Response to Consultation from the ODTR on the European Commission's Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services

"Draft Guidelines on Market Analysis and the Calculation of SMP" under Article 14 of the proposed Directive on a common regulatory framework for electronic communications networks and services

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Introduction

The Office of the Director of Telecommunications Regulations (ODTR) welcomes the European Commission´s Draft Guidelines on market analysis and the calculation of significant market power.[1] The provision of a document of this nature should provide for consistency in the interpretation and the approach to implementation by NRA's with respect to article 14 of the regulatory framework. The ODTR would also commend the document and would like to thank the Commission for affording the office the opportunity to comment on and hopefully contribute to the further enhancement of the document. While we fully support the IRG response (to which we have contributed) to the consultation, this paper presents the crux of the ODTR's independent concerns.

This document has been divided into 3 sections. The first presents the ODTR's views generally without specific reference to any sections in the guidelines. The second part refers to comments the office has in relation to particular paragraphs and the third part draws conclusions.

1. General Comments

1.1 Dominance ex post v ex ante

Firstly, the ODTR continues to harbour serious reservations about the alignment of Significant Market Power, a notion developed to facilitate sector specific *ex ante* regulation, with the concept of dominance as developed in an *ex post* context via competition law. While we appreciate the Commission's argument that there is a well established jurisprudence surrounding the issue of single dominance, *ex ante* regulation requires not only an assessment of prevailing market conditions, but more importantly prospective analyses on these relevant markets. The case law developed on dominance in competition law, meanwhile, has evolved by its very nature in an *ex post* context.

Consequently we are concerned that an *ex ante* designation of SMP on the basis of transposing the concept of dominance as developed in an *ex post* environment, might lead to legal uncertainty. The Commission's experience of competition law must show that dominant undertakings, even in highly stable markets, often contest the market definition in order to avoid liability. There is no reason to suppose that telecommunications operators, who operate in markets which will be more difficult to assess, will not behave in a similar way. Such uncertainty might only serve to prompt legal challenges to designation and while the courts may ultimately decide the question, effective sector specific regulation could be thwarted for years while these issues are debated through the courts.

1.2 Dominance – 40% Threshold

Coupled to our reservations about the complexities associated with the concept of dominance being applied in an ex ante context, is our serious concern about the market share threshold of 40% which paragraph 67 of the Guidelines presents as a minimum requirement for dominance (in passing, it should be said that 40% is at the low end of the scale: as the Guidelines point out, the Court of Justice has held that a

[1] Hereinafter: SMP-guidelines or Draft guidelines

market share of 50% only gives rises to a presumption of dominance which can be rebutted). In the ODTR's view even a 40% threshold for presuming single firm SMP, as implied in paragraph 67 of the guidelines, is too high given that we are in the early stages of liberalisation in Ireland. Firms may be released from regulatory controls while they still possess the ability to damage the development of effective competition. In oligopolistic markets, e.g. mobile telephony, there may never be more than a small number of firms operating due to high barriers to entry (because of spectrum contraints), yet it may be quite reasonable to envisage a situation where no party has a greater than 40% market share (e.g. three players with one-third each). If there are challenges to a joint dominance SMP designation (which, as outlined below we believe is a distinct probability), this could preclude any regulation in a market where competition needs to be nurtured in its early stages of development.

Given that the Commission has expressed a view that market share should only be considered as one of the criteria in an SMP/effective competition investigation, we do not believe that it should be presented as the overriding factor as is implicit in the text of paragraph 67.

1.3 Joint Dominance

The ODTR's concerns about legal uncertainty are even more prevalent with respect to regulating where the notion the joint dominance (JD) applies. The ODTR's fears in this regard have been further exacerbated by a recent judgement given in the Irish High Court on the issue of joint dominance[2]. A regulator applying the Guidelines to the facts of the case might have concluded that there was joint dominance, but the court seems to have reached a different conclusion. This underlines how complex the concept of joint dominance is: as outlined below, we feel the guidelines should illustrate practical situations, so as to give regulators the certainty that their decisions will not be open to challenge on the basis of some legal argument not covered in the guidelines.

Furthermore, given that the judgement clearly distinguished between the concept of "conscious parallelism" and the concept of "acting as a unit" (the latter qualified as the requirement for JD), suggests that conclusive evidence of explicit collusion would have been required before attaining judgement that there was *prima facie* evidence of JD. As the Commission can appreciate, it will be very difficult to prove that explicit collusion exists in any market and at any rate it is highly unlikely to occur in the majority of cases. Therefore, we would urge the Commission to provide clear practical examples in the guidelines as to cases where an NRA might confidently designate SMP on the basis of Joint Dominance where tacit collusion (or "conscious parallelism") might be in evidence.

A further reservation we would have in relation to JD pertains to the fact that JD has primarily been explored in the context of merger control. In a SMP joint dominance designation NRAs will be obliged to firstly, define the relevant markets and in the event that the market is not effectively competitive, they must then define which operators should be designated as having joint dominance SMP. This process differs greatly from that of merger cases where only the market needs to be defined. In direct contrast to an SMP investigation, operators willingly provide the relevant information

[2] Meridian Communications Limited and Cellular Three Telecommmunications Limited v Eircell Limited

in merger control, as they have an incentive for their transaction to be approved as quickly as possible. Operators who fear being designated with SMP have the opposite incentive: they may try to delay providing information or provide as little as possible. Effective regulation could be severely restricted (even without the legal uncertainty) as a consequence of operators' unwillingness/indifference in providing information promptly.

1.4 Effective Competition v SMP

While the Commission has clearly indicated that insofar as the guidelines are concerned, effective competition = absence of SMP (and vice versa), we would urge the Commission to provide for greater clarity on this issue in the guidelines themselves. The consequence of there being potentially two tests which NRAs must perform (one for effective competition and one for SMP) could impose undue demands on NRA's in terms of resources and burden of proof, not least because the guidelines neither define effective competition nor do they detail investigative procedures for testing its existence or not.

2. Specific Comments in relation to the Guidelines

Paragraph 8

"*NRAs must decide which of the specific obligations should be imposed as a measure to* ***substitute*** *for effective competition*"

We believe that in many cases regulation **facilitates** rather than substitutes for effective competition and this should be recognised in the guidelines.

Paragraph 56

"…In the market for fixed telephony retail services, the Commission has distinguished various services: the initial connection, the monthly rental…."

Concerning the market for fixed telephony services, we fail to find the distinction between access and monthly rental and we would ask that the Commission to at least recognise that such a distinction may not be appropriate for all member states.

Paragraph 59 & fn 43 and paragraph 60

Para 59 – "*The Commission has decided that with regard to the "access" market, the latter comprises all types of infrastructure that can be used for the provision of a given service* – referred to footnote 43

Fn 43 – *"….the provision of basic voice services to consumers, the relevant infrastructure market included not only the traditional copper network of BT but also the cable networks of the cable operators, which were capable of providing basic telephony services, and possibly wireless fixed networks."*

Para 60 - *….although alternatives to the PSTN for providing high speed communications services to residential consumers exists (fibre optic networks, wireless local loop or upgradable TV networks), none of these alternatives may be considered as a substitute to the fixed local loop infrastructure*"

The ODTR would ask the Commission to clarify its view with respect to the "access" market given the conflicting positions outlined above. The ODTR would tend towards the view expressed in paragraph 59 but again, we would ask the Commission to recognise that conditions may vary in different member states.

Paragraph 67
"*In the Commission's decision-making practice, dominance concerns normally arise only in the case of undertakings with market shares of over 40%"*
Please refer to section 1.2 above. Also, the wording "*normally arise only*" is contradictory and we would suggest that the word "*only*" be deleted from this sentence.

Also concerning Paragraph 67 & fn 57
Para – 67 "*….An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, only if its market has remained stable over time*" – referred to footnote.
Fn 57 – "*In case Hoffman-LaRoche v Commission…..In dynamic markets characterised by technological changes, any period less than 3 years might be considered too short a period to assess the existence of a dominant position*"
Again we have concerns about the language used in Paragraph 67. To suggest that an undertaking can '*only'* have SMP if its market share has remained stable over time is completely at odds with a regulator's obligation to analyse on the basis of 'prospective assessment' (as, is rightly recognised by the Commission in Paragraph 13 and 62). In addition, in dynamic markets such as the telecommunications market, having to establish dominance (even on a prospective basis) over a 3 years could prove very restrictive. The ODTR would suggest that given that SMP reviews will probably be conducted on an annual basis, the most appropriate period for consideration of a dominant position would be a corresponding period of 12 months.

3. Conclusion
The ODTR would strongly reiterate its position that the proposed and collective SMP tests lack certainty and simplicity. The old SMP test, whatever its theoretical shortcomings, performed well on these measures. The ODTR contends that it is possible to bring in consistency with economic principles without harnessing the notion of SMP to legal definitions developed for quite different purposes under competition law. The legal uncertainty pertaining to collective SMP based on joint dominance seems likely to end in lengthy court challenges without the same degree of certainty as to what the outcomes will be. We believe that consumer interest will not be served if the definition of SMP is so difficult to apply and the case so difficult to sustain, that NRAs are coerced into over-cautiousness in using it, to the detriment of rapid liberalisation.

Again we would like to thank the Commission for providing the ODTR with the platform to present its concerns with respect to the guidelines and we hope the Commission will give serious consideration to the issues highlighted above.