impact Assessment (RIA) in ensuring that regulatory actions are objectively justified and proportionate. The Commission and its predecessor, the Office of the Director of Telecommunications Regulation, participate in the High Level Group on Regulation set up on foot of the OECD Regulatory Reform Review of Ireland in April 2001, and in the sub-group on Regulatory Impact Assessment, and fully supports the work of the group.

In practical terms, the Commission would be presented with some difficulties in carrying out a Regulatory Impact Assessment on each regulatory decision it makes, given the legal context in which it operates, and, in particular, the provisions of the new regulatory framework which will come into operation from 25 July 2003. Under the new framework, National Regulatory Authorities

such as the Commission for Communications Regulation will only be empowered to apply ex-ante regulation to a specific market, where the market in question has either been defined in advance by the European Commission, or approved by the European Commission on foot of a request from the National Regulatory Authority. Within that market, the Commission for Communications Regulation can only apply regulation to an operator or operators which have/has been found to be dominant.

The new framework requires that any remedies imposed must be proportionate. In addition, the set of possible remedies which can be imposed is pre-defined. If an operator or operators is/are found to be dominant, at least one remedy must be imposed.

The net result is that the Commission for Communications Regulation is not legally empowered to consider the broad range of possibilities for action (and inaction) which is a prerequisite for an RIA as it is currently being discussed in the High Level Group on Regulation. Thus, certain parts of the RIA would be rendered meaningless. Others, such as the requirement for regulation to be objectively justified and proportionate, are already a necessary part of the analysis which the Commission is required to make.

The Commission notes that, separately from the provision regarding RIA, the draft policy direction requires it to regulate only where necessary. The Commission suggests, therefore, that this safeguard, coupled with those contained in the new European regulatory framework, would essentially replicate the process and intended results of an RIA, and hence it may be the case that a separate provision regarding RIA is not necessary. The ODTR developed and ComReg continues to use a systematic approach to the identification of issues and their analysis, presenting these for consultation in respect of major policy items before decision, which takes account of the views of those who respond to the consultations.

The Commission notes that developments and refinements currently being considered by the High Level Group and as such looks forward to evaluating where and when such a process might be appropriate.

2.6 Consistency across Member States

A feature of the EU Regulatory package to be implemented from July 2003 is a greater degree of cooperation between National Regulatory Authorities (NRAs) and the EU Commission and between NRAs themselves. It is an objective of all NRAs to ensure consistent application of regulatory measures across the EU. To this end specific forums have been established, the Communications Committee and the European Regulators Group. ComReg actively participates in both forums. In addition there are procedures in place under Article 7 of the Framework Directive for specific consultation between NRAs and the Commission in respect of specific draft measures.

All regulators recognise the importance of harmonisation where possible, and also the need to ensure that specific issues relating to the size or development

of a sector in any country need special attention to ensure that that country can reach the same level of development as the most advanced countries.

2.7 Cost of Regulation

The Commission notes the Minister's concern that the costs of regulation are minimised and consistent with best practice. This view reflects the policy of the Commission. In an Appendix to our recent consultation on Charging Principles for Authorisations and Rights of Use (ODTR document 02/102), the Commission compared its costs to a range of other NRA's and the results gave a strong indication that our activities are efficient and our level of costs amongst the lowest in Europe.

The Commission notes the Minister's concern that the costs of regulation in the postal sector are minimised and consistent with best practice. This view reflects the policy of the Commission. In addition to the Minister's reference relating to the cost of regulating the postal sector, solely for the provision of universal service, ComReg would refer to additional obligations to ensure prices are 'geared to cost' and obligations to promote the development of the postal sector with affordable pricing for the benefit of all users.

2.8 Consistency across Platforms

ComReg fully endorses the Minister's policy regarding the consistency of regulatory obligations and notes that the application of general authorisation conditions in a technology neutral manner will help meet the objective of the policy direction in this area.

2.9 Regulation of Retail Prices

The Commission agrees with the proposed policy direction on the regulation of retail prices. It is consistent with other parts of the legislative framework and also with the Commission's current practices. In the most recent consultation on retail price cap proposals in November (ODTR document 02/96) for example, two of the objectives for the price cap that are being proposed relate to ensuring affordable access to a universal service and introducing price cap measures that do not distort or restrict competition, including the development of future competition. The Commission notes that under section 7 of the Telecommunications (Miscellaneous Provisions) Act 1996 (No. 34 of 1996) a price cap may also be applied to wholesale prices under certain circumstances.

2.10 Management of the Radio Frequency Spectrum

The Commission notes the Minister's proposed policy directions relating to the taking account of all users' views when managing the radio frequency spectrum. The Commission welcomes this move and believes that such

practices are consistent with the Commission's established policy of extensive consultation and debate in advance of all major decisions.

In 'Strategic Management of the Radio Spectrum in Ireland' (ODTR 02/43), the ODTR outlined the approach it seeks to adopt in managing the radio frequency spectrum. This approach is based on the principle that, where possible, access should be licence exempt. Where specific assignment of spectrum is necessary and there is substantial availability of spectrum, it will generally be assigned on a first come first served basis. Finally, where it is necessary to limit the number of licences, it is intended that competitions will be held. The Commission believes that the best way to support national development objectives is by using comparative selection processes designed to meet national needs

2.11 Universal Postal Service

The Commission notes the Minister's proposed policy directions relating to the taking account of the impact of any regulatory decisions on the cost of sustaining the universal service by designated universal service providers. This is consistent with the Commission's established policy of extensive consultation and debate in advance of all major decisions.

Conclusion

The draft Policy Direction contains objectives and general policy guidelines which cover numerous facets of the regulatory environment. Taken in their entirety, these objectives and guidelines highlight the need to maintain a balanced, considered approach to regulatory policy. The Commission believe such an approach is eminently prudent and building on its work to date, the Commission intends to continue adopting this approach in its future dealings.