



Commission for
Communications Regulation

Consultation Paper

ComReg's Approach to Regulatory Impact Assessment

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All responses to this consultation should be clearly marked:-
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and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5:00 pm on
Wednesday 31 January 2007, to:

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Please note ComReg will publish all respondents submissions
with the Response to this Consultation, subject to the provisions
of ComReg's guidelines on the treatment of confidential
information – ComReg 05/24

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1 Foreword

This consultation document sets out ComReg's planned approach to conducting Regulatory Impact Assessment ("RIA"). RIA plays an important part in regulatory decisions by ensuring a number of different options are considered and in doing so ensures that the most effective option is chosen. Options such as maintaining the status quo, regulatory forbearance, along with alternative forms of regulation will need consideration.

Appropriate use of RIA will assist ComReg in performing its functions to meet its statutory functions and objectives, set out in s 12 (1) of the Act of 2002¹ and in the various directives comprising the EU Regulatory Framework. RIA is intended to make the regulatory process more transparent by allowing stakeholders a full input and improves effectiveness by allowing for a more structured and explicit focus on the objectives behind proposed rules.

This document sets out ComReg's approach to RIA and provides guidance on the types of decisions which ComReg believes should be subject to RIA. It also explains the steps which are used in conducting RIA.

Any comments on the draft guidelines should be received by ComReg by 5 pm on Wednesday 31 January, 2007.

Mike Byrne,
Chairperson

¹ The Communications Regulation Act, 2002.

2 Executive Summary

- 2.1 In 2003 the Minister for Communications Marine and Natural Resources issued a Policy Direction to ComReg, which requires ComReg, before deciding to impose regulatory obligations on undertakings, to conduct RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme.
- 2.2 ComReg believes it is appropriate to consult on the types of decisions which will be subject to RIA and also on the approach which will be taken when conducting RIA if deemed necessary.
- 2.3 In conducting RIA ComReg is cognisant of the *RIA Guidelines* adapted under the Government's Better Regulation programme.
- 2.4 RIA identifies the range of regulatory options which are available to deal with a particular issue, assesses the potential impact of each option, and in doing so allows ComReg to identify and impose the most effective measure.
- 2.5 ComReg envisages RIA will be a core part of many projects and will be conducted from the beginning of such projects. Where intervention is deemed necessary RIA will ensure the intervention is justified and is done by the least intrusive means while still allowing ComReg to discharge its functions and attain its objectives.
- 2.6 ComReg has set out examples of where RIA would be carried out and a 5 step approach to follow where conducting RIA. ComReg proposes to adopt a common sense approach to conducting RIA in that if a decision appears to have relatively low costs, then ComReg would expect to carry out a less detailed RIA in respect of that decision.
- 2.7 In the following sections of this consultation document the following issues are considered:
 - Section 3 sets out the background as to why RIA should be an important part of ComReg's decision making process.
 - Section 4 sets out the benefits which conducting RIA will bring, through making the regulatory process more transparent and effective.
 - Section 5 outlines the types of decisions which ComReg believes should and should not be subject to RIA.
 - Section 6 sets out the steps that ComReg will take in conducting RIA.
 - Finally, section 7 provides interested parties with details of how and when comments to this consultation document should be submitted.

3 Introduction

- 3.1 RIA is intended to determine the impact of any new regulatory measure or process, or any proposed changes to (including the withdrawal of) an existing measure or process, on all stakeholders. It is incumbent on ComReg to consider the impact of proposed decisions as they may impose a significant burden or cost on stakeholders. Appropriate use of RIA should ensure the most effective approach to regulation is adopted.
- 3.2 RIA is part of best practice policy-making and provides a way of considering a range of possible options in order to choose the most effective form of regulation. RIA should set out the regulatory options available (including the option not to regulate) and contribute to determining the best option by considering the impacts on all stakeholders and by assessing the advantages and disadvantages of each option. Section 6 sets out a suggested approach to that assessment. Options include leaving the status quo unaltered (“do nothing”), or varying degrees of regulation. Setting out the options should ensure that appropriate alternatives are not overlooked.
- 3.3 According to the EU Better Regulation Group² a systematic use of RIA can make national regulatory systems more amenable to economic activities and national economies more competitive. Furthermore, RIA is supposed to improve all types of regulatory measures and processes, not only those affecting the economy, with regard to their effectiveness, efficiency and responsiveness.
- 3.4 S 13 (1) of the Act of 2002 empowers the Minister for Communications Marine and Natural Resources (“the Minister”) to issue such policy directions to ComReg as he or she considers appropriate, and ComReg must comply with any such direction. The OECD Report on Regulatory Reform in Ireland (2001) found that the effectiveness of the Irish regulatory management system would be enhanced by the integration of RIA. In 2003, the Minister issued a policy direction to ComReg, section 6 of which requires ComReg, before deciding to impose regulatory obligations on undertakings, to conduct RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.
- 3.5 One such measure adopted under the Government’s Better Regulation programme is the *RIA Guidelines*³. These guidelines were issued as a consequence of the Government White Paper *Regulating Better* (2004). Section 1.1 of those guidelines states that RIA will apply to:
- i. *all proposals for primary legislation involving changes to the regulatory framework (subject to some exceptions)*
 - ii. *significant Statutory Instruments*

² “A Comparative Analysis of Regulatory Impact Analysis in 10 EU Countries” May 2004

³ Published by Department of the Taoiseach, Oct 2005 - www.betterregulation.ie

iii. proposals for EU Directives and significant EU Regulations when they are published by the European Commission

3.6 The *RIA Guidelines* are not formally or legally binding upon ComReg. However, in conducting RIA ComReg will have regard to the *RIA Guidelines*, while recognising that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation may be different to regulation exclusively by way of enacting primary or secondary legislation.

4 What is RIA?

- 4.1 The purpose of RIA is to assist ComReg choose the best available regulatory option. RIA first identifies the full range of regulatory options which are available to deal with a particular issue. Next, it assesses the potential effect of each option, by identifying the advantages and disadvantages of its implementation. RIA should thus establish whether regulation is in fact necessary, and if it is, it should allow ComReg to identify and impose the most effective measure.
- 4.2 RIA is used internationally to strengthen regulatory decision making processes. The governments and state agencies of Australia, Canada, Mexico, the UK and the USA use RIA as a core part of their decision making processes.
- 4.3 RIA, where obligatory or necessary, will be a core part of many ComReg projects. In order to be effective RIA will be undertaken from the beginning of such projects and will be developed as the project progresses. Stakeholders will be consulted from an early stage, as in many cases they will need to provide information required to carry out the RIA.
- 4.4 ComReg works to create a regulatory environment which benefits both end users and industry. ComReg's decision making should be evidence-based, analytical and appropriate for the sectors it regulates and the needs of the market.
- 4.5 RIA is intended to assist ComReg in performing its functions to meet its statutory functions and objectives, set out in s 12 (1) of the Act of 2002 and in the legislation comprising the EU electronic communications regulatory framework. RIA will aid the advancement of ComReg's corporate values of effectiveness and transparency. RIA is intended to make the regulatory process more transparent by allowing stakeholders a full input and to improve effectiveness by allowing for a more structured and explicit focus on the objectives behind proposed regulations.
- 4.6 Where regulatory intervention is deemed necessary, RIA should help to determine how this intervention may be made. Where ComReg intervenes in any market, RIA should ensure that the intervention is justified and is done by the least intrusive means possible, while still allowing ComReg to achieve its objectives. Hence, regulation will only be used where it will improve welfare to society as a whole given that markets are not always perfect.
- 4.7 ComReg does not want regulation to be overly burdensome and will, where possible, identify the opportunities to withdraw from or reduce regulatory intervention in the relevant markets in the transition to more effective competition. In each case, ComReg will establish all the options and select the best option of those available.
- 4.8 Where possible the costs and benefits of any proposed regulation will be quantified by assessing in detail to the greatest extent possible the impacts and side effects of regulation on stakeholders and the impacts on competition. ComReg will also, if appropriate, consider the impact on vulnerable or socially excluded users.

- 4.9 The option which best achieves ComReg's functions and objectives, as set out in its Strategy Statement⁴, in s 12 of the Act of 2002, and in the EU regulatory framework should be chosen. These objectives include promoting competition, contributing to the development of the internal market and to promote the interests of users within the community, promoting the development of the postal sector and ensuring the efficient management and use of radio frequency spectrum and numbers from the national numbering scheme.
- 4.10 RIA also aims to determine that the option which is eventually selected will have the desired impact. If the regulatory obligation or rule is not complied with, then it will not achieve its objective. Therefore, when assessing various regulatory options, during the RIA stage, ComReg will consider how compliance will be monitored and be enforced.
- 4.11 As decisions are likely to vary in terms of their impact. If, after an initial appraisal the decision appears to have relatively lower costs, then ComReg would expect to carry out a less detailed RIA.
- 4.12 The ultimate goal of RIA is to help regulators to choose the best possible option and to therefore make regulation more effective.

⁴ ComReg document 05/77.

5 When will ComReg conduct RIA?

- 5.1 ComReg is the statutory authority responsible for regulation of the Irish electronic communications (telecommunications, radio communications and broadcasting transmission) and postal sectors, in accordance with EU law which has been transposed into Irish legislation. In performing its regulatory functions in either of these sectors, ComReg will conduct RIA whenever it is appropriate and/or necessary.
- 5.2 The purpose of RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation, and to consider any alternatives. Under normal circumstances RIA will be conducted in the preparation of any ComReg document which proposes to impose a regulatory obligation, or amend an existing regulatory obligation to a significant degree, or which will otherwise significantly impact on the market or any stakeholder(s) or consumers. ComReg expects to carry out RIAs in advance of many of its regulatory decisions.
- 5.3 S 13(1) of the Act of 2002 provides that “[in] the interests of the proper and effective regulation of the electronic communications and postal markets, the management of the radio frequency spectrum in the State and the formulation of policy applicable to such proper and effective regulation and management, the Minister may give such policy directions to the Commission as he or she considers appropriate to be followed by the Commission in the exercise of its functions. The Commission shall comply with any such direction.”
- 5.4 The Minister issued such a policy direction to ComReg on 21 February, 2003. The direction concerns a number of regulatory issues, parts 5 and 6 deal specifically with the issue of RIAs:

“5. Policy direction on regulation only where necessary

Where the Commission has discretion as to whether to impose regulatory obligations, it shall, before deciding to impose such regulatory obligations on undertakings in the market for electronic communications, examine whether the objectives of such regulatory obligations would be better achieved by forbearance from imposition of such obligations and reliance instead on market forces.

Where the Commission has discretion as to whether to impose regulatory obligations, it shall, before deciding to impose such regulatory obligations for the purpose of the management of the radio frequency spectrum, examine whether the objectives of such regulatory obligations would be better achieved by forbearance from imposition of such obligations and reliance instead on market forces.

6. Policy direction on regulatory impact assessment

The Commission, before deciding to impose regulatory obligations on undertakings in the market for electronic communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme.”

- 5.5 The starting point for RIA is to set out the issue to be addressed. One then identifies the options which are available to deal with that issue. In doing so, ComReg will have regard to part 5 of the policy direction and will impose regulation obligations

only where it is necessary and justified; ComReg will also consider whether to forbear from imposing regulations and instead rely on market forces to achieve desired objectives.

- 5.6 It is clear from part 6 of the Ministerial direction that all RIA should be conducted strictly on an *ex ante* basis. RIA constitutes a central part of the decision-making process, hence it should be carried out from the outset of any review, or as close to the outset as possible. This should allow ComReg to appropriately consider the impacts of a range of regulatory measures, in light of comments received from affected parties.
- 5.7 In matters such as Market Reviews (conducted under the provisions of Regulations 25-27 of the Framework Regulations⁵. ComReg may determine that any operator has significant market power (“SMP”). In such cases, ComReg is obliged to impose at least one SMP obligation. However, ComReg will nevertheless conduct RIA in order to ensure that the most effective regulatory option is chosen.
- 5.8 ComReg expects to conduct RIAs on the majority of its policy decisions, in accordance with the policy direction. However, in certain cases it may not be appropriate to do so. For example, where a requirement or obligation is imposed directly by statute, without any decision by ComReg then ComReg is clearly not itself imposing regulatory obligations on undertakings. In such cases, the requirement or obligation exists solely by virtue of statute but ComReg has statutory responsibility for ensuring that an obligation is complied with. ComReg does not propose to conduct RIAs in these circumstances. Further examples of where ComReg does not envisage conducting RIAs are set out later in this section.
- 5.9 In the past, ComReg has conducted RIAs in relation to market reviews; examples include the recently published Retail Fixed Narrowband Access market (06/39) and the Retail and Wholesale Payphone Access and Calls Market (06/40) reviews. RIAs were also conducted in the Universal Service Designation consultation papers⁶, and Ovum in a consultative document prepared for ComReg set out the impact of Number Portability in Ireland.⁷
- 5.10 In the future, ComReg will continue to conduct RIAs in respect of any proposed statutory instruments which would impose regulatory obligations, or in respect of any market analyses which propose to impose, amend or withdraw obligations, through the finding of SMP or effective competition (the latter resulting in the removal of obligations). If it becomes apparent that imposing (or withdrawing) obligations would not be the optimum way to achieve ComReg's objectives, then the RIA process may be curtailed or ceased. Thus, for example, the market analysis in relation to international roaming deliberately did not include a RIA since it concluded that the market (in which no obligations were in place at the time) was sufficiently competitive to negate the need for regulatory intervention.

⁵The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁶ ComReg documents 06/16, 06/29, 06/32.

⁷ ComReg document 99/01.

5.11 ComReg will also conduct RIAs on consultations which propose significant regulatory action for example changes to the use of a frequency band (including limiting access to a band, or providing open access to a band); changes in numbering policy (where the changes would be expected to affect competition and/or would have significant implementation costs for the public and/or for operators); and future policy proposals on next generation networks if such policy proposals entailed significant cost or significant impact on stakeholders, competition or consumers.

5.12 RIA is only mandatory, or necessary, in advance of a decision which could result in the imposition of an actual regulatory measure. Examples of cases where RIA may not be mandatory include the following:

- where a project is linked to another project for which RIA is already underway or complete (this may include RIA conducted by the European Commission or an Irish Government Department, in advance of the enactment of new legislation);
- where the decision is largely an administrative detail;
- where the matter relates to the preparation of reports, consumer guides, industry guidelines, or other documents which will not directly result in the implementation of an obligation;
- where there could clearly be no material or significant effect on interested parties or the measures taken could only have a temporary and limited effect;
- where RIA has already been conducted on the same or similar issue recently and there have been no material changes in the relevant factors in the interim;
- where the possible decision will not result in a significant obligation being imposed on any party or parties; and,
- where ComReg issues directions “specifying requirements to be complied with in relation to obligations” under any of the Regulations comprising the Electronic Communications Regulatory Framework.

5.13 RIA will not be conducted in advance of any enforcement proceedings that ComReg may commence. The RIA is appropriate and will have been concluded when the obligations were imposed either by legislation or by subsequent decision of ComReg. The breach of any instrument or provision must relate to an established state of affairs, where the offending party is aware of his or her rights and duties. RIA can have no application to this process as it may only be conducted in advance of the imposition of an obligation, whereas the enforcement procedure can only be concerned with obligations which are already established.

5.14 The RIA, where appropriate, will be presented as an addendum to the main consultation document, but will include a summary of the main points of the consultation. The RIA will be consulted on as part of the process.

5.15 In order for ComReg to be in a position to evaluate its decisions, RIAs will set out the results which ComReg expects to achieve, and if/when a review might take place.

6 Steps Involved

- 6.1 In conducting RIA, ComReg will take into account the six principles of Better Regulation set out in the Government White Paper *Regulating Better* (2004); these are necessity, effectiveness, proportionality, transparency, accountability and consistency. ComReg's values of integrity, professionalism, impartiality, effectiveness and transparency as set out in the Strategy Statement 2005-2007⁸ will also be forefront when conducting RIA.
- 6.2 A common sense and proportionate approach will be taken towards RIA. As decisions are likely to vary in terms of their impact, if, after initial investigation a decision appears to have relatively low costs then ComReg would expect to carry out a lighter RIA in respect of those decisions.
- 6.3 It is expected that at the start of the project ComReg would be able to assess approximately the likely impact of different decisions, however this assumption may need to be revised at a later stage should further information become available.
- 6.4 The Government's *RIA Guidelines* sets out the stages it believes are necessary for minor impact regulations and a more detailed set of steps for more comprehensive or full RIA, ComReg has taken these steps into consideration and has come up with a 5 step approach as follows which will be used:
 - 6.4.1 Description of policy issue to be addressed and identification of objectives
 - 6.4.2 Identify and describe the regulatory options
 - 6.4.3 Determine the impacts on stakeholders
 - 6.4.4 Determine the impact on competition
 - 6.4.5 Assess the impacts and select the best option
- 6.5 As set out above RIA will be an integral part of the decision-making process. From the start of the project ComReg should be able to identify the issue to be addressed and to define the policy objective. A possible list of options and the stakeholders which might be affected can then be set out. The list of options is likely to be refined and revisited during the policy making process.
- 6.6 In order to determine the impacts on stakeholders ComReg will consider the impact on all relevant stakeholders including operators and consumers (including vulnerable users where appropriate). In order to determine the impact on competition ComReg will set out what the effect of each option might be on competition.
- 6.7 These impacts will then be assessed and the best option chosen. Each of the 5 steps are set out in more detail below:

Step 1 Description of policy issue & objectives

- 6.8 As a first step in any project which requires RIA, the particular policy issue(s) and the background to the issue(s) need to be defined, the objectives of any proposed

⁸ ComReg Document 05/77.

action should also be identified, i.e. what does ComReg hope to achieve by addressing the issue.

- 6.9 The objective will be linked to ComReg's statutory obligations and ComReg will impose regulation only where justified.

Step 2 Identify and describe the regulatory options

- 6.10 The policy options which would achieve the objectives as set out in step 1 should be determined, with the first and benchmark option being to not change the current policy. International best practice shows that although this option may not always be practical its inclusion can serve as a benchmark against which other options can be compared.
- 6.11 Other options include alternative forms of regulation such as self-regulation and co-regulation, implementing different options as well as the option of not imposing an obligation.
- 6.12 Removing existing regulation will also be examined where possible, as will the reduction or increasing of existing regulations. A "wait and see" approach may also be considered where intervention is not made immediately, and the situation is monitored and reviewed at a later date. Each option should be clearly described and explained.
- 6.13 In some cases such as where an operator is found to have SMP, ComReg will have no option but to impose at least one obligation. In such cases, ComReg will set out why not regulating is not a valid option and will endeavour to choose the regulatory option which achieves the objectives by the least intrusive means.

Step 3 Determine the impacts on stakeholders

- 6.14 Having set out the options available the next step involves identifying the costs, benefits and impacts of these options. The impact on all stakeholders needs to be considered. Some of the costs of regulation are obvious, but others are hidden or unintended. There are a number of techniques which can be used to determine the impacts of the various regulatory options established, including cost-effectiveness analysis, multi-criteria analysis and cost benefit analysis. Often the choice will depend on whether it is possible to place a monetary value on the costs and benefits of a proposal.
- 6.15 Full cost benefit analysis would arise only where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Multi-criteria analysis can be used where a monetary value cannot be placed on all costs and benefits to society.
- 6.16 In cases where a comprehensive review is necessary, stakeholders will be consulted in any cost analysis. However, account will be taken of the fact that there is an incentive for those (negatively) affected to over-estimate costs, in particular those of compliance. Further, any RIA should be demonstrably independent and not solely dependent on information submitted by, or obtained from, any one sector or body. Such possible incentive will be taken into consideration and costs will be verified

using independent information where possible. Any cost benefit analysis should take account of the time value of money and an appropriate discount rate should be used.

6.17 Any risks which may be associated with any of the options must also be considered as it is impossible to determine with certainty the impacts, costs and benefits. The distribution of the benefits and costs should also be set out. ComReg would note that the OECD has in the past suggested that Irish regulation is more biased towards producers at the expense of consumers.⁹ In this regard, ComReg aims to deliver measurable improvements in consumer welfare, year on year in the areas of price, choice, quality, universal service and consumer protection.

6.18 In choosing the best option, achieving the objective is of primary importance.

Step 4 Determine the impacts on competition

6.19 ComReg will also need to determine the impacts each of the options might have on competition in the market. If a policy option would have negative effects on competition, ComReg would only proceed with this option if the benefits would outweigh any negative effects.

Step 5 Assess the impacts and choose the best option

6.20 Section 6 of the policy direction states that ComReg must impose regulatory obligations only where justified. Therefore, in assessing the impacts of the various options, ComReg will only choose an option to regulate which achieves the objectives where there is a clear advantage to doing so and where the benefits from such an option exceed the costs.

6.21 Current best practice appears to recognise that full cost benefit analysis would arise only where it would be proportionate/in exceptional cases and where robust, detailed and independently verifiable data is available. Such comprehensive review will be undertaken when necessary. However, ComReg will always try and implicitly consider costs and benefits before coming to a decision.

6.22 As it will not always be possible (or necessary) to quantify the costs and benefits such analysis will inform rather than determine ComReg's decision. As set out above there are other methods such as multi-criteria analysis which can be used to rank the options in order to choose the optimal one. Further, ComReg will consider the promotion of competition, the development of the internal market, the promotion of the interests of users within the community and the competitive impact when assessing which option is optimal.

6.23 For regulation to be effective, ComReg needs to ensure that the obligations it imposes are enforceable and that compliance can be monitored. Hence any RIA will describe precisely how the proposed decisions should be complied with and will set the means by which compliance may be enforced and the range of possible sanctions for proven non-compliance. Therefore, a review mechanism also needs to be considered when choosing the optimal option which would consider enforcement and monitoring of compliance. The review mechanism should be used to evaluate

⁹ OECD Review of Regulatory Reform in Ireland (2001).

the extent to which the regulation has achieved its objectives, it may also be useful in some cases to include a sun-setting clause whereby if a regulation is not renewed or remade it will expire on a certain date. For example, the market review process envisages that a regular review will be conducted.

7 Submitting Comments

The consultation period will run from Wednesday 20 December to Wednesday 31 January 2007 during which the Commission welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review the approach to RIA and publish its response (if any).

In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.