



Commission for
Communications Regulation

Decision Notice – Decision on SMP Obligations

**Market Analysis – Wholesale Access and Call
Origination on Public Mobile Telephony
Networks**

Decision No:	D6/05
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1 Introduction – Response to Consultation

- 1.1 The new EU communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.¹ In addition, ComReg is required to conduct an analysis of the relevant markets in order to determine whether or not they are effectively competitive. ComReg is obliged to impose obligations which are justified and proportionate, where there is a finding of ineffective competition by virtue of the existence of one or more entities that have significant market power ('SMP') (i.e. a position equivalent to dominance in competition law terms) on a relevant market.
- 1.2 On 10 December 2004, ComReg commenced a six week national consultation on its draft decision in relation to proposed SMP obligations following a review of the market for Wholesale Access and Call Origination on Public Mobile Telephony Networks and ComReg's finding that O₂ and Vodafone jointly, had SMP. Interested parties were asked to submit comments by 16 January 2005 on the draft decision. ComReg received submissions from the respondents listed below.
 - '3';
 - *eircom*;
 - Meteor;
 - Wendy Hederman Solicitors;
 - O₂; and
 - Vodafone.
- 1.3 ComReg wishes to thank all of the respondents for their submissions. All submissions received by ComReg are available for inspection (with the exception of material supplied on a confidential basis) at ComReg's office. Having taken in to account all submissions, ComReg has set out in this document, its conclusions in relation to appropriate SMP obligations.
- 1.4 ComReg has concluded that the key problem in the market for Wholesale Access and Call Origination on Public Mobile Telephony Networks is the jointly held position of dominance by Vodafone and O₂ and the maintenance of this position of joint dominance by the constructive refusal, in the absence of regulatory pressure on the part of the coordinating undertakings O₂ and Vodafone, to grant wholesale access to wholesale airtime or to a more sophisticated form of access, such as a mobile virtual network operator ('MVNO'). The conclusions resulting from ComReg's market analysis and the finding of joint SMP on Vodafone and O₂ were notified to the EU Commission in accordance with the Framework Regulations. These notified measures were accepted by the EU Commission on 21 January 2005.

¹ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

1.5 Having regard to the EU Commission's acceptance of the notified measure and the designation of Vodafone and O₂ jointly with SMP in the market for Wholesale Mobile Access and call Origination², ComReg, having taken in to account the submissions of all respondents in relation to the draft decision on SMP obligations,³ is maintaining its position in relation to the SMP obligations which it believes are appropriate to impose.

Proposed SMP Obligations - Response to Consultation

1.6 ComReg proposes the following SMP obligations:

- *An obligation to provide network access following a reasonable request by an access seeker;*
- *An obligation of non-discrimination;*
- *An obligation of price control to be implemented by way of cost orientation;*
- *An obligation of Accounting Separation; and*
- *An obligation to implement appropriate cost accounting systems.*

1.7 ComReg proposes to allow SMP operators a period of time in which to comply with the cornerstone SMP obligations of the effective set of remedies, notably, mandatory access on non-discriminatory terms, through commercial negotiations in the first instance. Only if commercial negotiations fail or other circumstances warrant it, will ComReg direct SMP operators to implement supporting obligations relating to Accounting Separation, price control and cost orientation, including Cost Accounting Systems.

1.8 ComReg has examined in detail the submissions which it received in response to the consultation in relation to SMP obligations. ComReg would make a number of further comments in relation to these submissions, as set out below.

Process for intervention

1.9 A number of respondents commented on the distinction to be drawn between implementation and imposition of the SMP obligations proposed in the draft measure⁴. Some respondents expressed concern that the process of ComReg's intervention required clarity. The lack of clarity, it was suggested, would create a situation where both network operators and access seekers would be unsure as to when ComReg

² ComReg document D 05/14.

³ ComReg's preliminary views in relation to the SMP obligations was set out in the original Consultation Paper entitled *Market Analysis: Wholesale Mobile Access and Call Origination* ('Document No. 04/05') and response to consultation *Market Analysis: Wholesale Mobile Access and Call Origination* ('Document No. 04/118 and 04/118a'). The submissions of the respondents to the original consultation ('Document No. 04/05') were taken in to account by ComReg before publishing its draft decision and which has been subject to a further second national consultation.

⁴ See ComReg document 04/118 and 04/118a.

would intervene and this would result in regulatory uncertainty for both parties. It was further suggested that a lack of guidance regarding intervention had the potential to create a situation of ‘regulatory overhang’ i.e. a situation where parties may decide not to actively pursue a commercial outcome but await a regulatory solution via ComReg.

- 1.10 In that regard, some respondents suggested that the criteria or conditions which would be required to trigger a ComReg intervention were uncertain. One respondent suggested that there was an assumption in the draft measure that any intervention would be on the basis of an access provider behaving unreasonably, rather than an access seeker. This respondent further suggested that access seekers had, in its experience, failed to provide information in their requests on the nature of the access required and that ComReg has underestimated the resources required by access providers to conclude access agreements.
- 1.11 ComReg accepts the view of one respondent that the failure to conclude commercial agreements can be the result of unreasonable demands by access seekers as much as access providers. ComReg expects that negotiations regarding access, its terms and conditions, including price, must be carried out in good faith by all interested parties to the negotiations. In order to encourage parties in negotiations to behave reasonably, ComReg has indicated that it reserves the right, if intervention is warranted, to impose the terms and conditions offered by one or more party or in the alternative, a compromise, if it believes that such terms are reasonable.
- 1.12 ComReg would again emphasise its preference for commercially negotiated access on non-discriminatory terms. Incorporating time for commercial negotiations benefits both access seeker and access provider. ComReg notes the lack of retail access offerings by mobile network operators (‘MNOs’) despite the advantages and economic incentives for mobile operators. To restore proper incentives for MNOs to compete against each other, whilst also stimulating competition through alternative access seekers, commercial negotiations should be underpinned by the imposition of SMP obligations. ComReg wishes to make it clear, however, that it will allow SMP operators, as outlined, a period of time to meet their obligations regarding access on non-discriminatory terms through commercial negotiations in the first instance.
- 1.13 Where commercial negotiations are unlikely to result in the conclusion of access agreements on a timely basis, ComReg will intervene to ensure that such agreements are entered into and may proceed to implement the full range SMP obligations in support of any warranted intervention. It is not ComReg’s intention to act as a ‘surrogate party’ in commercial negotiations. If and when ComReg intervened, it would be on the basis that ComReg believed it could facilitate the conclusion of an access agreement. In that regard, ComReg would consider the extent to which negotiations had already taken place in good faith by all parties concerned. ComReg may intervene on its own initiative or, using dispute resolution procedures. It is envisaged that ComReg’s request to receive progress reports on a monthly basis from the SMP operators would help clarify any areas of dispute.

Proportionality

- 1.14 Certain respondents argued the SMP obligations are an unjustified regulatory intrusion. In particular, these respondents would argue that ComReg has not justified why national roaming by itself is insufficient to remedy the market failure. In that

regard, the proportionality of the SMP obligations proposed are in their view, questionable.

- 1.15 In ComReg's view, *ex ante* regulation in the market for Wholesale Access and Call Origination on Public Mobile Telephony Networks is appropriate and justified having regard to the conclusions of the market analysis and the competition problems identified therein. ComReg does not have the legal discretion to forbear from intervention once a finding of SMP has been determined. Quite simply, such an approach would be contrary to Irish and EU law.
- 1.16 In ComReg Document No. 04/05, ComReg proposed that the remedies most appropriate to apply in the market for Wholesale Access and Call Origination on Public Mobile Telephony Networks are wholesale mobile access remedies via national roaming and service provider access. In addition, ComReg outlined a number of supporting obligations which may also be appropriate to ensure access on non-discriminatory terms. ComReg would reiterate the views expressed in Document No. 04/05 that SMP obligations to address the identified and persistent market failure can be both network in orientation (mandating national roaming) and or service based competition (in terms of indirect access). While ComReg accepts that the national roaming agreement concluded between O₂ and Meteor in the intervening period will allow Meteor to compete more effectively, there is no evidence as yet to suggest that this development of itself will significantly alter the current dynamics of this market. ComReg is closely monitoring this market's development for any impact at the wholesale or retail level.
- 1.17 In light of the conclusions of the market analysis the remedies appropriate to apply to this market are those which have been subject to the various national consultations and which incorporate the final Decision below. ComReg believes its proposals in relation to SMP obligations are appropriate, proportionate and justified. The issue of proportionality is further considered taking into account the specific comments below made by respondents in relation to each of the SMP obligations.

Access

- 1.18 In relation to access conditions, certain respondents questioned what would be considered by ComReg as reasonable access. One respondent submits that the access SMP obligation is 'bespoke' in nature. Providing, what in its view is, a loose definition of access to include all reasonable requests from any access seeker is in one respondent's view, an inordinately disproportionate requirement to place on the respondent. It argues that the interaction of such a bespoke SMP obligation with a requirement for non-discrimination will, in the context of limited resources and capacity, create very real and practical difficulties for the access provider involved. One respondent indicated its view that the completion of commercial negotiations required a number of tasks, some of which take some time to conclude.
- 1.19 The cost of compliance and implementation has been considered and ComReg believes it has proposed a regime which enables the SMP operators to avoid certain costs of compliance and implementation by pursuing a market based solution. ComReg does not wish to fetter the discretion of any of the parties to the commercial negotiations as it believes these parties are in a better position to decide the nature of those agreements. Examples elsewhere in Europe attest to the possibility of

agreements being concluded by commercial negotiation. Incorporating time for commercial negotiations benefits both access seeker and access provider.

- 1.20 One respondent expressed its wish for greater clarity on when ComReg would intervene and what ComReg would consider as reasonable progress in commercial negotiations. In relation to the types of access requested, ComReg will take the utmost account of the Access Regulations⁵ when considering the validity of the type of access sought by access seekers from the SMP operators. Were ComReg to intervene it would consider the reasonableness of the access seekers requests and the defined services requested. ComReg would expect access seekers to provide as much information as possible when making requests for access. However, ComReg's request to receive progress reports on a monthly basis from the SMP operators aims to clarify any areas of dispute.
- 1.21 ComReg will exercise its powers to direct the provision of information (in this case in the form of reports) either on foot of the SMP designation or, the decision imposing SMP obligations consequential to it. ComReg proposes this in addition to, and without prejudice to, its powers to obtain information in the context of disputes notified to ComReg. ComReg has clear powers in relation to access, which it is expressly permitted to exercise on its own initiative.⁶ ComReg believes it is reasonable for it to make use of such reports in determining when successful commercial negotiation in respect of access has failed or that it has been overly delayed and that accordingly, intervention might be appropriate. ComReg will of course also have regard to other information before it, including information from access seekers.

Non-discrimination

- 1.22 A number of respondents required more clarity in relation to the SMP obligation of non-discrimination, particularly in relation to the issue of various types of indirect access and associated access prices. They argued that various types of access will attract varying degrees of associated costs which needs to be reflected when interpreting the non-discrimination obligation.
- 1.23 As outlined in the various consultations, ComReg recognises the possible spectrum of access and associated costs. Furthermore, where objectively justified circumstances exist, a SMP operator may offer different terms and conditions, including price, to different access seekers. Different types of access and costs will be reflected in any directions or decisions in relation to mandatory access on non-discriminatory terms.

SMP Obligations relating to price control and cost orientation

- 1.24 In relation to the proposed obligations in relation to price control and cost orientation, one respondent suggested that the mere prospect of regulatory intervention in relation to prices, ultimately leading to regulated prices, would be enough of an incentive on

⁵ S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

⁶ Regulation 6 of S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

the part of access seekers not to engage in meaningful negotiations with the access provider. In addition, what it sees as the ‘threat’ of potential regulation of commercially agreed prices could also be expected to affect an access provider’s ability to engage with access seekers on price.

- 1.25 While ComReg favours commercial negotiation of access agreements in the first instance, it would be wholly inconsistent with a finding of joint SMP (and the identified competition problems arising from that SMP) not to underpin any commercial negotiations with a regulatory framework that would permit ComReg to compel SMP operators, where commercial negotiations fail, to provide access on non-discriminatory terms. From the responses to the original consultation, it is clear to ComReg that the terms and conditions, including the access price, is one of the key elements in an access agreement.
- 1.26 In ComReg’s view, one respondent’s suggestions in relation to ‘regulatory overhang’ are purely speculative and not substantiated by any credible evidence. ComReg does not accept that commercial negotiation between interested parties will be unduly delayed by the access seeker in the hope of a regulated solution. As previously outlined, if intervention is warranted, ComReg may intervene in any number of ways. For example, ComReg may impose the terms and conditions offered by one or more party, or in the alternative a compromise, if it believes that such terms are reasonable. Negotiation allows the market itself to set appropriate terms and may reach more favourable terms for the parties to the negotiations. ComReg expects delays to access agreements to be avoided with opportunities existing to obtain first mover advantage or to conclude a price better than any regulated price.
- 1.27 One respondent argued that as different levels of access were being proposed, ComReg should be explicit that access will be priced at different levels to recognise this. Certain respondents questioned in the setting access prices, the application of retail minus, cost plus and the use of LRIC (long run incremental costs) because, they argued, they do not give an adequate return. One respondent rejected the use of benchmarks to set regulated prices.
- 1.28 ComReg accepts the view of some respondents that different types of access will result in different access prices. If required to intervene, ComReg will consider what prices are reasonable in the particular circumstances. In following any approach, it would be appropriate to include a reasonable return on capital employed in order not to unreasonably reduce investment incentives.
- 1.29 Certain respondents argued that pricing needs to be appropriate and acceptable to both SMP operators. ComReg does not concur with the sentiment that pricing has to be acceptable to both SMP operators in the event of regulatory intervention. To create appropriate incentives, ComReg has indicated that it may impose the terms and conditions offered by one or more party, or in the alternative a compromise, if it believes that such terms are reasonable. In the event that commercial negotiation fails and absent detailed accounting separation and cost accounting information, benchmarking is appropriate in the short to medium term.
- 1.30 Certain respondents also argued that ComReg would be required to consult further on cost accounting issues. ComReg has indicated that it intends to consult further on

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accounting separation and price control issues and looks forward to industry participants responding to those future consultations.

Annex - Decision

1 STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the SMP obligations set out herein, ComReg has taken account of, amongst other things, its functions under Regulation 6 (1) of the Access Regulations, has assessed the proportionality of the obligations imposed relative to the objectives of ComReg set out in section 12 of the Act of 2002⁷, has taken in to account the factors set out in Regulation 13 (4) of the Access Regulations, has taken the utmost account of the EU Commission's Recommendation⁸ and the SMP Guidelines and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister⁹. This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for wholesale access and call origination on public mobile telephony networks related to the consultation document entitled 'Market Analysis: Wholesale Mobile Access and Call Origination' ('Document No. 04/05') and the document entitled 'Response to Consultation Market Analysis: Wholesale Mobile Access and Call Origination' ('Document Nos. 04/118 and 04/118a').
- 1.2 This Decision is made pursuant to Regulation 27 of the Framework Regulations, Regulations 9, 11, 12, 13 and 14 of the Access Regulations, having regard to the SMP Designation¹⁰ and sections 10 and 12 of the Act of 2002.
- 1.3 In this Decision:
- 'Access'** shall have the same meaning as in the Access Regulations;
- 'Access Agreement'** means a legally binding agreement for Access between a SMP MNO and an Access Seeker and any amendment thereto;
- 'Access Seeker'** means an undertaking, seeking Access to the mobile network of a SMP MNO;
- 'MNO'** means a mobile network operator;

⁷ Communications Regulation Act, 2002.

⁸ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁹ Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

¹⁰ ComReg document entitled 'Decision - Designation of SMP Market Analysis. - Wholesale Access and Call Origination on Public Mobile Telephony Networks'. Decision No: D04/05. Document No. 05/14. Date: 22 February, 2005.

‘SMP’ means significant market power, as referred to in Regulation 25 of the Framework Regulations; and

‘SMP MNO’ means the mobile network operators designated as having SMP in the SMP Designation in accordance with Regulations 25-27 of the Framework Regulations.

2 SMP OBLIGATIONS

2.1 ComReg has decided to impose the SMP obligations on the SMP MNOs, as provided for by Regulations 11, 12, 13 and 14 of the Access Regulations. These SMP obligations are described further in the sections below.

3 OBLIGATION TO MEET REQUESTS FOR AND TO PROVIDE ACCESS

3.1 As provided for by Regulation 13 of the Access Regulations, a SMP MNO shall have an obligation to meet reasonable requests for Access to its mobile network by an Access Seeker, if such a request is made by an Access Seeker.

3.2 Without prejudice to the generality of Section 3.1 of this Decision, a SMP MNO shall not withdraw Access already granted to Access Seekers prior to the effective date of this Decision.

3.3 Any Access Agreement between a SMP MNO and a MNO concerning roaming services shall not be effective until such time as the Access Seeker has constructed its own mobile network to cover 20% of the population of Ireland.

3.4 As and from the effective date, the SMP MNOs shall submit to ComReg a comprehensive progress report on the status of commercial negotiations with respect to the negotiation of an Access Agreement, no later than one month following the effective date of this Decision and every two months thereafter. For the avoidance of doubt, ComReg may, for the purposes of further specifying requirements in relation to this obligation, issue direction(s) to SMP MNOs which specifying the issues that must be addressed by any or all progress reports and the level of detail to be set out therein.

3.5 A SMP MNO shall submit to ComReg a copy of any Access Agreement, no later than one week from the date that it has been entered in to.

3.6 Within 28 days of the effective date of this Decision, a SMP MNO shall submit to ComReg a copy of any Access Agreement entered in to prior to the effective date of this Decision.

4 OBLIGATION OF NON-DISCRIMINATION

4.1 The SMP MNOs shall have an obligation of non-discrimination, as provided for by Regulation 11 of the Access Regulations. Without prejudice to the generality of this obligation, each SMP MNO shall:

- I. Ensure that it applies equivalent conditions in equivalent circumstances to Access Seekers and other MNOs providing equivalent services.
- II. Ensure that it provides services and information to Access Seekers and other MNOs under the same conditions and of the same quality as the SMP MNO provides for its own services or those of its subsidiaries or partners.

5 OWN INITIATIVE ACTION BY COMREG OR AT REQUEST OF AN ACCESS SEEKER OR SMP MNO

- 5.1 If an Access Agreement is not entered in to pursuant Sections 3 and 4 of this Decision, ComReg may decide to exercise its powers, on its own initiative, where justified and as appropriate, or at the request of an Access Seeker seeking to conclude an Access Agreement, or a SMP MNO, under the Access Regulations, the Framework Regulations, the Authorisation Regulations and the Universal Service Regulations¹¹, as provided for by Regulation 6 (5) of the Access Regulations¹².
- 5.2 A SMP MNO and the Access Seeker concerned shall be informed by ComReg of any decision by ComReg referred to in Section 5.1 of this Decision within one week from the date of such a decision.
- 5.3 If ComReg decides to exercise its powers under the Access Regulations on its own initiative, it may, amongst other things, direct that the relevant SMP MNO and the Access Seeker conclude an Access Agreement within a specified period and ComReg may set the terms and conditions (including price) of any such Access Agreement.

6 DISPUTE RESOLUTION

- 6.1 Either an Access Seeker or a SMP MNO may, if there is a dispute arising between them regarding rights or obligations under this Decision, or the Access Regulations notify the existence of such a dispute to ComReg under Regulation 31 of the Framework Regulations and the dispute resolution procedures set out in ComReg Decision D18/03 shall apply¹³.

¹¹ S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

¹² ComReg will have regard to amongst other things, any progress reports submitted in accordance with Section 3 of this Decision or, the non-compliance of a SMP MNO with the obligation to submit such reports.

¹³ ComReg document entitled 'Response to Consultation & Decision Notice D18/03 - Dispute Resolution Procedures' Reference Number: 03/89.

7 ADDITIONAL OBLIGATIONS ON SMP MNOS

7.1 In addition to the SMP obligations imposed in Sections 5 and 6 of this Decision, the SMP MNOs shall have the SMP obligations set out below imposed on them. These SMP obligations shall become effective upon a Direction being issued by ComReg to a SMP MNO in respect of any one, or more, of the SMP obligations.

- I. Obligations in relation to cost recovery and price control i.e. cost orientation, as provided for by Regulation 14 of the Access Regulations. ComReg will consult further on the detailed requirements of and the practical implementation of these obligations.
- II. Obligations in relation to accounting separation, as provided for by Regulation 12 of the Access Regulations. ComReg will consult further on the detailed requirements of and the practical implementation of these obligations.
- III. Obligations in relation to cost accounting, as provided for by Regulation 14 of the Access Regulations. ComReg will consult further on the detailed requirements of and the practical implementation of these obligations.

8 EFFECTIVE DATE

8.1 This Decision is effective on the 24th day of March, 2005 and until further notice by ComReg.

Isolde Goggin
Chairperson
The Commission for Communications Regulation

Dated the 24 day of March 2005