



Office of the Director of  
**Telecommunications  
Regulation**

**CONSULTATION PAPER**

*Future Regulation of Electronic  
Communications Networks and Services*

**Future Authorisations**

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## Foreword

The new regulatory framework for communication networks and services, recently adopted by the EU, will make some significant changes to the way the electronic communications markets are regulated.

The four Directives adopted so far by the EU are:-

- Framework
- Access
- Universal Service
- Authorisation

The regulatory package includes a Decision on Spectrum Management, and also a Directive on Data Protection which is near completion and will be adopted separately.

Although there has been little public comment in Ireland, since the initial Commission review carried out in 1999, the new Directives have been subject to intense debate between the bodies who together decide on the terms of the Directives – the European Commission, the Council and the European Parliament. This stage of the debate is now over and attention must focus on the practical issues regarding implementation.

As this is the first of a series of papers the ODTR will issue on the new Directives, it may be useful to review their overall context and broad implications.

Since the opening of the markets for telecoms which took place in most EU markets in January 1998, (Ireland - December 1998), the markets rose rapidly on a wave of optimism fired by liberalisation and also by the dot.com speculation. This has been replaced by more difficult market conditions reflecting economic performance generally and the financing of the sector, a more sober view of internet development, and of the issues involved in securing 'broadband for all', however defined. In the wake of the recent waves of speculation, investors appear now to have become too pessimistic. This has resulted in sharp cuts in available funding, and expectations in some quarters that the industry can provide pay-back in periods as short as 12 months.

However, telecoms is a fundamentally sound business and there is a need for a more balanced view of its future as a competitive industry.

So how will the new framework deal with the market? The current framework is primarily concerned with effecting market opening through regulation. The new framework is generally based on the presumption that the market has advanced beyond initial market opening to a point where competition, supplemented by regulatory intervention where required, should begin to take over.

Significant Market Power (SMP) is the fulcrum on which the new (as the old) framework turns. The definition of the markets and designation of SMP are key aspects: operators who are deemed to have SMP in a particular market can be subject to obligations for example to provide access to their network at cost oriented prices. Under the new regime, the opportunity is given to define the markets more flexibly in line with market developments. This is a more satisfactory arrangement in that it enables a more focussed approach to be taken and avoids regulatory action in those parts of the market where there is adequate competition.

Those operators who are designated to have SMP face extra obligations. The actual designation of SMP operators will move from a basis of about 25% of market share to a dominance based formula. This will be complex given the case law on dominance, but common application rules to support the implementation of the Directives, should help reduce uncertainty. In particular, the Directives provide that the existing designations remain until new ones are adopted. Like the new rules for market definition, designation is expected to be a longer and more complex process than at present.

The new Authorisations Directive provides for standardised authorisations to replace individual licences in most cases. This is not of great significance in Ireland where we have operated a simple standard licence regime for all fixed telecoms operators since 1998 and for mobile since 1999. What will be of greater significance is the provision for legal convergence as the new Directives cover all types of electronic communication transmission and services. At present, only the telephony regime is largely based on EU Directives; other communications services are covered by national legislation going back to 1926. The new EU framework will provide the basis for the regime for all these types of networks and services.

Convergence has already taken place in technological terms in that cable for example can deliver telephony and television, but it has lagged in the market given the costs involved of actually making this happen. The new framework will enable a substantial degree of

legal convergence.<sup>1</sup> This will be useful to market development as technology produces cheaper convergent solutions, and current and new programmes for development are rolled out.

The Access Directive mainly consolidates the current position on access and interconnect. It will not of itself make a major difference: as noted above in relation to SMP, the key issue will be the designation of bodies that may face obligations to provide access and interconnect in the electronic communications markets.

The Universal Service Directive sets out the range of services that may be designated as USO and also includes provisions on users' rights. There are key decisions for each Member State arising from this Directive.

The Framework Directive essentially sets out the key procedures for managing the regulatory programme. It provides for the Commission to have specific powers in respect of market definitions for SMP and for NRAs to have the obligation to contribute to the development of the internal market through the development of harmonised regulatory practices.

What does this mean for Ireland? We are well placed at present in respect of the liberalisation of the key elements involved in the internal market i.e. intra-community trade. For regulators the relevant issues are international telecoms retail traffic, international interconnect/leased lines and international mobile roaming. For all but the last of these elements, the current ODTR view is that there is competition in the market, and provided this continues to be the case, we would assume that no new regulatory measures would arise in the new regime. The remaining element is international mobile roaming, which is a matter of concern generally in the EU and on which the ODTR and Oftel are currently engaged in a joint project.

At a time of market difficulty it is important that the resources not alone of the National Regulatory Authorities (NRAs), but of all players in the market, are concentrated on the key measures where a real difference can be made to the development of competition.

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<sup>1</sup> There are still many technological issues to be sorted out in terms of spectrum law, where the characteristics of equipment for different purposes may change depending on the use to which it is put in terms of the need for protection from interference. Many such issues are not yet resolved at international level in the relevant bodies of the International Telecommunications Union.

At EU level, we must take a highly strategic approach to the issues. The main concentration should be on outputs, on NRAs taking action so that deficiencies or special needs in their markets are dealt with effectively. Special national measures such as the 1999-2002 programme in respect of leased line delivery to bring Irish performance up to the best international standards should continue to get priority. To achieve best international standards for telecoms generally, it is critical to have strong powers of enforcement of equivalent effect for all NRAs to harmonise performance across the EU.

Further harmonisation of some measures may be useful to the market. We should choose our ground carefully to ensure that a real benefit is obtained. A blanket policy of full harmonisation would tend to increase the intricacy of all processes to the highest level of detail needed to ensure compliance from the least co-operative telco for a particular application. This would add to the regulatory burden rather than lightening it, with implications for the provision of service to consumers.

We should also be conscious of the time-frame. The current package of Directives just now reaching conclusion, has taken nearly 3 years to develop. The detailed implementation measures are to be put in place in 15 months. It is right that they should not be delayed any longer. How can that time be best used to ensure that users get the best results in terms of price, choice and quality?

**Etain Doyle**

**Director of Telecommunications Regulation**

## Introduction

On 14<sup>th</sup> February 2002, the European Union adopted a series of new Directives that will have a significant impact on the way in which communications networks and services are regulated in all EU Member States. Publication of the texts in the Official Journal is expected shortly. In the meantime, the texts as adopted are available on the European Union website at

[http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm)

The Directives have to be transposed into national law; a process that must be completed in sufficient time to allow all aspect of the regime, including administrative arrangements, to be fully implemented within fifteen months. The framework is not fully prescriptive and there are areas where choices exist for Member States and competent authorities in the manner in which the aims of the Directives are to be achieved. These discretionary areas enable the common rules to take account of conditions in individual Member States while implementing the broad community framework.

Implementation will be a complex task with both national transposition and ODTR development and implementation of the necessary arrangements for authorisations and market interventions. Given the short time-frame, it is not possible to carry out all tasks sequentially, in particular as it is important to have a public debate and consultation on the new arrangements. Accordingly, the ODTR work is going ahead on a preliminary basis, subject to review and amendment in the light of any changes which arise due to transposition or to issues which may emerge in one part of the discussion impacting on others or due to the debate in other countries. The ODTR intends to issue a number of consultations and information notes over the next fifteen months with the aim of addressing all of the key issues and providing greater degrees of certainty as the implementation date draws near.

It should be stressed from the outset that transposition of the Directives into national law is a matter for the Minister for Public Enterprise. In advance of decisions on the form of transposition, for the purposes of this paper the working assumption is that the ODTR's responsibilities and powers will remain broadly as at present, supplemented by specific mandatory provisions of the Directives. However decisions taken by the Minister during the transposition process as well as other legislative developments may result in

changes to the ODTR's areas of responsibility, and/or necessitate changes in the way the arrangements are implemented.

The paper is primarily concerned with the transition from a scheme of licences to general authorisations as required by the Authorisation Directive.

The most significant change from an Irish point of view is that the authorisation of activities in relation to electronic communications networks and services will be based on the new EU Directives. At present, telecommunications licensing is subject to the Postal and Telecommunications Act, 1983, amended to give effect to EU requirements for the sector. In contrast, broadcasting transmission is based on the Broadcasting Acts and the Radio and Television Act. Broadcasting retransmission services are subject to regulations made under the Wireless Telegraphy Acts while other services are also subject to regulations made under the Wireless Telegraphy Acts. As a result, while some licence conditions are common across the range of licences, different procedures and requirements apply to many of the services.

The new EU framework requires that all of these various services be subject to technology neutral common rules defined in the Directives. In doing so, the issue of convergence is addressed by ending the distinction between regulation of networks and services based on the type of service carried on particular platforms and providing instead for the regulation of all networks and services on a common basis.

*This document provides information about the new EU 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 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

## 1.1 Current Licensing Provisions

Network and services are regulated under the following provisions:

**Telephony and telecommunications services** are subject to licensing and regulation under the Postal and Telecommunications Act, 1983. This Act has been amended by the terms of EU Directives which provided for the liberalisation of the sector. The licensing framework provides for two categories of licence, Basic and General, to cater for the services offered. There is no limitation on the number of licences which may be granted and applications are dealt with on an open-door basis. As the current regime is not technology neutral, there is a separate standard mobile telephony licence covering much the same areas as the General licence.

Where a telecommunications service involves spectrum use, such as mobile or fixed wireless or the forthcoming 3G service, in addition to a general or mobile licence, an additional licence issued under the Wireless Telegraphy Act, 1926 is required.

**Broadcasting licences** for off-air reception of radio and television services are issued under the Broadcasting Act, 1960 in the case of RTE services. In the case of TV3 and commercial, community and special interest radio services, licences are issued under the Radio and Television Act, 1988.

For **retransmission services**, such as cable, MMDS, deflectors and the forthcoming national DTT service, licences are issued under specific regulations made under the Wireless Telegraphy Acts

Other regulations made under the Wireless Telegraphy Acts provide for the licensing of a variety of **radiocommunication services**

## 1.2 New EU Framework

In 1999, the EU Commission undertook a major review of the state of regulation of the telecommunications sector in the European Union. In the light of this review and mindful of developments in convergence which has blurred the distinction between

services such as broadcasting and telecommunications, the Commission developed its proposals for a new framework. This has been subjected to a public consultation and discussed within the Commission, European Parliament and the Council of Ministers. The final texts were agreed on 14 February 2002. The texts of the Directives will be published shortly in the Official Journal at which point they will enter into force. A period of 15 months is provided for during which Member States are required to transpose the provisions into national law and make the necessary administrative arrangements to give effect to the new framework. The operative date for Member States to apply the Directives will be at the end of the 15 month period, i.e. a common date throughout the EU.

As already indicated there is a set of related Directives and Decisions. These are as follows:

- The **Framework Directive** sets the overall context and defines overall principles and approaches.
- The **Authorisation Directive** describes the mechanisms through which services and networks may be provided, including the conditions which may be applied to operators.
- The **Access Directive** describes how networks and service may be accessed and how interconnection between public network and service providers will be regulated.
- The **Universal Service Directive** considers how universal service will be protected and regulated and also addresses consumer rights.
- The **Spectrum Decision** concerns spectrum management issues.

A further draft Directive on Data Protection which will update Directive 97/66/EC is also relevant. It had been planned to complete the adoption of this at the same time as the Directives above. This will not now occur as the draft is still under consideration by the European Parliament with adoption not expected to occur before May or June.

A major feature of the new Directives is the extension of the scope of the framework to all electronic communications networks and services. This means that from June 2003, television distribution will be subject to the same regulatory framework as, for example, voice telephony. The task for the ODTR is to ensure that the transition from separate licences with individual and unique conditions to a scheme of general authorisations is

managed in a manner which fully addresses all aspects of the new EU framework and causes as little disruption to the market as possible.

The new Directives explicitly exclude all content regulation. This may be loosely interpreted to identify the scope of regulation under the Directives as pertaining to economic matters rather than the broader goals of encouraging cultural values, media balance, diversity, plurality, taste and decency that are often part of content regulation.

The new Directives make fundamental changes to the process with regard to the designation of operators with significant market power. The current Level 1 analysis of 25% of market share will be replaced by a concept of dominance. The markets designated in the current regulations will be replaced by a requirement to define new markets which will better reflect the competitive and technological dynamism evident in electronic communications services and network markets. As part of the new framework, the Commission will issue guidelines on the process of assessing SMP and recommend a number of relevant product and services markets for use by NRA's in their market analysis obligations. NRAs will have some opportunity to define additional markets subject to specific procedures.

The guidelines and recommended relevant product and services markets are at final consultation stages. Once finalised the market analysis process along with the SMP guidelines and the relevant product and service markets recommended by the Commission will be the subject of a wide ranging consultation. In the meantime, respondents may wish to familiarise themselves with the current issues and should review appropriate documentation as and when it is published by the Commission.

### **1.3 The Implementation Process**

Subject to the provisions of the final regulations as may be adopted by the Minister for Public Enterprise, the ODTR is seeking to advance preparation of the arrangements necessary in view of the wide-ranging nature of the new Directives and the potential complexity of new procedures involving harmonisation for Internal Market purposes and, in some case, a requirement for EU Commission approval. The ODTR considers that starting this process at an early stage will enable as much debate as possible on the new regulatory framework. The ODTR intends to publish a series of papers and to consult on the range of issues arising so that the new framework will be drafted on the basis of the views from as wide a range of interests as possible.

## 2 Key features of the new framework

In this section further information is provided about the general framework. Some areas as has already been mentioned will be subject to more detailed consultation at a later date.

The overall structure and aims of the new Directives are set out in the Framework Directive, which describes and establishes a broad framework under which regulation of all electronic communications will occur. Among the issues this Directive addresses are:

- Specific policy objectives for the regulation of electronic communications networks and services
- The establishment, independence and responsibilities of NRAs and the need for these to cooperate with each other, the EU Commission and other competent bodies – notably competition authorities - in respect of certain matters covered by the Directives.
- The right of appeal of decisions made by NRAs including appeal on merit.
- Requirements to share, exchange between the various parties, or publish information subject to relevant and appropriate confidentiality requirements.
- Requirements for public consultation about decisions,
- The manner in which spectrum and numbering resources are to be managed.
- Procedures for the definition of relevant markets, organisations with significant market power, and for the analysis of markets.
- National and cross-border dispute procedures.

Notable changes under the Framework Directive include, inter alia, the following:

- A broadening of the scope of regulation to provide a harmonised approach to all electronic communications networks which are in turn broadly defined. As noted earlier, this gives effect to a common set of rules covering developments regarding convergence. In addition, the broadening of the scope will mean that the framework will extend certain obligations and rights to operators who previously operated without licences.
- A change to the definition of significant market power.

### **3 Key features of the Authorisations Directive**

A key issue for Ireland is that the current licensing regime whereby licences are issued under the Wireless Telegraphy Act of 1926 or the Postal and Telecommunications Services Act of 1983 will need to be modified to ensure compliance with the Authorisation Directive.

The present position in Ireland is that we have a telecommunications regime involving individual licences (General Telecommunications Licence (GTL), Basic Telecommunications Licence (BTL) and Mobile Licences). However, these licences are in a standard form which, apart from the application procedures, largely meets the requirements of a scheme for general authorisation as envisaged by the Directive. Even allowing for current application procedures, the process for obtaining a licence in Ireland is simpler and quicker than in many Member States.

Individual licensing, even in the simplified approach used in Ireland, will no longer be appropriate and instead there shall be an authorisation scheme. The general rule will be that there shall be no quota on the provision of services, except where this would involve the use of limited resources such as spectrum and numbers. For such resources, the Directive provides for comparative or competitive methods for deciding on the allocation of rights of use. The only other grounds for restricting the provision of services are based on the exceptions mentioned in Article 46(1) of the Treaty of Rome – covering public policy, public security and public health. However in the case of a serious breach of the conditions of the authorisation, there is provision made to allow an NRA to prevent an undertaking from continuing to provide networks or services.

The key thrust of the Directive is therefore in enabling the provision of networks and services for all types of communications, the compliance process and the content of a scheme of general authorisations and individual rights of use for spectrum and numbers.

Authorisations will be in a standard form for all electronic communications networks and services, irrespective of the network involved or the service to be provided.

Authorisations shall be effected by an applicant sending a notification (containing certain specified details) to the ODTR. Once notified, operations can begin - there is no need for an operator to wait for the formal issue of an authorisation by the ODTR.

The rights conferred by a general authorisation include:

- The right to provide electronic network and services
- The right to have applications for the necessary rights to install facilities to be considered in accordance with the process set out in the Framework Directive.

If an operator makes its network or services available to the public, additional rights include:

- The right to negotiate interconnection (see Access Directive),
- The opportunity to be designated as a universal service provider (see Universal Service Directive).

The Directive also defines the set of conditions that may be imposed as part of a general authorisation. All of the conditions set out in the Directive need not be applied and Member States may choose to require only a subset of the list. The Directive also refers to provisions of other Directives (the Universal Service Directive and the Access Directive) which define certain additional conditions<sup>2</sup> that may be imposed on operators, primarily those determined as having significant market power. It also notes that there may be reasons to apply different (i.e. less onerous) conditions on private network and service operators than on public operators.

Where the allocation of radio frequency and numbers is concerned, individual rights of use are provided for which allow for specific obligations linked to the spectrum or numbers being allocated. These individual rights of use will be additional to general authorisations. The Directive recognises that individual rights of use may not be necessary in every case, such as where the risk of harmful interference is negligible.

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<sup>2</sup> **Access** Directive – transparency, publication of RIO (NB may include mobile operators), non-discrimination, accounting separation.

**USO** Directive – obligations regarding retail tariffs for access to and use of public telephone network,

obligations regarding carrier selection/pre-selection,

the provision of a minimum set of leased lines.

price cap & appropriate cost accounting system.

The Directive requires that the rights of use for radio frequency must be granted through open, transparent and non-discriminatory procedures (competitive or comparative processes are both permitted). However in the case of spectrum used for broadcasting, the granting of rights of use is subject to national legislative provisions adopted in relation to broadcast content providers. Decisions on rights of use shall generally be completed within 6 weeks for frequencies and within three weeks for numbers. A consultation procedure and subsequent review must be followed if there is to be any limit placed on the number of individual rights of use of spectrum or numbers to be granted.

The Directive also requires that the duration of rights of use shall be appropriate for the service concerned.

Any condition, whether general or relating to individual rights of use for frequency and numbers, must be justified in relation to the network or service concerned.

Member States may empower the relevant authorities to impose financial penalties to ensure compliance and for failure to provide information. For repeated breaches, where earlier enforcement measures have failed, the ODTR may withdraw or suspend rights of use and may prevent operations continuing. The Directive also requires that the ODTR be empowered to take urgent measures for breach of condition where appropriate.

The Directive also allows for administrative charges to apply to general authorisations to cover the administrative costs related to management, control and enforcement costs. Fees may also be imposed for frequencies or numbers which need not be solely restricted to the administrative cost involved in the administration of these rights of use.

Existing licences are to be brought into line with the Directives by the date of transposition (June 2003). If as a result, a reduction of rights or an extension of obligations would occur, the existing rights and obligations may be extended for a further 9 months.

Subject to review in the light of legislative provisions, the ODTR proposes to provide for general authorisations in the manner set out in the next section while individual rights of use to spectrum and numbers will be provided separately.

Existing licences will begin to be brought into line with the new framework when appropriate legislative provisions are in place.

## 4 Key issues arising from the Authorisation Directive

As has already been described, a key issue for Ireland is that the current licensing regime will need to be modified to ensure compliance with the Authorisation Directive. The ODTR recognises that many of the more complex issues can only be addressed in the context of a co-ordinated approach which addresses the totality of all of the Directives. A significant part of this task will be achieved by clarity on the structure and form of the new authorisation framework. In this section, views are sought in this area.

### 4.1 Need for authorisations

An authorisation scheme would allow the rights and obligations of undertakings providing networks and services to be set out in a transparent manner. This is an important consideration, not only for those undertakings, but for other network and service providers and end users. The ODTR believes that the communications market in Ireland has not yet sufficiently developed to a stage where such a scheme could be dispensed with. Accordingly, the ODTR does not consider that any such network should be exempt from the scope of a general authorisation scheme except certain classes of private networks provided for own use. Examples of such private networks are local area networks installed entirely on private property which do not require individual spectrum rights or private networks for own use constructed from leased circuits. Such an approach would maintain the current position which does not subject such networks to the requirements of licensing.

In the case of public networks or in the case of services being made available to third parties, the ODTR considers that these should come within the ambit of a general authorisation scheme to ensure that appropriate conditions set out in the Directives may be applied.

*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.*

## 4.2 Structure of authorisations

There are several distinct sets of conditions that may be included within the framework of general authorisations and individual rights of use. These are:

- Conditions applicable to private electronic communications network and service operators
- Conditions applicable to public electronic communications network and service operators. It should be noted that the Framework Directive defines such networks and services in broad terms.
- Special conditions applicable to undertakings designated as having significant market power or deemed to have universal service obligations
- Conditions relevant to rights of use of spectrum
- Conditions relevant to rights of use of numbers.

The ODTR believes that these conditions are nested – for example the first set of conditions is a subset of later conditions. It therefore believes that a modular approach to general authorisations is appropriate. Various approaches can be proposed.

At one extreme there could be a single authorisation that includes all possible optional elements. An example is the current texts of Telecommunications Licences where the General Licence contains conditions in Parts 2 to 5 relating to conditions on Numbering and Quality of Service, SMP obligations in the Fixed Line Market, SMP obligations for other markets and conditions relating to Wireless in the Local Loop Licences. Not all of these conditions apply to all holders of General licences as their applicability relates to the individual situation of licence holders. However, where the conditions are appropriate, no further administrative act is necessary to give legal effect to these provisions as they are stated in the licence document upon issue.

Such an approach would have the benefit of a simple structure and would allow the appropriate conditions to apply automatically. However, in relation to conditions attached to rights of use, particularly for spectrum, a modular approach might be problematic. Technical conditions are by their nature specific to individual spectrum bands and a description of all current and future requirements would be needed if a comprehensive document were to be produced. This would be unwieldy to manage and is not favoured.

For these reasons the ODTR believes 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. In addition, such a scheme would allow the inclusion as a condition in individual rights of use, the performance of obligations which the operator committed to in a competitive or comparative bidding process. Similar considerations apply in the case of rights of use for specific numbers.

In the case of general conditions associated with rights of use for spectrum, the ODTR intends, in so far as is practicable, that these will be specified in a standard form with the details of the specific allocations varying from one operator to another. The granting of rights of use will be subject to applicants meeting conditions which will be set out in advance in a transparent manner. These conditions may vary depending on the frequency involved and/or the intended use of the spectrum. However, as provided for in the Directive, the Director reserves the right to restrict the granting of rights of use where this is necessary for the efficient use of spectrum and/or in pursuit of specific policy objectives. A similar approach will be taken in the case of right of use for numbers.

*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.*

### **4.3 Conditions relating to SMP Obligations**

Turning now to special conditions relating to SMP operators with respect to access and/or universal service, the ODTR believes that the modular approach of the General Telecommunications Licences has worked well. Accordingly the ODTR considers that such an approach would also be appropriate to general authorisations. With such a format, the special conditions would only become active once an undertaking has been designated according to the mechanisms described in the Framework Directive. The obligations to be placed on SMP operators in particular markets will be defined in accordance with the terms of the Access and the Universal Service Directives.

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

#### **4.4 Public and Private Networks and Services**

The ODTR believes that it is important to distinguish between public and private operators. There will be circumstance where a private network will need to be authorised. For example, a private mobile radio network operator would need access to spectrum and must therefore be authorised. However, there may be general authorisation conditions that, while necessary for public operators, would be inappropriate for private operators.

Two approaches are possible. A single modular authorisation could be developed. Some conditions would apply to private operators; others (more onerous) would apply to public operators. Alternatively a structure similar to the distinction between Basic and General Telecommunications Licences could be made. Operators would notify their intention to operate either under a private or public general authorisation. The ODTR favours this regime, as it would avoid the complexity of checking on a case-by-case basis whether operators are providing public services.

*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.*

#### **4.5 Conditions to be applied**

The provisions of Article 6 together with the Annexes (summarised in Paragraph 6 of Appendix 1) sets out the maximum conditions which may be contained in authorisations and rights of use. Subject to possible legislative provisions in this regard, the ODTR will consider the appropriateness of these conditions to decide whether some of them should not apply generally. The ODTR intends to have a further consultation on the format of general authorisations and rights of use. The conditions associated with these will be a major feature of such consultation. In the meantime, operators and end users might wish to review the conditions and provide preliminary views

#### 4.6 Administrative charges and fees

The ODTR is funded by a mixture of licence fees and the telecommunication levy on telecommunications turnover. Licence fees are charged for telecommunications, broadcasting transmission and other radio spectrum uses, including mobile telephony and radio links. Different fee rates apply to various licences. The levy is payable by holders of Basic and General Telecommunications Licences and is based on the relevant turnover of these licensees. Under the terms of the levy order any surplus which may be collected falls due to be refunded in equal proportion to their contributions to all licensees.

Until the shape of the new authorisations regime is more clearly defined, it is difficult to determine what changes will need to be made to the fee structure. The ODTR intends to consult more fully on the issue of charges and fees later in the process, before taking decisions. Nevertheless, we would be interested to hear of any general concerns which may exist at this stage. Fees and charges will need to be set in accordance with the requirements of the Directive but in interpreting these requirements the ODTR sees the following principles as appropriate:-

- The ODTR's costs in carrying out its statutory functions, including enforcement of conditions should be met by authorised operators.
- All authorised operators should contribute to the costs
- Operators with higher turn-over should expect to pay more
- Provision should be made for spectrum fees

At this point, the possibility of fees for numbers has not been reviewed, but as noted in previous papers on Numbering issues, the possibility has always been kept open.

It should be noted that the purpose of administrative charges is to meet the relevant regulatory costs and that this will be taken into account in any changes in the fee structure – The ODTR does not anticipate raising additional surplus revenue under the new regime.

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

#### 4.7 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?*

## 5 Submitting Comments

All comments are welcome, but it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

The consultation period will run from 6 March 2002 to 12 April 2002 during which time the Director welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, the ODTR will review the question of format and conditions of a scheme to replace licensing and publish a report in May 2002 on the consultation which will, *inter alia* summarise the responses to the consultation. In order to promote further openness and transparency the Director will publish the names of all respondents and make available for inspection responses to the consultation at her Offices.

The Director appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.

All responses to this consultation should be clearly marked “**Reference: Submission re 02/22**” and sent by post, facsimile or e-mail to:

Ms. Joana Cardoso,

Office of the Director of Telecommunications Regulation

FREEPOST

Irish Life Centre,

Abbey Street,

Dublin 1,

Ireland.

Ph: +353-1-8049600 Fax: +353-1-804 9671 Email: [cardosoj@odtr.ie](mailto:cardosoj@odtr.ie)

to arrive on or before 4 P.M. on 12 April 2002.

Office of the Director of Telecommunications Regulation

6 March 2002

## **APPENDIX 1 – Detailed description of Authorisations Directive**

### **1. Scope of Directive – Article 1**

#### **Electronic Communications Networks and Services**

The Directive applies to electronic communications networks and services. The Framework Directive uses the following definitions

“...network” means 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 networks. Networks used for radio and television broadcasting, and cable TV networks, irrespective of the type of information conveyed.

“...service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services, in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include 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

Recital 4 stresses that the Directive covers the authorisation of all electronic communications networks and services whether provided to the public or not.

Recital 5 clarifies the position on spectrum rights. The Directive only applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration. The self use of radio terminal equipment, based on the non-exclusive use of specific frequencies by a user and not related to an economic activity, such as use of a citizen’s band by radio amateurs does not fall within the definition and is therefore not covered by the Directive regarding right to use spectrum.

### **2. Definitions – Art 2**

#### **Definitions from Framework Directive**

The definitions set out in the Framework Directive apply. Additional definitions are:-

“general authorisation” – a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector

specific obligations that may apply to all or to specific types of electronic communications networks and services.

“harmful interference” means interference which endangers the functioning of a radionavigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radio communications service operating in accordance with the applicable Community or national regulations.

### **3. General Authorisation of networks and services – Art 3**

#### **Freedom to provide networks and services**

Member States must ensure the freedom to provide networks and services subject to the conditions set out in the Directive. Member States are prohibited from preventing an undertaking from providing networks or services except where necessary for the reasons set out in Article 46(1) of the Treaty.

#### **General Authorisations**

Without prejudice to obligations which may arise under the Access and Universal Service Directives or conditions relating to rights of use of frequency or numbers, the provision of networks or services may only be subject to a general authorisation. An undertaking may be required to submit a notification but is not required to obtain an explicit decision before exercising the rights, including the commencement of activity, which stem from an authorisation

#### **Notification**

The notification is for the purpose of allowing the NRA to keep a register or list of providers of networks and services. It shall be no more than a declaration by a legal or natural person of an intention to commence the provision of networks and services. The Directive gives as an example of information which might be required as: - company registration number, undertaking’s contact persons, undertaking's address, a short description of the network or service and an estimated date for starting the activity

### **4. Minimum Rights – Art 4**

#### **Rights of all authorised undertakings**

- Right to provide electronic communication networks and services, and
- Right to have an application for rights of way considered in accordance with the provisions of Art 11 of the Framework Directive – transparent, non-discriminatory, timely consideration and similar principles in attaching conditions.

#### **Rights of undertakings providing networks or services to the public**

In addition to above

- Right to negotiate interconnection and access from other providers of publicly available communications networks and services in accordance with the Access Directive.
- Right to be given an opportunity to be designated to provide different elements of a universal service in accordance with the Universal Service Directive.

## **5. Rights of use for spectrum and numbers – Art 5**

### **Minimise granting of Individual Rights**

Where possible, particularly where the risk of harmful interference is negligible, Member States shall not make the use of frequencies subject to individual rights but shall include the conditions for usage of such frequencies in the general authorisation

### **Granting Individual Rights**

Where individual rights are necessary, Member States shall grant such rights, upon request, to any undertaking providing networks or services under a general authorisation, subject to conditions and procedures specified in the Directive

Rights of use shall be granted through open, transparent and non-discriminatory procedures. This is without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of frequencies to radio and TV broadcast content services with a view to pursuing general interest objectives.

When granting rights of use, whether those rights can be transferred at the initiative of the right holder shall be specified. Art 9 of the Framework Directive sets out conditions for transfer of spectrum rights.

Where rights of use are granted for a limited period of time, the duration shall be appropriate for the service.

### **Timescales**

Decisions on rights of use shall be taken, communicated (to the applicant) and made public as soon as possible after the receipt of the complete application by the NRA:

- Within 3 weeks in the case of numbers that have been allocated for specific purposes in the national numbering plan.
- Within 6 weeks in the case of frequencies that have been allocated for specific purposes in the national frequency plan. (This is without prejudice to the requirements for international co-ordination)

If numbers of exceptional economic value are to be granted through a competitive process, the maximum timescale may be extended from 3 to 6 weeks

The number of rights of use for frequency shall not be limited except where necessary to ensure the efficient use of frequencies – See Article 7.

## **6. Conditions – Art 6 and Annex**

The general authorisation and rights of use may be subject to conditions but these are limited to conditions recorded in the Annex. Conditions which are attached must be objectively justified in relation to the network or service concerned and must be non-discriminatory, proportionate and transparent

The general authorisation shall only contain conditions which are specific for that sector and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation.

The conditions of the general authorisation shall not be duplicated in the conditions attached to the grant of rights of use for frequency or numbers.

If specific obligations are imposed under the provisions of the Access and Universal Services Directives, these shall be kept separate from the conditions of the general authorisation but the criteria and procedures for imposing specific obligations on individual undertakings shall be referred to in the general authorisation

### **General Authorisation**

The maximum conditions which may be attached are:

- Financial contribution to the funding of universal service – See Universal Service Directive
- Administrative charges - See Art 12
- Interoperability of services and interconnection of networks – See Access Directive
- Accessibility of numbers from the national numbering plan to end users including conditions – See Universal Service Directive
- Planning requirements, requirements and conditions linked to granting access to or use of public or private land and conditions linked to co-location and facility sharing in conformity with the Framework Directive and including any financial or technical guarantees necessary to ensure the proper execution of infrastructure works.
- “Must Carry” obligations – See Universal Service Directive
- Personal data and privacy protection specific to the electronic communications sector – See Data Protection Directive
- Consumer protection rules specific to the electronic communications sector – see Universal Service Directive
- Restrictions in relation to the transmission of illegal content in accordance with the provisions of the Electronic Commerce Directive (2000/31/EC) and restrictions in the transmission of harmful content in accordance with the provisions of the Television Without Frontiers Directive (89/552/EC amended by 97/36/EC)
- Information to be provided under the notification procedure and for other purposes – See Art 11
- Enabling of legal interception in accordance with Directive 95/46/EC and the Data Protection Directive
- Terms of use during major disasters to allow communication between emergency services and broadcasts to the general public
- Limitation of exposure to electromagnetic fields
- Access obligations – See Access Directive
- Maintenance of integrity of public communications networks, prevention of interference
- Security against unauthorised access – see Data Protection Directive
- Conditions for use of frequencies where the use is not subject to an individual right of use

- Measures designed to ensure compliance with standards and specifications – See Art 17 of Framework Directive.

### **Rights of use for radio frequencies**

- Designation of service, type of network or technology for frequency allocation. This includes the exclusive use of a frequency for the transmission of specific content or specific audio visual services
- Effective and efficient use of frequencies in accordance with Framework Directive
- Technical and operation conditions to avoid harmful interference and to limit exposure to electromagnetic fields (where these differ from those in the general authorisation)
- Maximum duration – see Art 5, subject to changes in the national frequency plan
- Transfer of rights by the rights holder and conditions for transfer – See Framework Directive
- Usage Fees – See Art 13
- Any commitments made in the course of a competitive selection process
- Obligations under international agreements

### **Rights of use for numbers**

- Designation of service for the number
- Effective and efficient use of numbers in conformity with Framework Directive
- Number portability requirements on conformity with Universal Service Directive
- Obligation to provide public directory subscriber information – Arts 5 and 25 of Universal Service Directive
- Maximum duration – see Art 5, subject to changes in the national numbering plan
- Transfer of rights by the rights holder and conditions for transfer – See Framework Directive
- Usage Fees – See Art 13
- Any commitments made in the course of a competitive selection process
- Obligations under international agreements.

### **7. Procedure for limiting the number of spectrum allocations – Art 7**

Consider need to benefit users and to facilitate development of competition

Engage in consultation process – Art 6 of Framework Directive

Review limitation at reasonable intervals

Selection criteria must be objective, transparent, non-discriminatory and proportionate and must give due weight to the objectives of Art 8 of the Framework Directive

Where competitive or comparative selection procedures to be used, the period for award can be extended to a maximum of no longer than eight months to ensure that procedures are fair, reasonable, open and transparent.

### **8. Harmonised assignment of radio frequencies – Art 8**

Where usage of frequencies have been harmonised, and where access conditions and procedures have been agreed and undertakings to use frequencies selected, Member States

shall grant rights of use in accordance with agreements without further conditions, additional criteria or procedures which would restrict, alter or delay the correct implementation of the common assignment

#### **9. Declaration to exercise rights to install facilities and rights of interconnection – Art 9**

Within 1 week of a request by an undertaking, NRAs shall issue a standard declaration confirming

- That the undertaking has submitted a notification under Art 3(2), and
- Detailing the circumstances under which any undertaking providing networks or services under a general authorisation has the right to apply for rights to install facilities, negotiate interconnection and/or obtain access or interconnection

NRAs may issue such declarations as an automatic reply to the notification under Art 3(2)

#### **10. Compliance – Art 10**

##### **Undertakings to provide information**

NRA's may require undertakings to provide information necessary to verify compliance with applicable conditions – See Art 11.

##### **Breach of condition**

Where an NRA detects a breach, it shall notify the undertaking a give a reasonable opportunity to remedy the breach or state its views within the following as appropriate

- One month after notification
- A shorter period agreed by the undertaking
- A shorter period stipulated by the NRA in case of repeated breaches
- A longer period decided by the NRA

##### **Failure to repair breach**

If the undertaking does not remedy the breach within the period, the relevant authority shall take appropriate and proportionate measures aimed at ensuring compliance. Member States may empower the relevant authorities to impose financial penalties where appropriate. The measures and the reasons shall be communicated to the undertaking within 1 week and shall stipulate a reasonable period for the undertaking to comply.

##### **Financial penalties for non-provision of information**

Member States may empower the relevant authorities to impose financial penalties where appropriate for failure to provide information required to verify compliance with the general authorisation or individual authorisation or the transparency requirements of the Access Directive

##### **Serious and repeated braches**

Where specific measures aimed at ensuring compliance have failed, the NRA may prevent an undertaking from continuing to provide networks and services or suspend or withdraw rights of use.

#### **Ability to take urgent measures**

Where the NRA has evidence of a breach that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of networks or services, it may take urgent interim measures to remedy the situation. The undertaking shall thereafter be given a reasonable opportunity to state its views and propose remedies.

#### **Right of appeal**

Undertakings have the right to appeal against any measure taken by the NRA in accordance with the procedure set out in Art 4 of the Framework Directive.

### **11. Information requirements – Art 11**

Without prejudice to information and reporting obligations under other national obligations, the NRA may only require undertaking to provide information that is proportionate and objectively justified for:

- Systematic or case-by-case verification of compliance with contribution to funding of universal service and payment of administrative charges and usage fees
- Case-by-case verification of compliance of all conditions where a complaint has been received, where the NRA has other reasons to believe that a condition is not complied with or in the case of an investigation by the NRA on its own initiative.
- Procedures for and assessment of requests for granting rights of use
- Publication of comparative overviews of quality and price for the benefit of consumers
- Clearly defined statistical purposes
- Market analysis for the purpose of the Access and Universal Service Directives.

Where undertakings are required to provide information, they shall be informed of the specific purpose for which the information is to be used.

### **12. Administrative Charges – Art 12**

#### **Calculation**

Any administrative charges imposed shall:

- Cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations imposed under the provisions of the Access and Universal Services Directives. These administrative costs may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection.
- Be imposed in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

## **Transparency**

The NRA shall publish a yearly overview of their administrative costs and of the total of charges collected. Appropriate adjustments shall be made in the light of differences between costs and charges

Recital 30 makes clear that the purpose of administrative charges is to finance the activities of the NRA in managing the authorisation system and for the granting of rights of use.

Accordingly charges should be limited to cover the actual administrative costs.

Transparency is required to allow undertakings to verify that administrative costs and charges are in balance.

Recital 31 states that administrative charges should not distort competition or create barriers for market entry. Instead of charges based on individual cost attributes, a turnover related charge would be an example of a fair, simple and transparent alternative. Where administrative charges are very low, flat rate charges or charges combining a flat rate basis with a turnover related element could be appropriate

### **13. Fees for rights of use – Art 13**

Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property

Recital 32 states that usage fees levied for the use of radio frequencies and numbers may be used as an instrument to ensure the optimal use of such resources. However such fees should not hinder the development of innovative services and competition in the market. Such fees may be used to finance activities of national regulatory authorities that cannot be covered by administrative charges.

Recital 32 also adds that where, in the context of a comparative selection procedure fees for rights of use for radio frequencies consist entirely or partly of a one-off amount, payment arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio frequencies..

### **14. Amendment of conditions – Art 14**

Rights, conditions and procedures concerning general authorisations, rights of use and rights to install facilities may only be amended in objectively justified cases and in a proportionate manner. Notice shall be given and interested parties, including users and consumers, shall be

allowed sufficient period to make their views known. Except in exceptional circumstances, not less than 4 weeks shall be given.

Member States shall not restrict or withdraw rights to install facilities before the expiry of the period for which they were granted except where justified. Where applicable, relevant national provisions regarding compensation for withdrawal of rights will apply.

### **15. Publication of information – Art 15**

All relevant information on rights, conditions, procedures, charges, fees and decisions concerning general authorisations and rights of use shall be published and kept up to date so as to provide easy access to that information for all interested parties.

Where information is held at different levels of government, in particular information on procedures and conditions on rights to install facilities, the NRA, shall make reasonable efforts to create a user friendly overview of all such information, in order to facilitate applications for rights to install facilities.

### **16. Review by the Commission – Art 16**

The Commission shall periodically review the functioning of national authorisation systems and the development of cross border service provision with the first review taking place within 3 years of the measures in the Directives coming into effect (i.e. summer 2006)

### **17. Existing authorisations – Art 17**

Existing authorisations shall be brought into line with the provisions of this Directive no later than 15 months after the entry into force of the Directive i.e. June 2003

Where to do so would reduce rights or extend obligations already in existence, a further 9 months may be allowed for adaptation. The Commission must be notified and the reasons stated.

Where the abolition of an existing condition regarding access would create excessive difficulties for undertakings which have benefited from mandated access and where it is not possible to negotiate new agreements on reasonable commercial terms before the implementation date, Member States may request the Commission to approve a temporary prolongation of the relevant condition. The request must be made before the end of the 15 month period and the Commission shall make its decision within 6 months after receipt of the request.

**18. Transposition – Art 18**

Member States shall adopt and publish the laws, regulations and administrative provisions required by the Directive within 15 months after the entry into force – i.e. June 2003

The measures shall be adopted on the 1<sup>st</sup> day after the 15 month period – i.e. a common commencement date throughout the EU

**19. Entry into force – Art 19**

The Directive shall enter into force on the day of publication in the Official Journal