



Commission for
Communications Regulation

Response to Consultation and Decision Notice

Market Analysis: International Leased Lines (Response to Consultation Document 04/120 and Decision Notice)

Decision No:	02/05
Document No:	05/06
Date:	25 01 2005

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1 Introduction

Objectives under the Communications Regulation Act, 2002

- 1.1 Section 12 of the Communications Regulation Act, 2002 outlines the objectives of ComReg in exercising its functions. In relation to the provision of electronic communications networks, electronic communications services and associated facilities these objectives are to:
- promote competition
 - contribute to the development of the internal market, and
 - promote the interests of users within the European Union.
- 1.2 This review is in line with the objectives set out in the Communications Regulation Act, 2002, in particular as ComReg seeks to promote competition amongst operators to ensure that end-users derive the maximum benefit in terms of price, choice and quality.

Regulatory Framework

- 1.3 Four sets of Regulations,¹ which transpose into Irish law four European Community directives on electronic communications networks and services,² entered into force in Ireland on 25 July 2003. The final element of the European electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, was transposed into Irish law on 6 November 2003.
- 1.4 Regulation 14(9) of the Universal Service Regulations and Article 20(3) of the Framework Regulations obliges ComReg specifically, in relation to retail markets, to undertake market analysis in accordance with the procedures specified in the Framework Regulations (under Regulation 27) to determine whether obligations should be maintained, amended or withdrawn.³ In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Markets Recommendation* and the SMP Guidelines.

¹ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), (“the Framework Regulations”); the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), (“the Authorisation Regulations”); the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), (“the Access Regulations”); the European Communities (European Communications) (Universal Service and Users’ Rights) Regulations 2003 (S.I. No. 308 of 2003), (“the Universal Service Regulations”).

² The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (“the Framework Directive”), OJ 2002 L 108/33, and four other Directives (collectively referred to as “the Specific Directives”), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, (“the Authorisation Directive”), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, (“the Access Directive”), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services, (“the Universal Service Directive”), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, (“the Privacy and Electronic Communications Directive”), OJ 2002 L 201/37.

³ Universal Service Directive Art 16 (3) and Framework Regulations 20 (3) and 27.

- 1.5 The new communications regulatory framework requires that ComReg define 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*⁴. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive⁵. Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there is one or more undertaking with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate⁶. Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market. If ComReg has previously imposed sector-specific regulatory obligations on undertakings in that relevant market, it must withdraw such obligations and may not impose new obligations on those undertaking(s)⁷.
- 1.6 ComReg has reviewed the retail market for the provision of international leased lines in order to assess if it is appropriate to maintain, withdraw or amend the existing regulation and considering the provisions of Article 16(3) of the *Universal Service Directive*. This was transposed into Irish law, by Regulation 14(9) of the *Universal Service Regulations* and Article 20(3) of the *Framework Regulations*.
- 1.7 ComReg has defined a market for international retail leased lines. This market consists of leased lines which offer capacity between two points, the ‘A end’ which is in Ireland and the ‘B end’ which is outside Ireland. The Commission’s *Recommendation on Relevant Markets* does not define a relevant market for international leased lines.
- 1.8 ComReg formed the view that there is a distinct relevant market in Ireland for retail international leased lines. ComReg also takes the view that the relevant geographic market for the provision of retail international leased lines is from the Republic of Ireland and is not segmented on a route by route basis.
- 1.9 ComReg then conducted an analysis of the relevant market to decide whether or not it is effectively competitive. ComReg used a wide range of criteria including market share, absence of potential competition, high barriers to entry and expansion, absence of or low countervailing buyer power, pricing and profitability and also conducted a prospective analysis of the relevant markets.
- 1.10 The assessment of the market concludes that:
- there is a separate product market for national and international leased lines;
 - retail international switched services and retail non-switched leased line services are not in the same market;
 - the market for international retail leased lines includes multinational Virtual Private Networks (VPNs);

4 Framework Regulation 26.

5 Framework Regulation 27.

6 Framework Regulation 27(4).

7 Framework Regulation 27(3).

- the market for international retail leased lines includes all routes coming out of Ireland;
 - there is one national market for retail international leased lines coming out of Ireland.
- 1.11 In the case of the market for retail international leased lines, ComReg concluded in the market analysis that the market was, effectively competitive. The assessment of this market was made not only on the basis of market share data, but also on other factors such as technological and infrastructure advantages; countervailing buyer power; and pricing. Furthermore, the examination of the market using the three criteria specified in the *Relevant Markets Recommendation*, shows that this is not a relevant market that should be subject to ex ante regulation.
- 1.12 ComReg then held a national consultation and considered all comments in coming to its preliminary conclusions on market definition, market analysis and remedies. As required by Regulation 20 of the *Framework Regulations*, the draft measure was then made accessible to the EU Commission and the national regulatory authorities in other member states of the European Community. ComReg considered all comments on the draft measure and notified the response to the Commission.
- 1.13 Article 16 of the Universal Service Directive,⁸ allows Member States to carry forward some existing obligations on retail markets until the market analyses have been completed and a determination is made whether to maintain, amend or withdraw any such obligations. These provisions were transposed into Irish law by Regulation 13 of the Universal Service Regulations⁹.
- 1.14 ComReg has defined a market comprising a national market for international retail leased lines out of the State, undifferentiated by bandwidth (the ‘Market’). ComReg has made a determination, in accordance with Regulation 27(2) of the Framework Regulations,¹⁰ that the Market is effectively competitive and, accordingly, that those obligations imposed on eircom, in relation to the Market, by Regulation 13 of the *Universal Service Regulations*, be withdrawn.

⁸ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive).

⁹ European Communities (Electronic Communications Network and Services) (Universal Service and Users’ Rights) Regulations 2003.

¹⁰ European Communities (Electronic Communications Network and Services (Framework) Regulations) 2003.

2 Response to Consultation on the Draft Decision

Introduction

- 2.1 Four responses were received in response to the consultation on the Draft Decision. These were from
- alto
 - Chorus
 - eircom
 - EsatBT
- 2.2 ComReg would like to thank the respondents for their submissions and has taken them into account when arriving at its conclusions
- 2.3 In this document ComReg sets out its Response to Consultation to the Draft Decision. It also finalises the Decision in relation to regulatory obligations to be removed from eircom. The Decision is set out as an Annex to this document and the obligations previously applicable to eircom in relation to the Market by virtue of Regulation 13 of the Universal Service Regulations will be withdrawn two weeks from the date of publication of this document.

Decision Notice Issues

Responses to consultation and ComReg's Position

- 2.4 There was broad agreement among respondents in relation to the contents of the draft Decision published in Draft form in ComReg Document 04/120 to remove regulatory obligations on the international leased line market. A number of the respondents also commented on the market definition and market analysis conclusions. These however were not subject to consultation and so ComReg will not respond to these views in this document. ComReg notes that these conclusions have already been subject to a national consultation (ComReg Document 04/60) and have been responded to and notified to the European Commission (ComReg Document 04/120). Therefore it is inappropriate to revisit these conclusions in this document.
- 2.5 Two respondents noted concern regarding the potential for eircom to leverage its market power in the National Market to gain advantage in the international market, or to bundle components of both together to evade obligations in the National Market section. One respondent further noted that the report from the National leased lines market should be published with time for consideration before the draft decision on International is finalised.
- 2.6 ComReg notes that the respondents have been given the opportunity to review the proposed wholesale obligations on the National Leased Line market as part of the national consultation (ComReg Document 04/59). ComReg further observes that the Response to Consultation and Draft Decision have also been published *Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National) (Document Number 05/03)*.

2.7 Specifically regarding the draft decision, one noted ComReg's conclusion in paragraph 3.52 that the international segment of leased lines begins at the *point at which capacity is no longer carried on infrastructure used also for national traffic*. This is an important demarcation point as it defines the point at which regulation is proposed to be lifted. This definition has been included in the Decision to avoid the decision from being interpreted more broadly than intended.

Conclusion

2.8 The Final Decision is set out as an Annex to this document and, with effect from two weeks of the date of this document, the obligations referred to in the Decision which were previously applicable to eircom in respect of the Market, by virtue of Regulation 13 of the *Universal Service Regulations*, will be withdrawn.

3 Statutory Powers Giving Rise to Decision

- 3.1 In making this Decision, the Commission for Communications Regulation ('ComReg') has, taken account, of amongst other things, its objectives under s.12 of the Communications Regulation Act 2002, has (where appropriate) complied with the Policy Directions made by the Minister for Communications¹¹ under section 13 of the Communications Regulation Act, 2002; and has also taken the utmost account of the EU Commission's Recommendation¹² and the Guidelines.¹³ This Decision is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for international leased lines, as part of the consultation process arising from the ComReg document entitled Market Analysis: International Leased Lines, dated 17 December 2004¹⁴. That document forms part of this Decision.
- 3.2 The measures to be taken pursuant to this Decision were made accessible to the European Commission and the national regulatory authorities in other Member States in accordance with Regulation 20 of the *Framework Regulations* and the Article 7 Recommendation,¹⁵ and were registered by the EU Commission on 20 December 2004. The European Commission, in correspondence to the Chairperson of ComReg dated 19 January 2005, notified ComReg of its acceptance of the measures.¹⁶ The Commission examined the draft measure and commented on remedies at the wholesale level. It was highlighted that ComReg's finding of competition on the market for international leased lines is based *inter alia*, on the availability of wholesale national leased lines at competitive conditions. The Commission noted that ComReg should consider possible concerns on the ability of eircom to leverage dominance from the wholesale national leased line markets into the retail international leased lines market when analysing the relevant wholesale markets and proposing remedies for those markets. ComReg has taken due account of this possibility when drafting wholesale national remedies. ComReg has published the Response to Consultation and Draft Decision to the national review – *Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National) Document Number 05/03*.
- 3.3 In Document 04/120, ComReg consulted upon its Draft Decision and asked if respondents believed that the draft text of the proposed decision was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible

¹¹ Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 26 March 2004.

¹² 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.

¹³ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

¹⁴ ComReg Document No. 04/120

¹⁵ Commission Recommendation of 23 July 2003 on notifications, time limits and consultation provided in Article 7 of Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services.

¹⁶ Case IE/2004/0128: Retail international leased lines in Ireland.

with regard to the specifics of the remedies proposed. Comments were considered and are considered as part in Section 2 of this document.

4 Obligations being withdrawn

All obligations applicable to eircom Limited by virtue of Regulation 13 of the *Universal Service Regulations*¹⁷, including Direction 3(a) and Direction 3(b), set out in ODTR Document No. 02/30¹⁸, which require eircom Limited:

- to continue to offer international broadband services only on the basis of published offerings; and
- with effect from 1 April 2002, to give a minimum of 24 hours notice of tariff rate changes in respect of international broadband services.

Effective Date

4.1 This Decision shall be effective from the date of its publication.

¹⁷ By virtue of Regulation 13 of the Universal Service Regulations, eircom Limited was required to continue to comply with any obligations applicable to it on 24 July 2003 relating to, inter alia, leased lines, imposed under the European Communities (Leased Lines) Regulations 1998 (the “Leased Lines Regulations”), notwithstanding the revocation of the Leased Lines Regulations. However, Regulation 27(3) of the Framework Regulations requires ComReg, where it concludes that a relevant market is effectively competitive, in cases where an undertaking has previously been designated as having significant market power in such market and specific obligations are applicable to such undertaking, to withdraw such obligation from the undertaking concerned. Accordingly, the obligations set out above are being withdrawn from eircom Limited with effect from 2 weeks from the date of the Direction set out at Appendix B.

¹⁸ ODTR Document No. 02/30 of 25 March 2002, “eircom’s Reference Interconnection Offer – Miscellaneous Issues – Response to Consultation Paper, Decision Notice and Further Consultation”

Annex – Decision

1 STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and removing the obligations set out herein, ComReg has had regard to the objectives of ComReg set out in section 12 of the Act of 2002,¹⁹ has taken the utmost account of the *Relevant Markets Recommendation*²⁰ and the *SMP Guidelines*²¹ and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.²² ComReg's Decision contained below is based on the market analysis and reasoning conducted by ComReg in relation to the market for international retail leased lines (Document No. 04/120) dated 17 December 2004. Document No. 04/120 forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 27 of the *Framework Regulations*²³, Regulation 9 of the *Access Regulations*, *Regulation 14* of the *Universal Service Regulations* and having regard to sections 10 and 12 of the Act of 2002.

2 MARKET DEFINITION

- 2.1 This Decision relates to the market for international retail leased lines and is a market which differs from any market defined in the *Relevant Markets Recommendation*. The market in this Decision is defined as the market for international retail leased lines out of the State, undifferentiated by bandwidth,²⁴ and is not a relevant market defined in accordance with Regulation 26 of the Framework Regulations.
- 2.2 The geographic market for the market for international retail leased lines is defined as the State.

¹⁹The Communications Regulation Act 2002.

²⁰EU 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.

²¹Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

²²Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

²³S.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.

²⁴The international segment of leased lines begins at the point at which capacity is no longer carried on infrastructure used also for national traffic.

3 FINDING THAT THE MARKET IS EFFECTIVELY COMPETITIVE

3.1 ComReg concludes that the market for international retail leased lines out of the State, undifferentiated by bandwidth is effectively competitive.

4 WITHDRAWAL OF OBLIGATIONS²⁵

4.1 ComReg concludes that the relevant market for international retail leased lines is effectively competitive and, accordingly, withdraws, with effect from two weeks from the date of this Decision, all obligations applicable to eircom Limited by virtue of Regulation 13 of the *Universal Service Regulations*²⁶, including Direction 3(a) and Direction 3(b), set out in ODTR Document No. 02/30²⁷, which require eircom Limited:

- to continue to offer international broadband services only on the basis of published offerings; and
- with effect from 1 April 2002, to give a minimum of 24 hours notice of tariff rate changes in respect of international broadband services.

Isolde Goggin
Chairperson
The Commission for Communications Regulation

Dated the 25th day of January 2005.

²⁵Where ComReg concludes that a relevant market is effectively competitive, in cases where an undertaking has previously been designated as having significant market power in such market and specific obligations are applicable to such undertaking, ComReg is required by Regulation 27(3) of the Framework Regulations, after giving reasonable notice to any parties which it considers to be affected by such withdrawal, withdraw such obligation from the undertaking concerned.

²⁶ By virtue of Regulation 13 of the Universal Service Regulations, eircom Limited was required to continue to comply with any obligations applicable to it on 24 July 2003 relating to, inter alia, leased lines, imposed under the European Communities (Leased Lines) Regulations 1998 (the “Leased Lines Regulations”), notwithstanding the revocation of the Leased Lines Regulations. However, Regulation 27(3) of the Framework Regulations requires ComReg, where it concludes that a relevant market is effectively competitive, in cases where an undertaking has previously been designated as having significant market power in such market and specific obligations are applicable to such undertaking, to withdraw such obligation from the undertaking concerned. Accordingly, the obligations set out above are being withdrawn from eircom Limited with effect from 2 weeks from the date of the Direction set out at Appendix B.

²⁷ ODTR Document No. 02/30 of 25 March 2002, “eircom’s Reference Interconnection Offer – Miscellaneous Issues – Response to Consultation Paper, Decision Notice and Further Consultation”