



Office of the Director of  
**Telecommunications  
Regulation**

**RESPONSE TO CONSULTATION**

## Future Regulation of Electronic Communications Networks and Services

### Future Authorisations

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## Introduction

ODTR 02/22 (issued on the 6<sup>th</sup> March 2002) concerned the future regulation of electronic communications. It was prompted by the adoption of a family of four Directives and one Decision which have recently been published in the Official Journal<sup>1</sup>. The consultation document was intended to launch a dialogue concerning the framework for the future provision of communications networks and services which will need to continue over the period leading up to the European-wide introduction of the measures contained in the Directives on 25 July 2003.

The Director would like to thank the twelve organisations and individuals that responded for their helpful contributions. Those responding were:

- B SkyB Ltd.
- Chorus Communication Ltd.
- Colm Ward
- Duharra Limited
- eircom
- Esat Telecommunications Ltd. and Ocean Communications Ltd.
- IBEC – Telecommunications and Internet Federation
- it'sTV Ltd.
- Manus Elliott
- NTL
- Digifone MMO2 Ltd.
- Vodafone.

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<sup>1</sup> 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)

Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision);

All published in the Official Journal: L 108 Volume 45, 24 April 2002 and are available at [http://www.europa.eu.int/eur-lex/en/oj/2002/l\\_10820020424en.html](http://www.europa.eu.int/eur-lex/en/oj/2002/l_10820020424en.html)

The Director hopes for many more similarly useful contributions to future consultations connected with the issues relating to the future regulatory framework.

This document considers the points made. Some comments were made concerning the scope of future authorisations which were not covered by the specific questions included in the consultation paper. These matters are addressed briefly in paragraph 2.1. As indicated, they will be dealt with further either by way of guidance notes in the context of the new authorisation framework or, where appropriate, in future consultations. Views on individual questions are addressed in paragraphs 2.2 to 2.7. The document closes with some comments on the immediate next steps in this process.

*This document is without prejudice to the legal position or the rights and duties of the Director 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 Director may issue.*

## 1 Background

The family of Directives aim to achieve an integrated framework under which electronic networks and services are regulated. The Framework Directive describes and gives power to the overall shape of the regulatory regime and is briefly reviewed in ODTR 02/22. It should be noted that the recently enacted Communications Regulation Act, 2002 gave effect to some of the provisions of this Directive in relation to the role and functions of a National Regulatory Authority.

The Authorisation Directive concerns how rights and obligations with respect to the provision of electronic communications services and networks will be conferred onto operators. ODTR 02/22 provided a detailed description of the provisions and was principally concerned with this Directive.

The family of Directives need to be transposed into Irish law by the Department of Communications and Natural Resources, ready for implementation on 25 July 2003. Prior to this date, ODTR will need to implement appropriate arrangements reflecting these legal provisions. It is noted that the manner in which certain provisions of the Directives will be acted upon in Ireland depends crucially on the transposition, building on and adapting as necessary, the particular legislative framework already in place.

The Director was pleased to see that respondents are already engaged in considering the issues connected with the future requirements.

The Director wishes to emphasise that there are many issues that need to be considered during the implementation period. The Director concurs with many of the respondents who noted that the process is in its early stages and wishes to emphasise that the purpose of the consultation paper included an intention to stimulate a wider consideration of the process. She also wishes to assure interested parties that they will have future opportunities to consider the detailed arrangements being considered by ODTR for implementing the framework.

## **2 Key issues arising from the Authorisation Directive**

### **2.1 Scope of authorisations**

As was set out in ODTR 02/22, the Directives aim to apply a common framework to all electronic communications networks and services.

A few organisations sought clarity on the applicability of the framework to particular networks and services. The overall intent of the Directives is clear – to provide a common framework for the operation of all electronic communications networks and services, and the Director has not changed her view on its broad applicability as set out in ODTR 02/22.

The Director intends to consult on the question of appropriate conditions for general authorisations during July and will set out more detailed guidance at that stage. Respondents should bear in mind that, subject to the conditions set out in the Authorisation Directive, the common framework confers a freedom to provide networks and services. Specific conditions with general application, as provided for in the family of Directives will be applied only where objectively justified, with Significant Market Power related conditions only coming into play in the case of individual undertakings following a determination of SMP arising from market analysis.

The Director notes that an appropriate application of the framework will need to take into account all of the issues covered by the Directives. These include issues such as the state of competition in relevant markets, significant market power, consumer and user rights, and access and interconnect conditions.

Some respondents raised concerns which are largely matters of spectrum management. Such comments included the future availability of spectrum for deflector television operations and for “return paths” for what are currently broadcast services. In respect of deflector operations, the general position is as set out in ODTR 99/55 which indicated that where spectrum continued to be available after the introduction of DTT, the Director would consider providing for future deflector operations. The issue of “return paths”, while of great importance, involves key legal and commercial concerns beyond the scope of this consultation. Nevertheless the Director would like to thank respondents for raising their concerns and will take comments made into account when considering the future management of spectrum.

## 2.2 Need for authorisations

### 2.2.1 Summary of consultation issues

In the consultation paper, ODTR set out its view on the need to develop an appropriate authorisation regime that excluded certain types of private networks and allowed appropriate conditions as set out in the Directives to be applied to other networks generally. The following question was asked.

*Q 1. Do you agree with the assessment in favour of authorisations generally (other than private networks as indicated above)? Do you envisage any circumstances where authorisations would not be needed? Please provide your reasons.*

### 2.2.2 View of respondents

There was agreement with ODTR's assessment and no specific circumstances were mentioned where authorisations would be inappropriate. Some concerns were raised about what might constitute a private (as opposed to public) network. This matter is considered in the responses to question 4 in section 2.5.

### 2.2.3 Position of Director

Accordingly, the Director proposes that, subject to legislation, all networks, with the exception of certain types of private network as indicated in ODTR 02/22, should be subject to the conditions appropriate for general authorisations. The application of particular conditions to different categories of networks and services will depend on the networks or services involved. The ODTR will consult further on this issue.

## 2.3 Structure of authorisations

### 2.3.1 Summary of consultation issues

In the consultation paper, ODTR described the distinct sets of conditions that may be included within the framework of general authorisations and individual rights of use, and how these conditions may be nested in a modular approach to general authorisations.

ODTR expressed its view that the general authorisation regime should incorporate a standard general authorisation (with modular elements applicable in so far as practicable) along with individual rights of use for spectrum which address the appropriate technical conditions and the type of service for which the spectrum is to be used. Similar considerations may apply in the case of rights of use for specific numbers.

The use of standard conditions, in so far as is practicable, set transparently was discussed.

The following question was asked.

*Q 2. Do you agree with the assessment that conditions relating to rights of use of spectrum and numbers should be provided for in the manner described above? Please provide your reasons.*

### 2.3.2 *View of respondents*

There was strong endorsement for the use of standard conditions where practical although concerns were raised by some respondents about how ‘where practical’ may be interpreted. However, the Director also noted with some concern various comments made that appeared to reject the principle that conditions accepted, as part of a comparative bidding process either in the past or possibly the future, should remain binding on bidders. Respondents indicated that that the imposition of such conditions might be discriminatory and lead to inadequate transparency and comparability.

### 2.3.3 *Position of Director*

Comparative selection has been used in the past and is one of the allocation methods allowed for in the Directives. Attention is also drawn to the specific provision (B7 in Annex to the Directive) which addresses this issue. The advantage of comparative selection process is that it allows operators to differentiate their applications (appropriate to their own operating conditions) by offering, to accept special conditions. The ODTR considers that the use of a competitive selection process encourages extensive service coverage and the delivery of higher service quality. These factors are indispensable for the widespread availability of services for the maximum number of users, and assist in dealing with Ireland’s infrastructural deficits.

The view that the imposition of such conditions might be discriminatory and lead to inadequate transparency and comparability ignores the essential features of a competitive or comparative selection procedure. In such procedures, operators must be able to differentiate their bids in a meaningful way. If offers are not binding, there is little reason why such offers should be taken into account in deciding which companies might be awarded licences. Factors which operators take into account in framing offers are not matters for the Director’s consideration but it is self evident that superior offers, which result in the successful securing of a licence or future right of use for frequencies, may entail an operator assuming greater commitments than unsuccessful applicants or in some cases other successful candidates. All applicants are aware of this possibility and the Director does not accept that the market is distorted as a result. Similarly there is no question of discrimination; any such commitments which a successful applicant assumes have been proposed by the undertaking concerned. Neither does the Director accept that the adoption of the new regulatory framework requires a review of commitments made under earlier competitions and accepted by the relevant successful applicants.



## 2.4 Conditions relating to SMP Obligations

### 2.4.1 Summary of consultation issues

The ODTR proposed that a modular approach would be appropriate to general authorisations. With such a format, the special conditions would only become active once an undertaking has been designated as having Significant Market Power according to the mechanisms described in the Framework Directive.

*Q 3. Do you agree with the assessment that a modular approach should be used for special conditions for SMP? Please provide your reasons.*

### 2.4.2 View of respondents

There was general agreement to a modular approach to SMP obligations. The Director also notes comments made about the need to withdraw special conditions in a transparent manner should competitive conditions improve, and to ensure that conditions are imposed only when necessary.

### 2.4.3 Position of Director

While the modular approach permits (and requires) the establishment of criteria and procedures for imposing SMP obligations in a general authorisation, it is a requirement of Article 6(2) of the Authorisation Directive that such obligations be legally separate from the general authorisation conditions. It is not considered that such a requirement will detract in a material fashion from the essential features of a modular approach but it has implications for the manner in which the measures will be transposed.

## 2.5 Public and Private Networks and Services

### 2.5.1 Summary of consultation issues

The ODTR noted the importance of distinguishing between public and private operators and proposed that operators should indicate whether it was their intention to operate as a private or public operator.

*Q 4. Do you agree with the assessment that separate private and public general authorisations are needed and that operators should be required to notify under which they intend to operate? Do you see difficulties of a commercial or a technological nature developing with such a distinction? Please provide your reasons.*

### 2.5.2 View of respondents

Some respondents were concerned that the definition of private networks would need to be clear. The example was given of the owner of a business park providing communication services to tenants.

### 2.5.3 *Position of Director*

The ODTR concurs that definitions need to be clear and will take comments into account when developing the detailed framework. The purpose of liberalisation is to give users choice and while there should be a “de minimus” rule, the objective of the ODTR is to ensure that users have effective choice in as far as possible. In the context of the example given in the response, the supply of communications services by a business park or campus would currently require a telecommunication licence, and the Director considers that this should continue to be the case in the future. For the future, such a service would come under the ambit of a general authorisation and the new framework

## 2.6 **Administrative charges and fees**

### 2.6.1 *Summary of consultation issues*

ODTR raised the matter of charges and set out the principles which it considered appropriate when setting charges and fees.

*Q 5. Do you wish to make any preliminary comments on the principles indicated above in relation to charges and fees?*

### 2.6.2 *View of respondents*

Respondents provided some useful preliminary comments on the future charging regime. Comments were generally supportive of the principles involved in administrative charges and stressed the need for transparency in the collection of such charges. Some comments were also provided in relation to wireless telegraphy licence fees suggesting that the level of fees should take account of economic conditions and should not act as a barrier to entry or encourage market exit.

### 2.6.3 *Position of Director*

These comments will be considered and more detailed proposals will be developed prior to further consultation on the issue.

## 2.7 **General comments**

*Q 6. Do you wish to make any other comment on the Authorisation Directive?*

*Q 7. Bearing in mind that there will be further opportunities to comment on the complete framework, do you wish to make any more general comments at this stage?*

Apart from the general issues of scope discussed at the beginning of this section no further substantive issues were raised. Operators and users will have a number of further opportunities to raise concerns.

### 3 Next Steps

The Director intends to consult during July on the issue of the applicability of general conditions which would apply to authorisations. Such a consultation will consider the appropriateness of the conditions listed in the Annex to the Directive to particular categories of networks and services. It is also planned to consult on issues connected with spectrum rights of use and this consultation is tentatively scheduled for September.

During the above period it is also planned to issue a paper on the provisions relating to Access and Interconnect as well as initiating a public consultation on market analysis and relevant markets.

#### Indicative Timetable for planned further documents

Subject matter	Publication	Consultation Close	Publication Subject to
Paper on Access and Interconnect provisions under future regulatory framework	June		
Consultation on conditions associated with general authorisation to provide networks and services	Mid July	end August	
Consultation on Market Analysis and Relevant Markets	Late July	Early September	Finalisation by EU Commission of its Guidelines for Market Analysis and Recommendation on Relevant Markets
Initial Consultation on issues concerning Spectrum Rights of Use	Mid September	Mid October	
Consultation on Universal Service Obligations	November	January 2003	
Consultation on Consumer and User Rights	November	January 2003	

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11<sup>th</sup> June 2002