New Regulatory Framework for Electronic Communications infrastructure and associated services

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1. Introduction

The ODTR welcomes this further opportunity to comment on the European Commission's latest proposals on the future legislative framework as set out in the working documents on "A new framework for electronic communications infrastructure and associated services" (COM(2000)239).[1] The ODTR commends the Commission for the speed of its response in preparing these papers which provide a clear focus on a number of essential issues and deal with some concerns raised in our earlier response to the initial Commission's paper 'Towards a new Framework for Electronic Communications and associated services; The 1999 Communications Review'.

The ODTR supports the objectives and principles underlying the Commission Communication and working documents and believes that the documents seek to develop a new framework that enables the EU telecommunications industry to move forward as rapidly as possible. A vibrant competitive European telecommunications sector will be best positioned to provide the widest range and highest quality of service at the most competitive prices to the benefit of European consumers. The ODTR understands the balance that the Commission seeks to strike between setting a firm and clear legal basis for the regulatory framework so that the market players and regulators can respond and move the market forward rapidly, and providing the flexibility to respond to new issues that may arise in such a fast moving and dynamic sector.

In particular the ODTR welcomes the Commission's move to a single threshold for measuring market power. We believe that the use of a single appropriate threshold will provide the certainty and effectiveness that the Commission seeks to achieve by facilitating clarity in the market where players know when and how specific obligations may apply to them and regulators may act decisively and swiftly to ensure that those appropriate obligations are met.

The ODTR supports the views of the Independent Regulators Group (IRG) which have been submitted to the Commission separately. In this response the ODTR will concentrate, from the perspective of both the specific Irish and the wider EU telecommunications markets, on some of the key over-riding issues that arise across all working documents. However on some particular issues we have made very specific comments and in keeping with the Commission's preferred position, a suggested alternative text is proposed in such cases.

[1] The Commission working documents are:

- Common regulatory framework for electronic communications networks and services (ONPLIC00-02)
- Universal service and users' rights relating to electronic communications networks and services (ONPLIC00-05)
- The authorisation of electronic communications networks and services (ONPLIC00-04)
- Access to, and interconnection of, electronic communications networks and associated facilities (ONPLIC00-03)
- The processing of personal data and the protection of privacy in the electronic communications sector (ONPLIC00-06)

2. Goals of Regulation

The ultimate objective of a competitive European telecommunications sector should be to deliver the best to European consumers in price, choice and quality of services. To achieve this there needs to be rapid, targeted and effective implementation of the regulatory framework. The new framework must allow NRAs to intervene swiftly and fairly, where appropriate, to ensure that regulatory objectives are met. It is essential that the framework carefully balances this need for speedy effective implementation with the requirement for appropriate transparency and consultation processes.

The remainder of this paper addresses the principle issues in the Commission's proposals where the ODTR considers that these objectives will not be assisted and indeed may be hindered by the proposals.

3. Protection of Commercially Confidential Information

A key requirement for any NRA to carry out its functions is to have the most up-to-date information on the market, including information on costs and prices. The main source of this information is the operators themselves. The ODTR is concerned that the new proposals may significantly weaken the ability of NRAs to protect commercially confidential information and as a result impair in practice the ability to obtain information from operators who may fear publication of such information. This has the potential to greatly hinder the effectiveness of NRAs.

This Office suggests that the concerns of the Commission that there be transparency in the market can be met by an appropriate process of consultation and publication as discussed in section 4 below while at the same time ensuring that NRAs can protect commercially sensitive information that they receive from operators. For example, as part of its existing consultation process, the ODTR seeks and generally publishes opinions and positions from the industry, while at the same time protecting information that is commercially sensitive. This has lead to a great degree of openness in the market. In addition, the Office has required eircom to publish separated accounts which give a significant degree of transparency of costing information while protecting commercially sensitive information.

It is suggested that the Commission could meet its objective by placing a requirement on Member States to put in place adequate measures to ensure access to information by the public, except where the information relates to the commercial strategy of the party providing the information. NRAs should have the discretion to decide what constitutes commercial strategy. This text reflects that currently in place in the Interconnect Directive with respect to access to interconnect agreements and it is the view of this Office that its extension to other information should be more than sufficient address the Commission's concerns on this matter.

4. Consultation and transparency

4.1. Flexibility and speed

The ODTR strongly supports the need for openness and transparency the implementation of the regulatory framework. This is evidenced by the fact that this Office since its establishment has consulted widely on all regulatory developments. Such consultation has proven to be an extremely valuable tool as it helps to build confidence in the regime being developed as well as helping to inform the decision making of the Office. However the key to the success of this process to-date is related to the ability and entitlement of the Office to tailor the scope and speed of the process to the requirements of the market and the action concerned.

Within this process, the ODTR currently has the flexibility to undertake rapid actions where these are fully justified to facilitate competition. The adoption of a process along the lines of that currently set out in document ONPLIC00-02, the "Framework Document" would significantly reduce the effectiveness of this Office to carry out its functions. The proposals have the potential to be abused by one dissenting party to block regulatory action for a considerable period of time and could seriously damage the development of the European single market in telecommunications. In fact, the ODTR has encountered situations where demands for consultation would have resulted in significant delays, but this was avoided by the use of fast, flexible, targeted, but open consultation on key issues.

The principal concern of this Office about the Commission's proposals in section 6 of the Framework Document is that the new proposals do not take account of the requirements, or the stage of development, of the communications market in individual Member States. In Ireland the consultation process adopted to date has enable the ODTR to implement all EU requirements within a very short period of time, thereby allowing for increased competition in the sector. The consultation process adopted has been tailored to accommodate the issue under consideration as some regulatory developments are of a wider scope and of a more complex nature than others. The Commission's proposals have the potential to introduce significant delay into the regulatory process, as is set out in more detail in Annex A. Such potential delays in implementation of NRA's decisions will have the effect of delaying fuller competition to the detriment of the consumer.

It would appear that Section 6 of the Framework Document is based on the *Transparency Directive* 98/34/EC which was designed to preserve the integrity and smooth-functioning of the Single Market in areas of the economy where there is little or no harmonisation of legislation. This procedure is not appropriate because;

- There exists, and will exist, a strong framework for regulatory harmonisation in the communications sector, removing the requirement for such a mechanism, and
- The telecommunications sector is moving at a rapid pace and the mechanism proposed does not build in the necessary flexibility to allow this to happen.

In particular, the ODTR is of the view that the existing consultation processes adopted by various NRAs are adequate and take account of national circumstances while achieving the overall objective of transparency and openness. It is not clear what may be achieved by adopting an EU Directive on the topic. The ODTR suggests that at most, the Commission could require NRAs to publish their consultation procedures and that those procedures should be adequate to ensure the desired level of transparency and meet the stated objectives of the legislation. This will allow the process to be appropriately tailored while still meeting the harmonised objective of transparency.

4.2. Scope of the Consultation Process

A further concern with regard to this specific proposal centres on the issue of which regulatory decisions are to be subject to consultation. The ODTR is concerned that currently there is no distinction between new regulatory policies or decisions and decisions to enforce existing legal obligations. The ODTR is of the opinion that enforcement decisions need to be implemented immediately by the NRA in order to underpin fair competition and to protect consumers. The ODTR is strongly of the view that enforcement decisions must remain outside the scope of the section.

5. Harmonisation

The ODTR agrees with the objective of the Commission to promote a more harmonised and advanced level of competition in the EU market as a whole and agrees that this can be encouraged by greater harmonisation in the approach to the regulation of the communications market at a European level. It is important that this harmonisation is geared to the needs of the markets in the Member States, their size and maturity, and that NRAs have the flexibility in line with the principle of subsidiarity to deal with particular issues in their market, provided that they ensure that any measures are in line with the stated principles and objectives. The ODTR fully supports the need for a clear pan-European framework that provides legal certainty to all players. There is however a need to balance this objective with the need for effective regulation of the market at Member State level. With this in mind the ODTR has identified some areas in the Commission's proposals that cause some concern in this regard.

This response has already focused on the difficulties that the proposed consultation process may present and therefore will not comment on it further at this point. The proposals in relation to market analysis (Section 14 – Framework Working Document) for intervention to prevent abuses of market power will impact on NRAs making decisions with the speed necessary to protect the competitiveness of the market. Situations may well arise where an NRA needs to intervene in a market that is outside the scope of the Notice being proposed by the Commission but must first obtain the approval of the Commission. The delay caused by seeking such approval will mitigate against the newer entrants and weaker players. Indeed, given the pace with which this market is developing a delay of the length necessary to comply with the Commissions proposed requirements could be critical to the success or failure of an operator.

Further the proposals do not achieve the Commission's stated preference for the taking of decisions as close as possible to the market nor do they take adequate account of the expertise and local market knowledge of a NRA.

This Office welcomes the Commission's proposal concerning cross-border exchange of confidential information between NRAs and between NRAs and national competition authorities. Until now, NRAs have encountered real legal obstacles to maintaining a European perspective when trying to deal with trans-national issues. However we support the proposals submitted by the IRG with regard to improving upon the text as proposed by the Commission.

6. Sector-specific intervention in markets where competition is not effective

6.1. Overview

The ODTR agrees that sector-specific intervention in markets where competition is not effective should be limited to that necessary for the achievement of the regulatory objectives. Accordingly, since general competition law applies to the communications sector, interventions under sector-specific rules should be designed to deal with circumstances where problems cannot be solved successfully by use of competition law.

The use of a threshold to identify when and what obligations to apply in regulatory law is appropriate. In fact, this section of the Commission's proposals underpin the remainder of the entire regulatory regime. It is the identification of which operators are to be regulated that leads to the imposition of the relevant "tools" from the Commission's proposed toolkit as set out in the various working document. Due to pressure of time, the ODTR is confining its comments to the threshold mechanism for deciding when to apply regulation rather than the detailed measures set out in the Commission's proposals, although we would be pleased to provide further assistance to the Commission on the detailed regulatory measures in due course.

While the ODTR welcomes the Commission's decision to opt for a single threshold we still have a number of concerns regarding the proposals as currently set out in the Framework Working Document. These concerns can be set out briefly under the following headings:

- The use of the "dominance" test in accordance with Competition law is not appropriate to ex-ante regulation for various reasons set out below;
- The level of the threshold (at dominance according to competition law) is too high for the reasons set out below;
- There is a lack of legal certainty which arises due to the lack of a clear "ex-ante" threshold based on a transparent and identifiable rule of thumb such as a percentage market share, and finally,
- The Commission's proposed threshold is even higher and more onerous than "dominance", compounding the difficulties described in the previous headings.

These are dealt with in more detail below.

6.2. The use of the "dominance" test is inappropriate to ex-ante regulation

First, we remain unconvinced that a dominance-based test is the most appropriate one for use in sector-specific communications regulation. The dominance test was developed for general ex-post capture of particular abuses. There has to date been no explanation of why the economic analysis behind dominance implies that exactly the same test applies to the communications market. The dominance test is designed to meet the specific objectives of competition law, e.g. to establish when and how an abuse of a dominant position has taken place in order to take corrective proceedings against the abuser. The dominance test therefore represents a very high level of market power.

In practice, it also focuses on the current state of the market (as opposed to what it may be like in a year's time) and requires intensive analysis when it is applied. The result of a dominance test is a determination that a firm held (or did not hold) a dominant position in a particular market for particular services at a particular point in time related to a particular alleged abuse.

6.3. The level of the threshold is too high

Turning to the communications markets, there are several reasons why a separate test reflecting a lower level of market power would be more appropriate for communications regulation:

- ***ex ante* regulation -** Since the relevant directives require NRAs to apply *ex ante* regulation, any tests applied to firms need to facilitate continuous rather than "snapshot" assessment. The requirement of the NRA is to identify which firms have what level of market power over a period of time across a range of markets covering a variety of products and services in order to scrutinise an array of different behaviours. In addition, the periodic examination of the same group of firms over time provides the opportunity to gather information and adjust policies over time.

  The difficulty is that the complex vertical structure of many large telecoms firms and the profusion of related products, prices and pricing structures within the sector make quantitative market-definition tools difficult to apply. Because of this, a test designed for telecoms regulation needs to facilitate the use of the widest possible range of information about firms and markets if it is to meet the required objectives. The dominance test does not lend itself to this;

- **related markets -** The main telecoms operators tend to possess market power in an array of closely linked markets. In the competition-policy sphere, some argue that a holding made up of substantial positions in a range of related markets may confer more market power than the sum of its parts.[2] If this is so, the traditional single-market dominance test will sometimes understate the degree of market power possessed by a firm in such markets. This factor can either be dealt with explicitly or by setting a lower market-power threshold;

[2] For example, DGIV identified "portfolio effects" in its recent investigation of the Guinness/Grand Met merger.

- **technological change and new markets -** Some telecoms services are subject to extraordinarily fast growth and change (e.g. convergence). Where this is the case, there is increased risk that markets will be misdefined when a dominance test is applied, so it may be best to use a test that allows for a wider range of criteria. Also, in new markets with competing standards and network effects,[3] there is a danger that early abuse of market power could lead to lock-in and long-run damage to competition and consumer welfare. For this reason, too, a lower threshold than that implied by dominance might be appropriate; and

- **implications of a finding of "market power" -** It is important to consider what policy measures will be triggered by the market-power test we use. When competition authorities use a dominance test, the outcome may be prevention of a merger or a penalty for abuse of a dominant position. In contrast, telecoms NRAs are principally using the test to impose additional reporting requirements, cost-reflectivity conditions, pricing constraints and so on.

6.4. Lack of certainty as to designation of SMP

The Commission's proposals in this area introduce a high degree of uncertainty in the market. It is not clear to any player in the market when and how they might be designated as having significant power. Furthermore, it is not clear to new entrants that any incumbent or other large player may be designated as there seem to be many reasons that could be argued for excluding such players. This will lead to confusion and potentially inhibit entry by smaller players into the EU telecommunications market. The ODTR recommends the retention of a clear ex-ante presumption of SMP at a given threshold. The explicit inclusion of a percentage threshold will provider greater certainty and clarity.

6.5. Commission Proposal amounts to an even higher threshold than dominance

In addition to the problems associated with using dominance as the core of the test, others arise because the proposed test amounts to holding a dominant position *plus* having either derived past benefits from exclusive rights or controlling certain types of facilities. As set out in the IRG submission, this definition is likely to cause considerable practical difficulties. Moreover, even if dominance were the most appropriate basis for the test, there would still be fundamental conceptual problems with the proposed test:

The process of testing for possession of a dominant position includes an assessment of barriers to entry and control of bottleneck facilities. Including additional references adds little to the test but ads uncertainty by diverging unnecessarily from the dominance test employed in other markets.

[3] Network effects arise where all subscribers benefit from an additional subscriber joining a network. Where these effects are strong, they give networks or standards with large market shares a competitive advantage over smaller competitors. Network effects are a common feature in telecoms markets, and they can sometimes lead to a substantial barrier to entry.

Past control of special and exclusive rights has no bearing, in an economic sense, on the degree of market power currently exercised by a firm. The past existence of such rights may help explain how some firms gained their market power, but it does not make the market power of such firms any more or less significant than that held by firms that gained market power through other mechanisms (such as the scarcity of key resources or the presence of natural monopoly cost structures).

The effect of the Commission's proposed new definition of *Significant Market Power* will be that some competition problems in the sector will not be solved. There are significant gaps between the problems which are amenable to solution by competition law and those were sector-specific intervention is permitted. Member States, in particular those where liberalisation has been introduced more recently, may find that effective competition is not sufficiently established in a range of markets. Moving to an SMP threshold that reflects a high degree of market power could damage the prospects for extending competition in such cases. Oligopolistic markets could become entrenched, with the attendant problems of higher than competitive prices, lower than competitive service and quality and perennial competition law investigations to try to force real competition

7. Retail tariff regulation

The ODTR in general welcomes the Commission's proposals with respect to retail tariff regulation. However we share the concerns of the IRG with regard to the need for NRAs to be provided with the flexibility to respond, in the interest of consumers, to other market failures – not just those of SMP operators. Compulsory bundling of retail services or undue preference to certain groups of customers, are examples of the type of problems that consumers may be faced with in the future. The consumer is equally at risk from new entrants as from the incumbents in this regard. For this reason NRAs need to have the ability to address such problems should they arise.

8. Must Carry Obligations

The question of "open access" to networks will become more acute as almost every type of network becomes capable of carrying content. There are major competition issues raised as well as issues for broadcasters and other content providers. The issue goes broader to include 3G and WAP network operators and providers for example. More work is needed to develop key principles that would regulate the relationship between network providers and content providers. The core objective of such a regime should be the needs of consumers, but it should also balance the need for network providers to earn an appropriate return, the facilitation of innovative service development and the encouragement of diversity in content.

Some aspects of the Working Document on Universal Service and Users Rights cause particular concern. Firstly, section 26 of that document contains provisions relating to 'must-carry obligations' on organisations operating cable TV networks. The ODTR considers that the definition of networks upon which "must carry" obligations may be imposed may be too narrow. Ireland has a number of TV distribution services including cable network, MMDS (a wireless service) and in the future potentially DTT and DTH satellite services.

As presently drafted the provisions contained in this section would exempt all except cable networks from must carry obligations. This is not appropriate in an environment where multiple platforms are used to achieve universal coverage.

Secondly, the ODTR notes that the question of compensation for 'must carry' obligations is primarily an issue for broadcasting policy authorities and we do not propose to comment on it in detail. Insofar as the issue impacts on the ODTR's area of responsibilities of licensing transmission and retransmission systems, we hold the view that network operators should be treated equally in respect of the carriage of "must carry" services and in particular the same rules relating to payment for carriage should apply.

However, as currently drafted, the proposal is for "adequate compensation…taking into account the network capacity required". In the case of cable, where network capacity will not generally be a major issue, compensation might be low in absolute terms. However in the case of MMDS or DTT where capacity will be constrained by the availability of frequency, compensation could be significant. Furthermore, there is no guidance as to how is compensation might be calculated. A network operator might claim that the capacity devoted to the must carry channels would otherwise be utilised for pay services and that the compensation should include subscription income foregone.

This office has included in Annex B a suggested replacement text for Section 26 of this working document, which in our opinion more accurately provides for a more even-handed approach to the Commission's concerns.

9. Conclusion

The ODTR repeats its thanks for the opportunity to be involved in the discussion on the Commission's proposals. We regret that, due to time constraints it has not been possible to comment in more detail on specific aspects of all of the working documents but we would be pleased to provide the Commission with further comments during its work on the legislative framework.

Annex A

Practical Example of the Implications of the proposed Consultation and Transparency Mechanism (Section 6 of the Framework Document).

Accounting Separation: In the context of regulating the mobile telephony market, if an NRA were to consider that accounting separation by operators designated as having SMP would be an appropriate and effective regulatory tool to ensure transparency and prevent anti competitive practices, then under the new process proposed by the Commission, it could take up to five years to complete. This is particularly likely where it is in the interests of the affected party to delay the process.

Action	Time
Definition of appropriate market by the Commission	**Estimate Jan 2002 (when framework complete)**
Measurement of market by NRA – Decision on methodology to be used by NRA: It is necessary to make a decision on how to interpret the Commission's definition of the market, and to decide on a methodology to measure the market. This must be completed before a decision can be made on what data is required and in what format from market players.	***Minimum 11 months*** **Possibly 18 months** **Potentially longer**
• Engage consultants to prepare methodology (if necessary)	3 months
• Consult with competition authority	1 month
• Consult on method of measurement of market power - publish consultation document with proposed methodology for measuring SMP (2 months) - simultaneous referral to the Commission and other NRAs (1 month) - receive responses within "reasonable" time (1 month) - possible referral by Commission to HLCG – this is assumed to happen immediately after referral to the Commission, and given the requirement for the HLCG to meet it is expected that a "reasonable" time for comment would be longer than one month (3 months) - receive all comments back from all parties and prepare final decision on methodology for measuring SMP – final decision and publish this (2 months) - Potential delay caused under pars 3,4,5 of section 6 of working document (3 to 12 months)	Minimum 7 months, possibly 14 months
• If there is a challenge to the process in the national courts further delays could be encountered	Unknown

Collection of data for measurement of market (from all players): On the assumption that the methodology has been accepted and not challenged, it will be necessary to provide market players a minimum amount of time to gather the relevant data and report to NRAS. This should not be overly onerous.	**4 months**
Decide on designation of operators with SMP • Analyse data and prepare proposed designation • Consult on proposed designation of operators - publish proposed designation of named operators - receive responses to proposed decision within "reasonable" time (1 month) - simultaneous referral to the Commission and other NRAs (1 month) - possible referral by Commission to HLCG – this is assumed to happen immediately after referral to the Commission, and given the requirement for the HLCG to meet it is expected that a "reasonable" time for comment would be longer than one month (3 months) - receive all comments back from all parties and prepare final decision on designation – finalise decision and publish this (2 months) - Potential delay caused under pars 3,4,5 of section 6 of working document (3 to 12 months) • If there is a challenge to the process in the national courts further delays could be encountered	**Minimum 9 months,** **Possibly 19 months** **Potentially longer** 2 months Minimum 6 months, possibly 12 months Unknown
Organisation designated now must commence on the preparation of separated accounts. Experience shows that this required time for designing systems, capturing information and preparing accounts is a minimum of 18months.	**18 months**
It is possible that further regulatory decisions might be required at this stage for example on the form and nature of the accounts, the extent of publication etc. A full consultation on any one of these issues could take at a minimum between 6 and 12 months based on the process set out above and the requirement for consultation. It is likely to be considerably longer.	
Total	• **Minimum 42 months** • **More likely 59 months** • **Potentially longer**

Annex B

Proposal in relation to revised text for Section 26 of the working Document on Universal Service and Users Rights

Definitions: Suggested amendments

Delete reference to cable TV networks and replace with:

> "programme services distribution system" means any system authorised for the distribution of radio or television signals, whether encoded or not, intended for general or approved reception by members of the public.

Also define "public service broadcasting remit" by specifying mandatory elements to be in national law. e.g. diversity, universal service, etc

Section 26: Suggested re-draft

"(1) Member States may impose "must carry" obligations on organisations operating programme services distribution systems, for the transmission of specified broadcasts, in pursuit of a public service broadcasting remit as conferred, defined and organised in relevant national law.

"(2) Member States may, on the basis of subscriber numbers, system capacity and spectrum efficiency, differentiate between different types or classes of programme services distribution systems when imposing "must carry" obligations.

"(3) Member States shall ensure that system operators may receive adequate payments for the transmission of 'must-carry' channels on a basis that is proportional and transparent and which does not distort competition either in the provision of programme services distribution or communication services.

"(4) In the cases referred to in paragraph 1, or in cases where rights of use of spectrum granted to a system operator are linked to conditions concerning the transmission of specified radio and television broadcasts, Member States shall ensure that the obligations are proportional and transparent and do not distort competition either in the provision of radio and television broadcasting or in the provision of communications networks."