Regulatory Remedies, Appeals and Penalties

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1 Introduction

A new EU regulatory framework for the electronic communications sector was introduced in July 2003 and has now been fully implemented in Ireland[1]. This framework is based on the primacy of technological neutrality and competition law principles. It consists of five Directives and one Decision: the Framework Directive (2002/21/EC), the Authorisation Directive (2002/20/EC), the Universal Service Directive (2002/22EC), the Access and Interconnection Directive (2002/19/EC), the Data Protection Directive (2002/58/EC) and Decision No 676/2002/EC on a regulatory framework for radio spectrum policy in the European Community. The relevant national Regulations transposing the Directives create a framework of obligations and remedies, an appeals body and enforcement mechanisms for the communications sector.

The framework draws heavily on competition law principles. Certain measures, mainly those concerned with consumers' rights, apply to all operators in a sector. Others, aimed at promoting competition or at preventing the exercise of market power to the detriment of consumers, apply only to operators which have been designated as possessing significant market power (SMP) on a particular market, defined according to competition law principles. Significant market power is defined in the framework as equivalent to dominance, either individual or collective. National regulatory authorities (NRAs) are required to review markets, starting with a list of 18 pre-defined by the Commission, in order to determine whether or not they are "effectively competitive", a state defined as the absence of dominance. If the market is not effectively competitive, appropriate remedies must be imposed, from a pre-defined set.

A market review by an NRA, then, consists of three phases: market definition, market analysis and the imposition (if appropriate) of remedies. Since the framework became effective in July 2003, there has been a wide divergence amongst Member States in the speed with which it has been implemented. Ireland was one of the first to transpose, and is among the leading group of NRAs in terms of completing the market analyses.

This paper is concerned with remedies and with what happens after their imposition; with the procedures set out, both at EU level and nationally, for appeals from regulatory decisions; and with penalties for non-compliance. It considers, in each case, the legal situation and the experience to date, and makes recommendations for further change. This is timely as the European Commission has begun its formal review of the Framework, and expects to issue consultations next year on the list of relevant markets and on the legal framework itself.

[1] The new EU Regulatory Electronic Communications package was transposed on July 25th 2003 in an attempt to harmonise and streamline regulation of the communications sector in the EU.

2 Remedies

2.1 Legal situation.

Where an NRA has concluded that a market is effectively competitive, it must withdraw existing obligations and may not impose new ones. Where it concludes that a market is not effectively competitive, it can maintain existing obligations and/or impose new ones. The eighteen markets identified by the Commission in its Recommendation on Relevant Markets cover two levels of the industry – the upstream or wholesale level, where operators purchase inputs from other operators in order to create services which they sell to end users, and the downstream or retail level.

The obligations which can be imposed vary according to the market concerned. In every case, however, they must be based on the nature of the problem identified, proportionate and justified in the light of the objectives of the Framework. On a wholesale market, they include obligations to provide access to, and use of, specific network facilities; transparency; non-discrimination; accounting separation; and price control and cost accounting. At the retail level, regulatory obligations should only be imposed where relevant wholesale measures would fail to achieve the objective of ensuring effective competition and the public interest.

Retail remedies may include requirements that the undertaking with SMP does not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services. National regulatory authorities may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, measure to orient tariffs towards costs or prices on comparable markets, “in order to protect end-user interests while promoting effective competition.” A reasonable rule of thumb would be to regard remedies imposed at the wholesale level as aimed at promoting competition, and remedies imposed at the retail level as aimed at curbing both anti-competitive behaviour and direct exploitation of market power at the expense of consumers.

The term “remedies” is used in this paper to mean obligations imposed on an undertaking or undertakings to remedy a competition problem identified in a market analysis. The regulatory framework also creates obligations on all undertakings providing electronic communications services, regardless of size or scope. These obligations, mainly arising from the Universal Service Directive, deal with issues such as the consumer’s right to a contract and to transparent and easily available information on tariffs. A third class of obligation arises where an undertaking is designated as having a Universal Service obligation, in which case it must meet obligations such as fulfilling reasonable requests for (narrowband) access and providing functional Internet access. This paper, however, is concerned only with “remedies” as defined above.

The remedies set out in the Directives for both wholesale and retail levels have been transposed into Irish law via statutory instrument, with no apparent divergences.

2.2 Experience to date

One of the peculiarities of the Framework is that, while it provides ample guidance for NRAs on market definition and market analysis – in the form of the Recommendation on Relevant Markets, its accompanying Explanatory Memorandum and the Commission's Guidelines on Market Analysis and the Assessment of Significant Market Power (2002/C 165/03) - there is little formal guidance on the imposition of remedies. Instead, the European Regulators' Group (ERG) has produced a set of guidelines ("the Helsinki document") which it recommends that individual regulators use when considering remedies in a market where there is SMP. Part of the consultative process laid down in the Framework is that NRAs must notify their market analyses (market definition, SMP assessment and remedies) to the Commission and to other NRAs before finalising their decisions. While the Commission has the power to require the NRA to withdraw a market definition or a finding of SMP with which it disagrees, it can only make comments on proposed remedies. It could be argued, however, that if the Commission were to make an adverse comment on a proposed remedy, this would provide good grounds for appeal to the affected company, so the likelihood is that the NRA would re-consider. Given the incomplete state of implementation of the framework, however, it is too early to judge what the effects of such comments might be.

Crafting remedies which are proportionate, based on the nature of the problem identified and justified in the light of the objective of the Framework is a complex task. To take an example, one of the objectives is the encouragement of "efficient investment". Incumbents will use this to argue against any access obligation, arguing that requiring them to open up their networks to competitors will discourage them from investing. New entrants will argue that they need regulated access to the incumbent's network at various stages in order to build scale so they can invest in their own network elements. One practical manifestation of this is that different pricing mechanisms are applied to different wholesale markets, depending on the level of investment required. For instance, two of the Commission's recommended markets are "wholesale broadband access" and "unbundled local loops". Both markets concern wholesale inputs which alternative operators use to provide broadband services to retail customers. Bitstream involves essentially reselling the incumbent's broadband service, with little or no value added. Local loop unbundling requires considerable investment by the alternative operator, but allows them to customise products and provide different solutions to the incumbent's. ComReg has recognised these differences by pricing unbundled local loops on a "cost-orientated" basis, where the incumbent recovers its network costs plus the cost of capital, and pricing Bitstream access on a "retail-minus" basis, i.e. at a discount off the consumer price. Greater margins are available to alternative operators who use LLU, but they require more investment. This illustrates the type of complex decision-making and trade-offs involved in developing remedies.

2.3 Recommendations

Given that many Member States have yet to complete their market reviews and impose remedies, and that those remedies would have to be in place for some time in order for their effects to be felt, it is probably too early to draw conclusions. A complicating factor is that many decisions regarding SMP and remedies have been appealed across Europe, and this will lead to further delays in assessing the effects of remedies.

3. Appeals

3.1 Legal situation

The new Regulatory Framework, namely Article 4 of the Framework Directive, requires Member States to have in place an effective appeal mechanism and provides some guidance on what constitutes such a mechanism. According to Article 4, the following factors must be considered:

- Any user or undertaking providing electronic communications networks and/or services affected by a decision of a National Regulatory Authority (NRA) must have the right to appeal against the decision
- The appeal body has to be independent of parties involved
- It has to possess the appropriate expertise to carry out its functions
- Pending the outcome of an appeal the NRA decision shall stand, unless the appeal body decides otherwise

Any appeal provision must be compatible with Bunreacht na hÉireann, with European Law particularly the Directives applicable to the Communications sector, and with Ireland's obligations under the European Convention of Human Rights. Various provisions in Bunreacht na hÉireann must be noted in addressing the issue of appeals. A key provision in this regard is Article 34.1 which states that: "justice shall be administered in courts established by law by judges appointed in the manner provided by in this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public." .

The European Convention on Human Rights (ECHR) came into force in domestic law by virtue of the ECHR Act, 2003, which was commenced from December 31st 2003. Of particular significance is Article 6(1) of the Convention. This contains a range of procedural guarantees in relation to determination of an individual's civil rights and obligations. Since ratification of the ECHR in December 2003, regulators must satisfy the range of procedural guarantees contained in Article 6(1) when making regulatory decisions. It is worth noting that many of the Article 6(1) procedural guarantees, such as the right to a hearing, are already part of our law and practice by virtue of the application of the rules of natural justice and constitutional justice. There has been no ruling to

determine whether judicial review in Ireland satisfies these requirements but it should be noted that judicial review is not an appeal on the merits.

ComReg decisions are appealable to the Electronic Communications Appeals Panel (ECAP) which can review ComReg's decision to see if it has committed a significant error or errors which have a bearing on the conclusion reached. It may annul in whole or in part or confirm a decision, or amend it in respect of technical defects only. The Regulations state that the Appeal Panel is to consist of three persons, at least one of whom shall be a practising barrister or solicitor with at least seven years' experience, and that the others shall have such commercial, technical, economic, regulatory or finanical experience as the Minister considers appropriate. Decisions of ECAP can be appealed to the national courts via judicial review, but also could be referred to the European Court of Justice where issues such as the correct interpretation of Directives arise. The Minister may decide to constitute an appeal panel or not to do so. The effect of this is that the panel is not a standing body: a new panel may be constituted to hear an appeal, or it may be referred to an existing panel, but several panels may be extant at the same time with no overlapping membership. The Regulations require that the panel should endeavour, as far as practical, to determine an appeal within four months of referral.

3.2 Experience to date

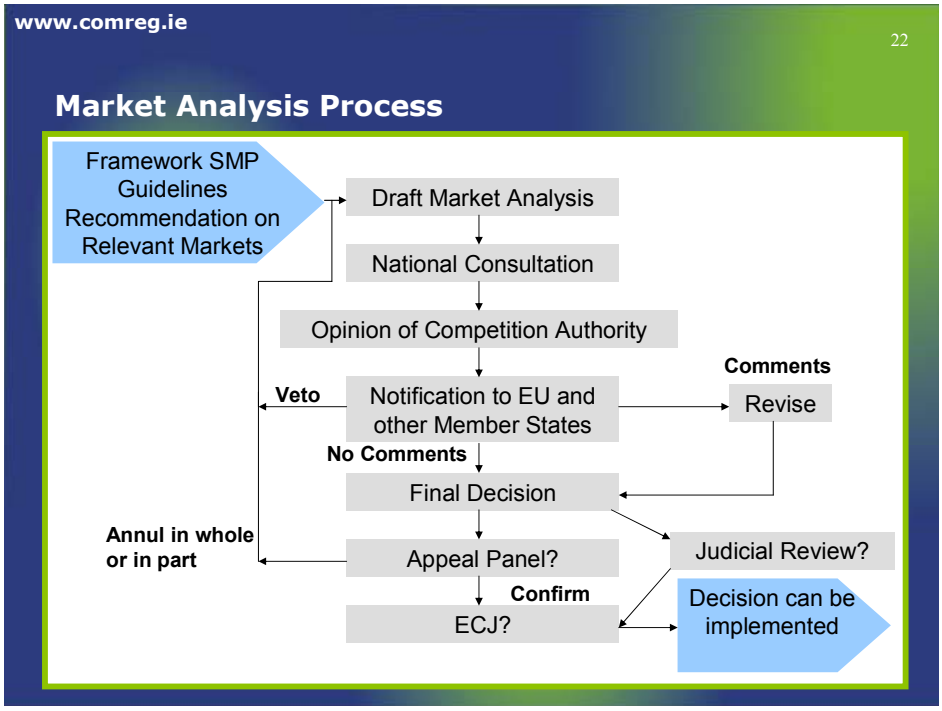
Effective appeal procedures are particularly important in a fast moving market. The possibility of appealing decisions taken by NRAs and the way in which such appeals are implemented in practice can significantly impact the effectiveness of a regulatory system. The major criticism expressed with regard to appeal procedures under the old regulatory regime was the time it took to finally resolve appeals against regulatory decisions. Since resistance to change is normally in the financial interest of incumbents, appeals may be viewed as a relatively cheap and easy way to delay the implementation of key decisions. Such delays can be particularly useful to incumbents in a rapidly evolving sector such as telecommunications.

Since the inception of the Appeals Panel legislation there have been eleven appeals. The majority have sought a stay on the relevant decision, meaning that the decision will not be complied with pending at least the constitution of an Appeals Panel, the referral of the appeal to it and a hearing on the issue of a stay. The first decision by the Electronic Communications Appeals panel was issued on 27 September 2005, some fourteen months after the decision appealed was taken. The panel noted in that ruling (at Section 1.22) that it felt the guideline timescale of four months would be difficult to achieve except, perhaps, in the simplest of cases.

The proliferation of appeals against regulatory decisions, and the delays in hearing them, have meant that, in many cases, decisions have been slow to take effect. This has been the case, not just in Ireland, but across Europe where the market reviews have been completed. Although the Framework provides that a decision may stand while it is being appealed, our experience with Irish courts and appeal panels is that they tend to grant a

stay rather than allow the decision to stand. Where the decision is to give further directions to ensure compliance with an existing obligation, it may be that not suspending a decision would render the finding of the Appeal Panel moot by the time it was made. In other words, if the regulator directs the SMP operator to carry out certain work in order to allow access to its network, that work is not reversible even if the Appeal Panel finds in the incumbent's favour. This line of reasoning generally means that decisions are suspended pending resolution. This can create considerable uncertainty in the market, restrict planning and development of products and services and result in the diversion of investment to areas where more certainty exists.

Certain operators have stated that, if they lose in the Appeals Panel, they intend to bring the issue to the European Court of Justice. This would mean, probably, a three to five year time lapse from the taking of the decision to its final implementation – a timeframe which is at odds with the regular market reviews required by the framework. Given the time and effort required of regulators even to get to the stage of taking the decision (in terms of national and EU-wide consultations – see diagram below), this makes taking any regulatory decision a long, complex, onerous and expensive business for all concerned.



The panel itself does not consist of experts in the telecommunications sector, although it can avail of such expertise from outside consultants. This in itself, however, tends to slow down the process. The communications sector is highly complex and there appears to be a lack of experienced non-conflicted panel members to enable the hearing of the multiple pending appeals in parallel. The Minister has recently added six new experienced members to the panel with another two to follow. However, consistency is of a concern if there are to be multiple panels hearing cases in parallel.

The Directives do not set out the scope of appeal. In the case of Ireland, the scope of the first appeal (against the imposition of obligations on 3 in the market for mobile access and call origination) was decided by that Appeal Panel itself. It is not clear whether this same scope will apply to all appeals in Ireland, since the parties to a subsequent appeal have argued that the scope should be widened and that the appeal should be *de novo*. The fact that different Appeals Panels decide on different appeals makes it possible for appellants to make this argument in each successive appeal. Thus the lack of defined terms of reference for appeals bodies, or of a scope for appeal defined at pan-European level, could potentially lead to inconsistencies in the application of the framework.

3.3 Recommendations

Membership
Ideally, panel members would have relevant experience in the electronic communications sector, and preferably in the regulatory arena. It must be recognised that, in a relatively small market like Ireland, it may be difficult to find such individuals who do not have a conflict of interest. It may be necessary to look outside the jurisdiction to find those with relevant expertise who are non-conflicted. Since regulation is a multi-disciplinary exercise, involving law, engineering, accounting and economics, individuals with a mix of backgrounds would be desirable.

Legal Certainty
The delays in coming to final, enforceable decisions create an uncertain environment for industry – both incumbents and new entrants. There are a couple of relatively minor changes which could be made to the implementing regulations which would reduce some of the delays. First, if the Appeal Panel were made a standing institution rather than being re-appointed every time an appeal is notified to the Minister, some time would be saved. It is true that once an Appeal Panel is appointed to hear a particular appeal, the Minister can refer subsequent appeals to that Panel rather than appointing a new Panel. To date, however, that has not happened.

Secondly, the notification of appeal could be made directly to an already constituted Panel, without the need for it to be made in the first instance to the Minister. Both of these would require changes to the Framework Regulations.

Harmonisation
Besides the risk of divergent procedural and substantive decisions from different appeals panels, noted above, there is also the danger, since appeal panels are not subject to the requirement to notify the European Commission of their decisions in advance, that different appeals bodies in different countries will come to different conclusions, thereby nullifying the attempts at harmonization within the Directives. In Ireland, this risk is minimized by the fact that the Appeals Panel can generally only annul a decision of ComReg in whole or in part, rather than substituting its own judgement. However, it is by

no means clear that this is the case throughout the EU. This could be obviated by amending the Directives to include a defined scope of appeal, and by requiring the decisions of the appeals bodies which act as decision-makers to be notified to the European Commission for approval, in the same way as decisions of the regulators.

4 Penalties

4.1 Legal situation

Article 8 of the Framework Directive provides that the national regulatory authorities of Member States are required to take all reasonable measures to achieve the objectives enunciated in the Framework Directive and that such measures must be proportionate to those objectives. Enforcement measures are crucial in the achievement of those objectives and are principally addressed by Article 10 of the Authorisation Directive. Article 10(2) states that, where a national regulatory authority finds an undertaking to be non-compliant with certain obligations (including those imposed as remedies through the market reviews), it must notify the operator of its findings and give it one month to remedy the breach. Only if the undertaking does not remedy the breach within this period can compliance measures be taken.

Most breaches are treated as civil matters in the Regulations by which the new framework was transposed. The enforcement mechanism is that, if an operator persists in breaching an obligation after it has received the notification, the regulator may apply to the High Court for an order of compliance, which may include an application for an order to pay the regulator a sum of money by way of a financial penalty. The amount of the financial penalty is at the discretion of the High Court, although the regulator may propose a sum. In practice, matters are very unlikely to reach this stage, since the operator has an opportunity to remedy the breach and in most cases will do so or claim that its actions satisfy the obligations and defend the High Court action on that basis.

What criminal offences are created under the new framework tend to be technical in nature (for example, non-compliance with the conditions of a general authorisation, or failure to comply with a direction of the Director of Consumer Affairs regarding technical interface standards for television sets). The civil and criminal routes cannot be pursued in parallel. Since the transposition was achieved via statutory instrument rather than via primary legislation, the limited number of offences under the new Framework can only be summarily prosecuted for a maximum fine of €3,000. Such a penalty is too low to act as an effective deterrent and as such is not a proportional response to the range of potential offences under the regulations. The prior provision of a maximum penalty of €4M or 10% of turnover following a conviction on indictment was lost with the creation of the new Framework and removal of licences.

Summary offences provided for under the Framework Regulations[2] may be brought and prosecuted by ComReg. These also provide that Section 44 of the Communications Regulation Act 2002 (which allows a person who is alleged to have committed an offence under the Act to make a financial payment of €1,000 and to remedy the offence in exchange for ComReg not proceeding against it) applies to offences committed under the Framework Regulations. The liability on summary conviction is a fine not exceeding €3,000.

4.2 Experience to date

For a regulator to be effective in the performance of its duties, it must have sufficient powers to ensure that its decisions, properly taken in accordance with the law and the objectives of regulation, are implemented. In particular, the enforcement powers available to ComReg should allow for timely intervention and provide for levels of penalties that are likely to act as a deterrent to non-compliance and in the case of an actual breach of the regulations, fines which are at least commensurate with the impact of that offence.

The European Commission in its 7th and 9th implementation reports has noted that there is an enforcement weakness in Ireland due to constitutional issues over the ability of the NRA to impose fines, noting this causes serious problems for the functioning of the single market as a whole.

The framework, as implemented in Ireland, seems to regard technical infringements as more serious (being criminal offences) than economic offences, although it would appear that the latter have the potential, at least, to be more harmful to consumers in the long term. The combination of the awkward breach notification procedure with the lack of offences means that there is no penalty for non-compliance before it is enforced. In other words, if an undertaking wishes to behave in a way which damages competition or consumers, it can do so freely until told to stop. There is no mechanism for recovering the supracompetitive profits made while the behaviour persisted, or for rectifying the harm to competition.

4.3 Recommendations

Under the community law principles of equivalence and effectiveness ComReg considers it appropriate that it be provided with national laws equivalent to similar bodies such as IFSRA, and national legislation giving effect to the directives, which require that ComReg be able to directly impose penalties. It is recognised that enforcement is a key

[2] S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003

element of effective regulation and ComReg requires a fining capacity commensurate with the sector.

ComReg is seeking the re-introduction of indictable offences and commensurate penalties appropriate to an industry with a turnover in excess of €4bn. The restoration of the penalties contained in the Communications Regulation Act, 2002 (which provided for fines of €4m or up to 10% of turnover) would achieve this. Such a maximum level of fine would be necessary to act as a deterrent, albeit proportionate to the business to which the fines are applied. Primary legislation is necessary to achieve this.

Additionally ComReg is seeking the power to impose civil fines following a finding of a breach, with appropriate recourse to the courts by the affected party and a requirement that such fines be confirmed by a Court, similar to the provisions concerning IFSRA under the Central Bank Act, 2004. Such a proposal involves the regulator itself making a finding that there is a breach and imposing a fine but safeguarding the rights of the alleged offender by providing for recourse to the Courts by an affected party. This principle has found favour in other jurisdictions and has been discussed in Ireland.[3] It is noted that Articles 10(3) and (4) of the Authorisation Directive explicitly make provision for NRAs to have the power to impose financial penalties. It is also noted that Head 42 of the Electricity Bill 2002 proposes to grant the CER the power to impose a fine on a licensee for breach of a condition.

ComReg is also seeking to make breaches of economic obligations under the Regulations an offence. In this regard we would like to see the restoration of the prior indictable offences, provision for cumulative and daily offences and an increase in financial penalties. In view of the effective prohibition on prosecutions on indictment, ComReg is also recommending that the penalties for offences to be dealt with in a summary manner be reconsidered along the lines addressed by Section 8 of the Competition Act 2002. Under that section the penalties (for both summary and indictable offences) operate so that if an offence continues for one or more days after its first occurrence, the person guilty of the offence is guilty of a separate offence for each day the offence occurs and is liable to be fined for each subsequent offence. ComReg is also recommending that continuing offences should be punishable by daily fines of €3K and €1K.

[3] See "Competition" Page 216, Vol 11, Edition 8.