



Office of the Director of
**Telecommunications
Regulation**

**Publication of prices
for
Eircom ATM services**

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1 Introduction

In April 1999, the ODTR issued a Notification withdrawing Instruction 99/01. This document also invited opinions on whether or not Asynchronous Transfer Mode (hereinafter “ATM”) services are included in the Relevant Market for the purposes of Eircom’s General Telecommunications Licence and the related question of whether or not ATM services should be covered by Condition 13 of that licence.

Six sets of written comments were received from the following organisations:

- Eircom
- Esat Digifone
- Esat Telecom
- MCI WorldCom
- NTL
- Ocean

In the initial review of these submissions, an administrative error led to three submissions being omitted from consideration. As a result of this, the Director considered that a fresh review of all submissions should be conducted. This has been done, and the conclusions of this revised report take account of all submissions made to the review as well as such other information as the Director considers relevant.

Notwithstanding the administrative error, consideration of the issues in the light of the further submissions has not materially changed the Director’s original conclusions. It is in the interests of transparency that this review outlines the nature of the arguments received in the submissions that were originally omitted.

The Director is very grateful to the operators listed above for the submissions they made to the ODTR on this matter.

2 ATM as a service in the Relevant Market

Condition 6.1 of the General Telecommunications Licence requires a licensee to make available for inspection, when requested by any member of the public, a statement setting out the standard terms and conditions on which each category of Licensed Service is provided to its customers. Condition 13.1 requires operators designated as having Significant Market Power (SMP) in the Relevant Market to publish prices applicable to each category of Licensed Service provided by the operator in that Relevant Market. Relevant Market means the market for Fixed Public Network and Services as set out at Annex I to EC Directive 97/33/EC (hereafter referred to as the Interconnection Directive), in which a licensee is designated as having SMP. Therefore, if ATM services were considered to fall within the Relevant Market for the purposes of its General Telecommunications Licence, Eircom would be required to publish prices relating to those services.

The ODTR requested views on whether or not ATM services fall within the definition of the Relevant Market.

2.1 Arguments that ATM should be included in the Relevant Market

Most submissions considered that ATM services *should* be covered by the definition of the Relevant Market, but no arguments were provided as to whether or not ATM services *in fact* fall within the scope of the Annex. It was pointed out that ATM services must fall within the definition of Relevant Market, if they were considered to fall within the legal scope of Annex I of the Interconnection Directive. Most of the points made by the non-Eircom submissions related to issues of principle rather than definition and are discussed in Section 3 below.

2.2 Arguments that ATM is outside the Relevant Market

Eircom argued that ATM services are not designated as falling within the Relevant Market for SMP. It suggested that “in the designation of SMP in 1998, the Director did not include ATM type services, or consider or seek observations on why ATM should fall within any of the markets or products so designated.” Eircom’s submission described ATM services and argued that the characteristics of these services place them outside the definition set out in Annex I of the Interconnection Directive.

2.3 ATM services – technical characteristics

These services derive their name from the networking protocol that underlies them. The protocols – and the equipment implementing them – facilitate broadband transmission of digital information between two or more points. Data are transmitted in packets, known as “cells”. Streams of cells sent by a particular user can be multiplexed (i.e. intermingled) with those sent by other users; no exclusive physical connection path is established for a particular transmission. However, software can create virtual connections that make it appear that a distinct end to end connection exists. ATM is particularly well suited to applications requiring a variety of priority levels for traffic, e.g. mixed voice, video and data.

While ATM technology is used in the provision of local area networks and as a component of operators’ core networks, here we are principally concerned with wide area ATM services that are provided to corporate customers. These services can be provided across borders, and indeed an important component of demand relates to services including international elements.

3 Scope of requirement to publish prices

All submissions made by parties other than Eircom argued that Eircom should in principle be required to publish the prices of ATM services.¹ It was also argued that prices for all Eircom products and services should be published.

Eircom argued that it should not be required to publish ATM pricing.

3.1 Arguments in favour of publication

The non-Eircom submissions considered that requirements to publish prices, terms and conditions

¹ Eircom introduced its ATM services in the 1998/99 financial year: Eircom Share Offer Prospectus, p.36.

are an essential ingredient in preventing anti-competitive behaviour; these requirements were characterised as a “first line of defence” against a range of potential abuses. The competition concerns raised included the following:

- unfair cross subsidisation of competitive services from dominated services,
- discrimination between terms offered to subsidiaries and competitors,
- targeted discounting,
- bundling and linked selling, and
- predatory pricing.

The importance of ATM for the provision of broadband services in Ireland was emphasised, and it was claimed that “no OLO can effectively compete with Telecom Eireann for ATM services” in the absence of a requirement that Eircom publish its prices. This was explained by the observation that “Telecom Eireann is currently in a position to provide case-by-case pricing, undercutting OLOs in competitive situations and inflating prices where OLOs have not yet built infrastructure as witnessed by recent bidding contests for the provision of ATM services.”

3.2 Proposed mechanisms to ensure publication

A variety of mechanisms were suggested for requiring price publication. Three main (not necessarily mutually exclusive) alternatives were presented.

- Redefine the Relevant Market to include ATM services if such services were found to be excluded from the definition. It was argued that unless a broad definition of Relevant Market is adopted, Eircom will be able to evade licence conditions by disputing that individual services are included.
- Amend the General Telecommunications Licence to impose price publication requirements currently triggered by SMP on *all* services offered by an operator with SMP, not just services covered by the SMP designation.
- “Decouple” publication from SMP and develop a new approach for applying price controls to Eircom that does not rely on a finding of SMP.

3.3 Arguments against publication

Eircom’s submission presented arguments against imposing publication requirements, making the following points:

- The existing rules for publication of prices are intended to prevent undue discrimination and to provide clarity and transparency in charges to facilitate better consumer and supplier choice and service based competition. They are not needed in a sophisticated and competitive market such as this one.
- The market for ATM services is highly competitive, with most demand coming from large, sophisticated firms holding sealed tender competitions. In such an environment, any published price will become the market reference point and limit price competition.

- Publication of prices in this market could facilitate collusion.
- Moreover, publication of prices by Eircom alone could facilitate predation by allowing other firms systematically to undercut Eircom's prices and drive it from the ATM services market.

4 Conclusions

4.1 Significant Market Power designation does not currently cover ATM

The Director has reviewed the current designation of SMP. It is not correct to say that every service designated as falling within a Relevant Market must be named explicitly; the key issue is whether ATM services fall within the definition - set out in Decision D4/98 and Annex I of the Interconnection Directive – of the Fixed Public Telephone Network and Services market. The focus of this definition is on carriage of public switched voice telephony between numbers in the national numbering scheme, whereas the salient characteristics of ATM are carriage of packet-switched data across broadband networks with end-points substantially outside the national numbering scheme.

Having compared the characteristics of ATM services and the Annex I market definition, the Director takes the view that ATM services are outside the specified Level 1 Relevant Market. She concludes therefore that Eircom has not been designated as holding SMP in the supply of ATM services pursuant to Regulation 5 of the European Communities (Interconnection in Telecommunications) Regulations, 1998 (hereafter the Interconnection Regulations), on the basis that ATM services do not currently fall within the Relevant Market.²

Price publication requirements in the General Telecommunications Licence only pertain to organisations with SMP in the Fixed Public Networks and Services market. Nevertheless, the Director has also examined whether ATM services currently fall into either of the other markets defined in Annex I of the Interconnection Directive, Public Mobile Telephone Networks and Services and Leased Lines Services, and she takes the view that they do not. However, the Director considers that organisations providing ATM services, which are publicly available telecommunications services, fall within the scope of Annex II of the Interconnection Directive.

4.2 No requirement to publish prices for ATM services

As Eircom has not been designated as currently holding SMP in ATM services, Condition 13 of the General Licence does not apply to it with regard to its provision of ATM services. Condition 6 of the General Licence, by itself, does not include an obligation to publish prices. Eircom, as a result, is not currently required to publish prices for ATM services under the present terms of the General Telecommunications Licence and the October 1998 designation of Relevant Markets in which the firm is held to have SMP.

4.3 Review of Significant Market Power

This conclusion is without prejudice to any re-designations that may be made following the ODTR's forthcoming review of SMP. This review of SMP is scheduled to take place in the third quarter of 1999, and all operators will be requested to contribute data to assist in this review.

² As per ODTR Decision D4/98.

4.4 Measures to prevent cross subsidisation

A key objective of the SMP designation is to help the Director prevent firms that possess SMP in one or more Relevant Markets from using profits gained in such markets to cross-subsidise activities in other telecommunications markets.³ The Director wishes to ensure that proportionate and objective means are in place to address this issue. Current measures to address concerns in relation to cross subsidisation by Eircom include the ODTR's ongoing examination of Eircom's accounting information and, where there are specific problems or complaints, the use of the Directors' investigative powers.

The ODTR considers that such investigations, and other work in this area, including investigations that the ODTR may undertake on its own initiative, are a key tool in preventing cross subsidisation. Decision Notice D10/99 sets out the requirements for accounting separation and publication of financial information.

In addition, the Director also considers that the ODTR review of this subject has raised important questions as to whether or not the rules on disclosure of terms, conditions and prices (contained in Conditions 6 and 13 of the General Telecommunications Licence) need to be revised in order to help prevent anti-competitive behaviour.

In setting the terms of the General Telecommunications Licence, the Director can impose "conditions intended to prevent anti-competitive behaviour in telecommunications markets, including measures to ensure that tariffs are non-discriminatory and do not distort competition."⁴ Such licence terms must "be objectively justified in relation to the services concerned, non-discriminatory, proportionate and transparent."⁵

Depending upon the circumstances and manner in which it is applied, mandatory price publication can assist or inhibit competition,⁶ so it is essential that any changes to the relevant rules be considered fully. The ODTR will examine this issue in the context of the 1999 review of SMP mentioned at 4.3 above and will consider whether or not any licence conditions should be amended or new licence conditions included in the relevant licences. In accordance with general practice and with legislative requirements, there will be a consultation period on any proposed licence changes. The suggestions made during the ATM review as to possible alternative triggers for application of price publication requirements will be taken into account. Another input to this review will be work currently being undertaken within the ODTR on the most appropriate tests to be applied to prices and discounts when assessing licence compliance of operators with SMP.

In response to the specific suggestion that Eircom's price publication requirements be decoupled from SMP, and without prejudice to the outcome of the review mentioned above, the Director considers that in general an objective measure should be used to decide what obligations are placed on operators and in what circumstances. In applying specific conditions to an operator it is important to ensure that they are not discriminatory or disproportionate to the aim of preventing anti-competitive behaviour. Designation of SMP is one objective measure identified in the relevant legislation.

4.5 Individual cases

The Director is empowered to investigate specific complaints of cross subsidisation or other anti-

³ See, for example, Recital 11, Directive 97/33/EC.

⁴ Condition 2.3, Annex to 97/13/EC

⁵ Article 3(2) of 97/13/EC (transposed into Irish law in S.I. No. 96 of 1998)

⁶ For example, compelling price publication by one party in a market with a modest number of large transactions, relatively few suppliers and a selling process based on sealed bid tenders could impact adversely on competition in that market.

competitive pricing practices and invites any interested parties to submit such complaints if they have them. Such formal complaints will be pursued on a case by case basis by the Office in accordance with dispute resolution procedures which were issued last week as Decision Notice D11/99.

/ENDS