



Commission for
Communications Regulation

Information Notice

Future Regulation of Electronic Communications Networks and Services

Entitlement to Interconnection under Access Directive 2002/19/EC

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Executive Summary

A New Regulatory Framework for the regulation of electronic communications networks, services and associated facilities has been adopted by the European Commission. Five new directives replace the current regulatory regime. These five directives cover various areas: namely Framework; Access; Universal Service; Authorisation and Data Protection and are known collectively as the New Regulatory Framework¹. The provisions of this Framework are to be applied from 25th July 2003².

Responsibility for transposition of the new Directives is held by the Department of Communications, Marine and Natural Resources, and ComReg is largely responsible for implementation. ComReg has published a series of briefing notes and consultations to inform operators and end users of the expected effects of the New Regulatory Framework. Of particular background relevance to this paper is Briefing Note 02/69³ discussing the Access Directive and setting out the future arrangements applying to wholesale relationships for access and interconnection. The Access Directive replaces the current regulatory regime created by the Interconnection Directive (97/33/EC), certain provisions of the Voice Telephony and Universal Service Directive (98/10/EC), certain elements of the Leased Line Directive, and the Advanced Television Standards Directive (95/47/EC).

This paper provides further guidance on the specific obligation of providing access to (and the right to negotiate) interconnection, sets out guidelines which ComReg intends to apply if required to assess whether an entity qualifies for the right to negotiate interconnection, and also sets out duties and obligations of interconnected operators.

The paper concludes that in order to qualify for interconnection rights, an entity must pass each of the following tests:

The entity seeking interconnection must:

- Be an undertaking authorised to provide an electronic communications network in accordance with the Authorisation Directive/Regulations

¹ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

² The Data Protection Directive was adopted on 12th July 2002 and therefore its transposition is not required until 31st October 2003.

³ Document 02/69 Future Regulation of Electronic Communications Networks and Services; Access and Interconnection Directive 2002/19/EC

- Be an electronic communications network provider
- Provide publicly available electronic communications services

Should an applicant for interconnection satisfy each of the criteria, then the entity is eligible for interconnection. Should the applicant fail all or any of the tests, then that entity does not qualify for interconnection rights. ComReg will apply these tests in any dispute regarding eligibility for interconnection, and may request information from relevant parties so as to reach a decision.

This document provides information about the New Regulatory Framework on the regulation of electronic communications networks. This information should not be considered to represent legal or commercial advice and readers should seek appropriate professional advice appropriate to their own circumstance. In particular readers should consult the official texts of the Directives as published in the Official Journal and not rely only upon the necessarily abbreviated interpretation of certain features contained in this document. No liability is accepted for any decision taken on foot of information included in this document. This document is without prejudice to the legal position or the rights and duties of ComReg to regulate the market generally.

Headline changes in the New Regulatory Framework

1.1 The Authorisation Directive

The Authorisation Directive prescribes a regulatory framework of a general entitlement to provide communications networks and services instead of the current licensing system. In brief, the new regime will remove the need for potential operators to apply in advance to ComReg for a licence but rather such an entity will be entitled to provide networks or services through compliance with minimal notification requirements. Further details are set out in Document No 03/61 ‘Future Regulation of Electronic Communications Networks and Services – Arrangements for General Authorisations ’ which is available on www.comreg.ie.

To ensure interoperability of services, an operator needs to interconnect its network with that of other operators and arrangements for negotiating interconnection are set out in the Access Directive.

1.2 The Access Directive

The Access Directive (“the Directive”) establishes arrangements for regulating access to electronic communications networks and services, and interconnection between networks. The Directive deals with wholesale relationships between providers of networks and services and associated facilities. It sets the regulatory framework for the relationships between suppliers and services that should result in sustainable competition, interoperability and user benefits.

There are two major aspects to the Directive:-

- (i) Details of the rights and obligations for operators seeking access and/or interconnection. These are general rights and obligations and apply to all operators who are within the scope of this Directive
- (ii) Arrangements for imposition of specific obligations on operators designated as having Significant Market Power (“SMP”) following market analysis of the relevant market.

Interconnection

1.3 What is Interconnection?

Interconnection is currently governed by the provisions of the Interconnection Directive 97/33/EC⁴ and is defined as *‘the physical and logical linking of networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access service provided by another organisation. Services may be provided by the parties involved or other parties who have access to that network’*.

In practical terms, following designation of Significant Market Power (SMP) in the interconnection market, such designated operators publish a Reference Interconnection Offer containing service schedules for interconnection offerings which is regulated by ComReg. Alternative operators, known as Other Licensed Operators (OLOs) may then avail of these services which include, for example, such products as voice interconnection path extension circuits (IECs), Carrier Pre Selection (CPS) and Flat Rate Internet Access Call Origination (FRIACO).

Interconnection is vital to the development of a vibrant and competitive telecommunications market. End users have further choice and benefit from both price and service competition, and benefit from interoperability. In Ireland, interconnection has proven vital to the development of a competitive market.

In the New Framework, the definition for interconnection is amended to reflect the move to regulation of electronic communications rather than telecommunications. The New Framework also provides for carryover of existing obligations on SMP Operators whilst market reviews are completed, SMP designations made and remedies imposed or amended.

The definition now reads *“Interconnection means the physical and logical linking of networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators”*.

It should also be noted that an Operator is defined as *‘an undertaking providing or authorised to provide a public communications network or associated facility.’*

1.4 Entities eligible for interconnection

At present, ComReg maintains a register of other licensed operators (OLOs) who are in possession of either a general or basic licence from the office. This licence is required before negotiating interconnection with other operators. In other words an operator must be in possession of a licence before signing an interconnect agreement. Beneficiaries of interconnection receive cost based access which facilitates and promotes competition and innovation in services and ensures efficient pricing to end users.

⁴ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles on Open Network Provision (ONP).

In the New Framework, the need to apply for and receive a licence is removed. To assist in the efficient negotiation and provision of interconnection, ComReg in this document sets out tests indicating the entities that qualify to negotiate interconnection with other operators

Eligibility for Interconnection

In this section, ComReg sets out tests to assess eligibility for interconnection. ComReg believes that an entity must pass each of the following tests:

The entity seeking interconnection must:

- Be an undertaking authorised to provide an electronic communications network in accordance with the Authorisation Directive/Regulations
- Be an electronic communications network provider
- Provide publicly available electronic communications services

Each of the three tests is now outlined in greater detail and the rationale for ComReg's position is outlined.

A. **The entity seeking interconnection must be an undertaking authorised to provide an electronic communications network**

To pass this test, the entity must be authorised to provide an electronic communications network in accordance with the Authorisation Directive. In practice this will require the entity to have submitted a notification to ComReg in accordance with requirements set out in the Authorisation Directive/Regulations.

B. **The entity seeking interconnection must be an electronic communications network provider**

There are two separate concepts in this test:

(1) The entity must be an electronic communications network provider.

Article 2(a) of the Framework Directive defines an *Electronic Communications Networks* as “transmission systems, and where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit and packet switched including Internet) and mobile terrestrial network, electricity cable systems, to the extent they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television, networks, irrespective of the information conveyed”

There are certain inclusions here that it is important to specifically mention. The definition includes switching and routing as well as transmission systems. There is no definition for a ‘transmission system’ but the inclusion of such a diverse list of examples facilitates a broad interpretation by ComReg.. Coupling this with part (2) of this test below also provides for a single node operator to engage in transmission. Therefore an entity that has limited physical infrastructure – for example operates a single switch or has a single node - falls inside the definition.

ComReg considers that this approach provides for innovation and service based competition .

(2) The entity must be an electronic communications network provider

In operating an electronic communications network, account must be taken of Recital 3 of the Access Directive. It is not necessary for the entity to own its own infrastructure, rather “*an operator may own the underlying network or facilities or may rent some or all of them*”.

The definition from the Framework Directive assists in explaining this test. Provision of an Electronic Communications Network means “*the establishment, operation, control or making available of such a network*”.

There is therefore no requirement for the entity to enjoy exclusive rights over the elements that combine to form an electronic communications network. For example a single node operator can qualify for this definition as the link to which the operator is seeking interconnection may be regarded as qualifying as a transmission system. In other words the actual link may be self-provided, leased from the interconnected operator, or from another operator altogether.

C. **The entity’s electronic communications network must be used wholly or mainly for the provision of publicly available electronic communications services**

There are also two separate concepts in this test

(1) Electronic Communications Services must be provided

The Framework Directive defines Electronic Communications Services as “*a service normally provided for remuneration which consists wholly or mainly of the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services*”

Regulation of such services explicitly excludes content (Recital 2 of the Access Directive, Recital 10 of the Framework Directive). It also excludes Information Society services as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. It is considered that the main difference for such services is that they are triggered by an individual request (i.e. booking a flight online) and therefore relate to information rather than signalling.

There is a definitive requirement that some element of signalling must be included. ComReg considers that a signal may include speech, sound, visual images or communications or data of any type.

(2) Electronic Communications Services must be publicly available

Recital 1 of the Access Directive specifically limits the provisions of the New Framework to those networks used for the provision of publicly available electronic communications services.

The definition of an Public Communications Network, as set out in the Framework Directive states that such a network is “*used wholly or mainly for the provision of publicly available electronic communications services*”

This definition leaves open a number of interpretations as to how a public network may be identified. ComReg has consulted on this in Document 03/61 referred to earlier.

Rights and Obligations of Interconnected Operators

Entities eligible for interconnection, who have passed the tests set out in Section 4, accrue certain rights and obligations. Interconnection therefore entails reciprocal rights and obligations.

According to Article 4 (1) of the Access Directive, *“operators of public communications networks shall have a right and when requested by undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing public available electronic communications services, in order to ensure provision and interoperability of services throughout the Community”*.

Therefore entities eligible for interconnection have a right to negotiate interconnection with other entities. Another important concept is that when requested, entities have an obligation to negotiate interconnection. This obligation applies to all operators not only SMP operators.

Furthermore operators shall offer *“interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5,6,7 and 8”* [of the Access Directive]. These obligations set out powers and responsibilities of the National Regulatory Authority with regard to access and interconnection, arrangements for conditional access systems and other facilities, review of former obligations for access and interconnection, and arrangements for the imposition, amendment or withdrawal of obligations. Undertakings designated with SMP as a result of a market analysis conducted in accordance with Article 8 may also have further obligations in respect of remedies imposed pursuant to Article 9,10,11,12,and 13 of the Access Directive.

Article 4 also imposes obligations of confidentiality on undertakings negotiating interconnection. In particular information should be used solely for the purpose for which it was supplied and respect its confidentiality. Information should not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.