



Commission for
Communications Regulation

Speech

**Address by Etain Doyle to
2003 IPA/CIPFA Conference, Croke Park**

**Regulation, Audit and Inspection – Delivering in the
Public Interest**

Document No:	03/152
Date:	16th Dec 2003

An Coimisiún um Rialáil Cumarsáide

Commission for Communications Regulation

Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland

Telephone +353 1 804 9600 Fax +353 1 804 9680 Email info@comreg.ie Web www.comreg.ie

Contents

<i>Introduction</i>	2
How Regulation Interacts with Market Forces and Trends	3
1997 - Expectations and results	4
Regulation, the Business Cycle and Investment	5
Regulation, Price Competition and Inefficiency.....	6
Infrastructure Competition	8
Services Competition	9
Demand for Competitive Services	11
Innovation.....	12
Communications services are volume business	13
Quality	14
Institutional Issues.....	15
Bias to action.....	16
Enforcement Powers	17
Industry - Regulator Relationships	18
The new EU Framework - convergence and consistency	19
Competition Law and Regulatory Culture	20
Conclusion.....	22

Lessons Learnt for Communications Regulation in Ireland

Introduction

I am very pleased to address this conference today on Regulation, Audit and Inspection – delivering in the public interest. While I normally want to look forward to the next set of challenges, as I depart the scene, I am happy to review the changes since 1997 when I was appointed the first sector regulator. Sector specific regulation represented a new departure for Ireland, a very radical change. This was not widely realised then – it was noted, if at all, as another thing we had to do because of the EU.

Communications regulation was the first, but was followed rapidly by other sector regulators from electricity to financial services to taxis. ODTR became regulator for post in September 2000. I believe that communications regulation has had a considerable impact not alone in the sector, but its modus operandi have been adopted and adapted by other regulators. It has perforce challenged some long standing traditions as to how things should be done and even aspects of our legal processes.

Some of these challenges arose because of specific aspects of the communications brief, some are yet another facet of the profound and rapid changes Ireland needs to make to adapt its administration and law, its public agencies and network industries, to meet the challenges of the twenty-first century. I hope to show this today, and also to outline its limitations: regulation is no ‘silver bullet’ solution to all problems.

In fact, if we look at our economic history, we see very rapidly that there are no silver bullet solutions to major transformation problems. Many may have been surprised by the massive and seemingly ‘easy’ growth of the Celtic Tiger years. What we have tended to forget is that it was built on the basis of far-sighted policies and investments going back more than a decade. It also drew on the large surplus of high quality people, in particular women, who had not been in the workforce.

We are all aware that those Tiger years are now past. This has affected overall communications growth which tends to closely follow economic growth. However, within that overall framework, some subsectors have forged ahead – digital TV and

mobile in particular. Over recent months, there are consistent signs of an economic recovery which if proven correct will lift the communications markets. I believe that the market is turning a corner and expect 2004 to be significantly better for users and industry. In this address I intend to draw examples mainly from telecoms and broadcasting distribution rather than the postal regulation, for many of the key issues are very similar.

How Regulation Interacts with Market Forces and Trends

There is a body of regulatory theory but regulation does not operate in isolation and timing is critical. I shall review its role in relation to a few key areas to illustrate this:-

Business and Investment Cycle; Price Competition and Inefficiency;
Infrastructure Competition; Services Competition; Demand; Innovation
Implications of volume; Quality

I will then review some institutional issues, both for ComReg itself and its impact on other aspects of Irish administration before dealing with the international context.

I am a major supporter of very strong Irish involvement within the EU. I believe that the EU has provided a framework for and has got us to start dealing with a wide range of important issues such as liberalisation, and environmental protection for example. In particular, with the second Nice campaign and the development of the new EU Constitution, we have been throwing off that comfortable, but rather colonised attitude to Brussels. This was epitomised by an image of our leaders going ‘over there’ to win goodies for Ireland from our “Governors”.

As full members of the EU for thirty years we are involved in all the meetings that decide all of the policies. It is not a ‘them and us’ scenario, but a partnership with our neighbours, and like Partnership here, it works best as an open debate leading to well founded decisions on how to tackle the real issues. My remarks on the new EU communications framework should be seen as comments from within the partnership. Let me make just a few points about the background to regulation here.

1997 – Expectations and results

The key events surrounding Ireland's introduction of independent telecommunications regulation in 1997 and then moving to full liberalisation in 1998 are well known. The EU programme of market opening was moving to a climax for 1 January 1998, and Ireland had to have an independent regulator in 1997, even if it wanted a derogation from full liberalisation, which it won for a period of 2 years in late 1996.

There were many who were already convinced of the need for competition in the market, and the loss of the Microsoft mirror site to the UK, on the grounds that Microsoft was unhappy with putting such a key project into a monopoly market swung the issue and full liberalisation was set for 1 December 1998.

What was the regulator expected to achieve? There were very many different expectations from the interested parties – Telecom Eireann and the other licensed operators wanted immediate action in opposite directions to reduce or expand the actual extent of the open market: a similar battle was long in progress between the licensed and unlicensed TV distributors. For Government, liberalisation was to provide for credible alternative carriers for major industry in particular, with foreign investment helping make up the gaps in Irish communications infrastructure. Prices here were very high and a price cap of CPI-6% has already been introduced in 1996.

When Ireland had digitalised the telecoms network in the 1980s there was some sense that telecoms had been 'done' and the early 1990s were spent paying down debt, with relatively lower investment programmes. Other countries in W. Europe were rolling out ISDN in the early 1990s, embarking on their major programmes to educate the population about the internet, on the basis of very high telephony penetration achieved under stiff Universal Service Obligation USO requirements. Second mobile licence operators were entering the markets and penetration was growing rapidly. Ireland's ISDN really got going at the end of the 1990s as did mobile penetration, internet growth was somewhat slower, and the Universal Service Obligation (USO) requirement in Ireland was never as stringent as elsewhere, with the result that some 15% plus of homes now do not have a fixed line phone.

However, the focus of Government attention was mainly on ensuring that the needs of key major businesses were met, and on this basis, Irish telecoms appeared in rather better shape than it was.

How did it all turn out? The original battles of 1997 and indeed those of the following few years are now part of history. I will not dwell on them, save to say that the nature of the regulatory job has not changed, but it has moved on through those initial matters and a great number of others, and there are always new ones to be tackled. In my experience, after 12-24 months, most decisions that generated white heat at the time become accepted and receive general approbation.

The market here has grown and competition has developed in all sectors, but it is not yet fully sustainable without continued regulation. Internationally, there were expectations at the time of the 1999 review of EU telecoms regulation that in a few years the market would be self-sustaining. The huge market bubble encouraged such thinking and the huge collapse that followed has resulted in a more measured view. In fact even in the UK, where liberalisation started in 1984, the new reviews of effective competition in markets carried out in 2003 have resulted in little change in the scope of regulation there. Mattias Kurth, head of the German NRA has just indicated that German market competition is not yet sustainable without regulation.

Regulation, the Business Cycle and Investment

But this does not mean that everything has stood still. Firstly, Ireland's perspective as to what is needed in terms of communications services has risen steeply. Our understanding of where we actually were in the second half of the 1990s has become clearer. The result is that although Ireland is now among the leading group in wireless, in particular mobile data and the 5-8 year gap on the fixed side has sharply reduced, it has not closed. Ireland is clearly focussed on closing it. While regulators are berated or praised in respect of overall market development, what they are actually able to do is facilitate – if there is no flood of investment being held behind the barriers, the lowering of entry barriers does not mean that it will necessarily flow.

This point is probably best illustrated by the strides made in the market during the short window of opportunity between the full liberalisation of the market in 1998 and

the closing of the capital markets in late 2000 early 2001. It is important to remember that until mid 1997, *eircom* had a monopoly on fixed infrastructure. In 1997/8 a wide range of operators began to make plans to enter or expand in the market. Between then and late 2000 when the telecoms bubble began to burst, some several € billion were invested in telecoms fixed infrastructure in Ireland. The speed of the loss of confidence was stunning: in autumn 2002 there were 8-10 operators interested in local loop unbundling: by early 2001 there was only one.

The picture is somewhat similar but much less stark in respect of mobile. There was more time in the investment window for the second entrant which got its licence in 1996, and mobile coverage and penetration grew rapidly. But the downturn did affect the third player, Meteor, which got its licence only in mid 2000 after a court battle. The strength of the mobile operators marketing of new services as compared with fixed provided the basis for the development of 2.5G. The 3G competition put up for ‘auction’ the amount of coverage the operators would do. This infrastructure gap is being closed by the operators directly, on time and within their budgets.

In television distribution, licence obligations for phased upgrade to digital were put in place in 1999, but again investment problems arising outside of Ireland resulted in cut-backs here. Regulation was the main spur to continued roll-out until BSkyB began to seriously target the Irish market and helped spur the other companies into action in selling their services. 30% of TV households now have digital service.

Regulation, Price Competition and Inefficiency

The argument is made, particularly by incumbents in Ireland and elsewhere, that regulators control wholesale and/or retail prices so tightly that there is no ‘incentive to invest’. The underlying idea is that prices should be freed up, and competitive pressures will ensure that they settle at appropriate rates, allowing for investment but not excessive profits. This is indeed where we all want to get to, but while competition is weak, key prices need to be constrained, otherwise the strongest player can squeeze competitors and the consumer.

Key regulatory prices are set in Ireland on the basis of an ‘efficient operator’, which puts pressure on *eircom* to reduce its costs, but allows for a return on capital of

11.5%. The expectation is that owners will respond to eliminate inefficiencies quickly for margins are narrowed to the extent that they do not. While some significant progress has been made by *eircom*, it needs to go faster now than international competitors in order to catch up and get ahead. Very substantial expenditures and employment on multimedia had to be unwound in *eircom* as elsewhere and IT investments 2-4 years ago do not seem to have as great an impact as might have been expected. Irish business and residential users need cheap, effective communications and cannot be required to pay for a continuation of levels of inefficiency in *eircom* – and more besides – to get appropriate services.

Turning to the impact on retail pricing issue, the impact of the impending arrival of competition in 1997/8 and new investment in the marketplace gave a far greater boost than regulation alone ever could. Nowhere can this be illustrated better than in the decline in the incumbent's prices during these years – and more specifically in how these declines exceeded those required by regulation under the price cap. In 1997, the first year for which the retail price cap, set at CPI-6%, was in place, the change in the CPI for the preceding year (i.e. 1996) was 1.7%. This meant that in 1997, Telecom Eireann, was required to reduce prices in the overall basket by 4.3%.

Spurred by growing competition from resellers and the imminent threat of infrastructure competition, during 1997 Telecom Eireann exceeded the required level of price reductions and lowered its tariffs by a total of 8.8%. With the carryover of excess permitted into the following year, in 1998 Telecom Eireann had the scope to increase prices in real terms by 0.1%. However, strengthening competition in the market forced Telecom Eireann to further reduce their prices - by 9.2% in 1998 and again by 9.3% in 1999. Regulatory concern about the continued excessive returns in the least competitive parts of the market and the substantial level of inefficiency persisting in *eircom* informed the setting of the new price cap of CPI-8% that came into effect from January 2000. However, competitive pressures were still very strong and during that year *eircom*'s aggregate price reductions reached almost 15.5%.

Since the end of 2000, however, the withdrawal of capital from the industry has weakened all players in the market. The new entrants in particular have suffered more than most, as many of their business plans were built on the assumption of a

continuation of the rapid growth rates of the late 90s. Many were not due to reach profitability until 2005+ and the sudden downturn left many with under utilised networks and an industry swamped by overcapacity. Faced with high levels of indebtedness and increasing cash burn rates, these operators stopped almost all new network builds, while marketing and operational expenditure was severely cut back.

In setting the price cap for 2003 onwards, while continuing to be concerned about the slow *eircom* catch up in efficiency, it was necessary to loosen the price cap to enable the fixed market generally to survive. Competition is not currently capable of driving the deep price reductions of the late 1990s, although importantly many of the reductions achieved during this time have been consolidated by the price cap which ensures that tariffs in the price basket do not rise above the rate of inflation. The price cap is the key one available to us in terms of putting pressure on in respect of inefficiency, where its impact is indirect and leaves a choice for the operator between margins and cost-cutting.

Infrastructure Competition

In Ireland the effect of the downturn can be clearly visible from the new entrants' market share. In the first two years after liberalisation, the new entrants quickly gained approximately 20% of the fixed line market. Since the beginning of 2001, however, this figure has remained relatively static as *eircom* stabilised its fall in its market share. Right across the sector the effects of oversupply and increased operator cutbacks can now be seen as operators either consolidate; restructure their balance sheets; seek increased efficiencies, or in some of the more serious cases fail to meet licence obligations or go out of business altogether.

In terms of fixed infrastructure development in Ireland, the lesson is set out clearly in the ground. Unlike operators in other countries which had been planning full liberalisation for years before 1998, Ireland's turn round was quick. Operators sought permission to build networks in major towns as well as trunk networks. While the procedures were not easy anywhere, they were sorted out in Dublin more rapidly than elsewhere and Dublin has a range of competitive fibre rings to show for it. The second mobile network, started in 1996 rolled out more rapidly than the third, started in 1999. There are still some significant black spots for mobile where local

opposition and/or local authority rules makes getting permission well nigh impossible. These local choices have to be respected, but they are not conducive to the development of economic or tourist facilities in the areas concerned.

It was not recognised at the time that the window of easy opportunity would be so short. With hindsight we can see the importance of being ready. This means removing any impediments to investment and ensuring that Irish administrative frameworks facilitate easy market entry and the development of new and innovative services. Ireland has been working hard in this respect and its timely transposition of the New Regulatory Framework directives – one of only 5 European countries to do so before the deadline – is an indication of its determination in this respect. There has also been progress with some concerted action on way-leaves, increased Government programmes and innovative spectrum regulation.

ComReg has taken a leading role in spectrum development internationally. In 1997, Ireland had yet to publish any information on spectrum use. The first Table of Frequency Allocations was published early in 1998, and following a major services review and several rounds of consultation, the Spectrum Management strategy in 2002. The regulatory framework for WLANs for public services worked out here including the opening up of the 5.8GHz band for more powerful services was copied in other countries. We have a new Fixed Wireless Access Local Area (FWALA) scheme for small operators who are interested in moving up from using only unlicensed spectrum. There is also a flexible test licensing scheme to help encourage the development of innovation. We are now in a position to consult regularly on future use of spectrum bands well ahead of need. This helps both existing and potential new operators to plan their involvement in the sector.

Services Competition

However, as well as facilitating entry into the market, it is also important that regulation supports the development of effective competition by matching regulatory actions to the current state of market development.

I will illustrate this by reference to the infrastructure/services debate, which is often presented as an either/or choice for regulators. In fact, regulators would always prefer infrastructure competition as more robust and self-sustaining, but market conditions may make services the only realistic choice at least in the short term. In the current capital constrained environment that means supporting the industry's move away from more capex intensive solutions such as full/shared LLU towards more market-based means of access such as bitstream and private partial circuits. In this way new entrants can more efficiently combine their infrastructure with wholesale products, creating the potential to offer subscribers a greater choice of competitive packages with varying price points, bandwidths, contention ratios and value added services.

In setting wholesale prices it is important that a delicate balancing of incentives between the different parties in the value chain is achieved. This means that at the wholesale level the price for cost-orientated access needs to be low enough so as to enable the incumbent to recover only its efficiently incurred access costs, but should provide for a return on capital to encourage investment in new infrastructure. Between the wholesale and retail levels, regulation must ensure that any vertically integrated undertakings with wholesale market power do not use anti-competitive behaviour to affect a margin squeeze between their wholesale and retail prices.

This means ensuring that service providers are not charged an excessive price for wholesale access, while also being vigilant to the possibility of predatory pricing at the retail level. Finally, at the retail level, regulation has to be cognisant of the need for new services to be priced at a level that encourages widespread take-up, but yet is not priced so low as to leave service providers vulnerable to a possible margin squeeze. Over time, however, as competition becomes effective the goal should be to reduce regulation to a minimum and allow the market operate efficiently.

Eircom has changed in the last 7 years, but its commitment to a competitive market is still uncertain to say the least. Is this a continued hangover of the traditional incumbent view of any market opening as a 'zero-sum' game for them, or a reflection of the current downturn in the market where overall growth is very limited? Either way, it is an attitude which does not help them. We as regulator are far more deeply

involved in their pricing and products than we would wish to be, for we have to ensure that their customers are treated fairly. Secondly, the OLOs provide a spur to the development of new products and market approaches which can benefit the whole market, in which eircom is the biggest player. While there may still be a yearning for the past and the comfort of being able to decide what services would be delivered and when, that era is definitively over. The OLOs have also evolved, and I hope that in a growing market they will resolve more commercial issues with eircom directly.

The need to relate regulation to market realities is well illustrated internationally by the damaging 3G auctions which did not provide a spur to 3G, but the opposite, as operators initially concentrated on their existing lower risk businesses to work their way out of trouble. Taking some €130bn out of the industry in advance taxation had a major impact on the equipment manufacturers who were first in the chain, followed by operator write-offs and increased consolidation. In all sectors, far more competitive pressure comes from new entry than from existing players. World consolidation in the mobile market, together with some interpretations of spectrum trading – itself seen in some cases as a compensation to operators for 3G auctions – could lead to a position where new infrastructure based entry would be impossible.

Demand for Competitive Services

There is evidence that users are becoming ever more aware of the benefits of increased choice. While the largest corporates benefited first in Ireland as elsewhere, SMEs have become increasingly aware of competition and targeted by operators. In our most recent survey, 64% of SME indicated that they believed there were savings to be made by changing their supplier as compared with 47% in 2001. The residential market is a step behind, with just 30% last March believing that they can make gains by changing their supplier. This will grow as we have again tightened up the CPS regulatory regime and some new entrants have started clearer, better communicated value offerings, for example ESATs €25 flat monthly ‘all you can eat’ package.

One very important element of demand has not been available to the market in recent years. The Government tendered all its VPN business in one contract which only eircom could realistically respond to. While the discount offered was considerable,

the locking up of this major tranche of business has had a significant effect on the overall turnover available in a small market. The market is generally aware that the tender scope will be modified next time which should result in Government getting better value from more suppliers and encourage greater expansion of the market.

Innovation

Much has been done by the industry since 1998 to close the gap between Ireland and other countries on technology roll-out and adoption. Attention is currently most closely focussed on Digital Subscriber Line (DSL) where progress has been slower than in other countries due to a variety of factors, in particular the absence of major competing cable networks. However, over the last year, we have seen more realistic pricing, better marketing and the results of gradual learning. We have finally reached the 1% take-up level. If experience in other countries is anything to go by, the first 1% is the hardest and slowest and the curve moves up more rapidly after that. In relation to other technologies, the gap between Ireland and other countries has also reduced very considerably as noted above. However, we should remember the lesson of the past – the leading edge of technology and service is always evolving and what is new today will be standard tomorrow.

At this point it may be useful to look again at where we were in the old monopoly days and where we are now. Innovation in Ireland has been led by the new entrants in mobile, in wireless, in FRIACO, in DSL with the pressure for local loop unbundling, and a range of specialised leased line products. Eircom complains that it sees no point in introducing products to the Irish market if the competition has to be enabled to compete with them. My response to that is that the competitors have repeatedly gone ahead, knowing that eircom, the incumbent with all the advantages that entails, can always compete. If they can see sense in it, eircom should.

There is no regulatory tool designed to change the entrenched attitude that only in monopoly conditions is it worthwhile investing and rolling-out new products. Unfortunately it is an attitude which extends far beyond communications in Ireland and is a barrier to innovation and competitive services. ‘Exclusivity’ should be banned from all Government and regulatory discourse on business. While there may

be some areas of business not subject to sector regulations where new entry may be slow or non-existent for economic reasons, let market players decide on this.

There has been some consideration as to whether Ireland might 'leap frog' developments such as ISDN and DSL and go directly to very large capacity roll-out. Particularly in a market which with few exceptions, had been unused to buying and utilising advanced services this would always have been difficult, but the investment downturn has also had an impact. In any event, the market internationally may be in a phase where transition technologies are the right answer. The 'flying boats' of the 1920s and 1930s were a key link in the development of commercial aviation, at a time when the business case for investment in aviation and airports outside of the main centres was uncertain. Flying boats could land on water, and could carry more fuel and so required less 'runway' investment than conventional planes. They enabled cheaper experimentation in postal and passenger traffic worldwide. The building of traffic volumes was vital to the development of the aviation and the widespread building of airports. Sea planes gradually disappeared from mainline routes, but modern versions are still used where appropriate, as a fully satisfactory substitute to ordinary aircraft. Such developments are essential and common in many sectors.

Communications services are volume business

Ireland may need more of such development than in densely populated countries. Accordingly as regulator, we have put considerable effort into facilitating alternative types of networks which are cheaper to install. Our spectrum strategy for everything from 3G licences to exemptions for low-power equipment has sought to do this, making it as easy and cheap as possible to get licences. In dealing with the main fixed network, we have put very considerable emphasis on the need for greater efficiency which will lower costs.

New technologies such as wireless reduce the costs of building in less sparsely populated areas, and can provide reliable, ever increasing levels of broadband capacity: but even so, it remains cheaper to supply the same number of people if they live in a town or city. All things being equal, the greater and more concentrated the volumes of post, telephony, broadcasting distribution, the lower the costs, and potentially the prices. We need to be at least as efficient as the average elsewhere,

and better. We need to get our timing right in developing of networks to meet demand, and in particular by giving attention to spatial strategy.

This is an important aspect of competitiveness, in terms of communications services and costs, but also all utility costs as Irish expectations of utility services rises.

Quality

A final key issue I wish to address in this section is that of quality. The Irish communications market generally had a poor reputation for quality. Stories of both poor service quality both in terms of the network and of the response times etc were legion in respect of telecoms services and worse in respect of broadcasting distribution. Given the generally low starting point, it was clear that competition would take some considerable time to have a major impact and it was a key objective of mine to seek to raise the level of the game generally for consumers.

The key strategic direction was based on an understanding that any external body handling complaints would tackle only the symptoms, not the root causes of poor quality. Only the operators could resolve the basic issues – inadequate training/availability of staff to deal with customers and to fix their complaints: inadequate basic networks and on-going maintenance: inadequate senior management focus on quality. A range of regulatory measures were introduced – requirements for customer contracts and codes of conduct, the development of a programme to measure operator performance on key parameters such as response times and repairs etc. There was no tradition in Ireland of service level agreements except for the handful of the biggest clients. At the time we could not require their introduction for all customers, but we could and did insist on regulated Service Level Agreements (SLAs) for leased line delivery to other operators. We had to tighten up the terms to include penalties to be paid to the OLOs and finally, *eircom*'s performance improved and is now among the best in Western Europe. I was pleased to note that leased line SLAs are becoming widespread among SMEs also, with 55% using them in 2003 (14% in 2002).

We conducted technical audits of the cable and MMDS networks, requiring remedial works which improved service quality and reduced breakdowns and maintenance costs significantly. Eircom has also engaged in a major programme of improving

local network quality which is showing results. While the overall position is not yet satisfactory, particularly in relation to customer handling, it has improved greatly. While ComReg does deal with complaints which operators do not solve, it is essential that the operator is centrally responsible, for in the last analysis individual problems have to be solved within the companies and only the operators can introduce the systematic internal solutions which prevent problems occurring.

Institutional Issues

Turning to the institutional issues regarding sectoral regulators what can we say as to the lessons learnt? There was some concern expressed during the 1996 Oireachtas debates that the regulator would be too powerful, taking decision-making away from Government and politicians. How would the regulator be accountable? Within the industry and at EU level there was very great concern that the regulator would be independent of Government which was seen as too close to – where not actually owning – incumbents, and inclined to shift direction in response to short-term issues.

Experience since then has brought into clearer focus the difference between a wide range of responsibility which undoubtedly the Communications regulator has, and power to make changes happen quickly. I will come back to the issues of enforcement shortly, let me first concentrate on the question of independence in terms of the range of responsibilities and accountability.

Firstly, the regulator was in law ‘independent in the exercise of its functions’, but those functions and how they could be exercised were set out in the 1996 Act and again in greater detail in the 2002 Act. The regulator is a ‘creature of statute’, operating within a specific framework of national and EU law. While many court cases have been launched, we have not lost one High Court case in nearly 7 years, apart from the Orange case which was roundly reversed in the Supreme Court. We work in a very contentious environment and have to be careful that we can make our decisions stick. Staff and consultants working with our office who have worked with other public bodies have been struck by the effort we put into ensuring that we clearly understand our remit and come up with solutions within them. So Government and Oireachtas can rest assured that the legal framework they have given us is respected.

Accountability is quite a straightforward concept. The 1996 Act set out specific provisions in respect requiring audit by the C&AG, reports on activities to the Oireachtas, and ODTR become subject to FOI. The 2002 Act added some further elements. In practice, the key external calling to account has been in the Courts, with the most detailed examination of what we have done and how. There is now provision for an appeal panel, which has been introduced to speed up decision making. Under the Constitution, nothing can preclude appeal to the courts, so we have yet to see whether the new system does speed up implementation.

The publication of reports, consultation papers, our reasoned decisions etc. on our web-site also enhances accountability. No one has to rely on speculative press articles quoting 'sources' as to what we are doing and why. On a more general basis, I think that there is a case for Government publishing reports such as the recent ones on the Health services, before taking decisions. The debate would be more comprehensively informed. The press would have better information for their analysis, although I am aware that the particular attractions of an 'exclusive' would be hard to forego. The Government decision would form the culmination of the debate, rather than a signal for further lobbying. It would fit better with the idea of Regulatory Impact Analysis – which should perhaps be re-christened Policy or Programme Impact Analysis, as it is not the intention of Government that it be confined to regulators. Advance publication would give the opportunity to assess any comments on potential impact in advance of decisions rather than afterwards.....

Bias to action

A regulator necessarily is engaged in technical matters – dismantling barriers to entry is not achieved with a stroke of a pen, it means writing licence or authorisation texts and delving into the processes of interconnection options and local loop unbundling for example. It is easy to get lost in the detail and to regard the process as the important thing rather than the output. When starting up, I wanted to ensure that we had a strong bias towards action for users, looking to the future and to the delivery of price choice and quality. It would not just be a question of looking at our in-trays and legislation and plodding ahead, but rather identifying where we wanted to get to and going for it as fast as we could. . I am pleased to say that this bias to action remains and has strengthened, despite the accretion of process and the necessarily ever more

technical detail involved in complex regulatory measures. The fact that, following some initial uncertainty, the office is staffed by a directly recruited, professional team on performance based contracts operating in multi-skilled teams is critically important to the high performance we have achieved and want to build further.

I recall as we started in 1997 that I commissioned a major report on the means of delivering television in the future. It was seen by many as a cop-out, a way to avoid dealing with the issue. However, my colleagues and I had a real purpose – we wanted to fully understand the options and the market – before making the decisions which followed our consultation on the report in 1998. We have repeated this process many times since and I believe that the scepticism has generally faded.

This bias towards action is now framed in objectives which ComReg has in its mission statement. It is also reflected in the 2002 Act which included a series of objectives for ComReg – an unusual approach in Irish law. The 2002 Act brought the objectives of the new EU framework into Irish law, creating a useful coherence. One aspect I might comment on however, is that we now have so many objectives, sub-objectives and Ministerial Directions including references to national strategies that they tend to disperse rather than focus our strategy. There are 3 central objectives

- to promote competition,
- to promote the development of the European internal market, and
- to promote the interests of users

which help us manage the 14 sub-objectives, 12 Ministerial Directions and the DCMNR strategy statement. While users come third in the listing, it is clear from the detail how central they are. For example, the first sub-objective under promoting competition in the Framework Directive is to ensure that ‘users, including disabled users, derive the maximum benefit in terms of price, choice and quality’.

Enforcement Powers

Regulators are set up to impose massive changes in the status quo in entrenched industries. To work effectively and quickly, they must have serious enforcement powers. Regulation by agreement may sound attractive and of course, agreement can be reached at times. It is flawed in so far as it means that the incumbent only moves forward as far and fast as it agrees to, while everyone else waits.

The Irish tradition was to provide only limited powers to bodies other than Government Departments and for us, there was a more serious difficulty in that regulations transposing EU law had very low penalties indeed. Attitudes have changed for ComReg as for others. Very substantial fines on conviction were provided for in the 2002 Act and will be re-inserted in new legislation. While such powers are a major benefit, they require conviction on indictment, a criminal process which is slow. A novel civil process for ComReg to seek a civil penalty to be imposed by the Courts has also been granted and we have looked at it a couple of times recently in the context of seeking progress. We are looking for the power to have fines imposed by the Courts on daily basis to deal with delays. It may be possible to justify for an individual delay, but the accumulation of delays over long periods is profoundly unfair to competitors and to users, and can endanger the market.

Industry – Regulator Relationships

The question of the relationship between industry and the regulator is an important one. The longer established international bodies such as the International Telecommunications Union, (ITU), International Postal Union (IPU) and European Conference of Postal and Telecoms Administrators (CEPT) have industry representatives as observers and indeed in some cases as members of committees and working groups. More recently established bodies such as the International Regulators Group (IRG) and the European Regulators Group (ERG) do not, the belief being that it is important that these remain very much working bodies, and not become the large, slow deliberative bodies that the older bodies have become and subject to industry capture. The older organisations can find it hard to find space to consider the user interest which is not so well represented as the industry players. Particular market players or market players' representatives should not become such privileged interlocutors and indeed decision makers, that regulators have difficulty in considering together their broad responsibilities.

On the other hand, it is vital to know what interested parties think before deciding on key projects. Open consultation processes are very valuable in this regard. It is essential to have full industry engagement in the processes necessary for major projects. No regulator can develop a full blue print for mobile number portability for example, nor for wholesale line rental. ComReg is very grateful for the contribution

made by the industry working groups to these development which benefit users. One of the difficulties for Ireland at present is the small scale of the industry and the limited personnel resources the smaller players can put into these projects.

The new EU framework – convergence and consistency

The new framework was designed to update the piecemeal series of directives which had been adopted over more than a decade up to 1998. The intention was to set out a coherent framework which would be simple and deal with the emerging issues of convergence and long term sustainability of the market. It was also to provide for greater consistency between regulatory regimes in the different Member States, as a major criticism of the industry generally was that regulators imposed different solutions in national markets, making it hard for major companies to develop products which they could roll out across all EU markets.

The new framework deals with convergence much better than the old one, and much better than the current US regime. It has not quite got everything right just yet – we have drawn attention to the differential treatment of users of broadcasting systems and users of telephony whether fixed or mobile. The 17 markets defined by the European Commission are a useful start but are somewhat technology bound. Notwithstanding these points, the new measures do make it easier to develop converged offerings. However, this is only facilitative: long standing other barriers in terms of incumbents' infrastructure and a tendency to stick to the knitting in difficult time may mean that full convergence is a long way off as yet.

The consistency issue is one that also deserves attention. The recitals to the Framework Directive indicate that 'NRAs should have a harmonised set of objectives and should where necessary co-ordinate their actions with other NRA in carrying out their tasks under this framework.' Article 7 (2) requires NRAs to seek in particular to agree on the types of instruments and remedies best suited to address particular types of situations in the market place.' A very substantial amount of work has been done on remedies and is just being published for consultation.

This is a very important body of work and valuable for all NRA staff in developing their market reviews. However, we all need to be realistic and stick to consistent

regulation, not seek uniformity. There are major differences in the structure and scale of the various national markets. Uniform measures will not have uniform effects in different markets. NRAs are very committed to reducing differences where possible, but ‘One size’ does not fit all.

The Benelux countries for example have well developed cable networks, putting them ahead in the fixed infrastructure competition stakes. Finland’s early development of mobile and Ireland’s slow development of fixed penetration means that mobile plays a greater role for us than it does in some other countries. We need to be mindful of the need for as much standardisation as possible, but fixed networks comprise vast layers of legacy investment and it is not possible to ensure that exactly the same types of access could be given in all countries. This is one of the key reasons for the wide variety of bitstream products. A second is the availability of capital. When it is very scarce, there is a need to preserve ‘reseller’ type competition as noted above. We all have the same goal, but it would be a brave person who would forecast that all markets will ever converge on a same pattern of networks and usage.

Another reason for avoiding the chimera of uniformity is the inherent danger of new single solutions. Similar demands for uniformity were made in the US before the 1996 Telecommunications Act and the Federal Communications Commission (FCC) took a much more leading role than before. Instead of each State working out its own solutions, the FCC solution was adopted. As it was to apply to all States, the stakes were very much higher and so also was the tendency (always high anyway) to sue all the way through the courts. Accordingly, the impact of the Act was delayed by several years, and some commentators consider that this single throw of the regulatory dice is contributing to the volatility of the market.

Europe has gained by developing its own paths. Let us continue to do so.

Competition Law and Regulatory Culture

The standard framework of national law includes the, by international standards, stringent tradition of administrative law which requires due and fair consideration of issues and reasoned decision making. As regulator, we developed a new decision making process for Ireland, with systematic public consultation on the issues and

reasoned decisions published on the web. I am fully aware that the industry complains both that ComReg is slow in decision making and should give far more time for consultation. Compared to when we started, we do give more time for responses – the issues are often more complex. I am concerned that decision making processes are becoming very cumbersome. I will outline one key reason.

Special sector regulation has been introduced in most international markets where it is considered that ordinary competition law will not suffice. New Zealand tried to use competition law alone and its experience proved the case, with long drawn out court battles while the industry languished. However, there is another aspect of the actual operation of competition law that has come into sharp focus in the new EU regulatory regime. The new regime uses competition law concepts in the definition of markets, and the determination of SMP has been generally aligned with the competition law concept of dominance. As one who had a very distinguished competition economist – John Fingleton, now head of the Competition Authority, develop our original SMP reviews under the old regime, I do not need to underline my commitment to using solid economic and business analysis to ensure that we understand the market dynamics in which we are intervening.

However, I am concerned that because of its current structure, competition law is too uncertain and complex, and can be very slow for the fast moving telecoms industry. The old regulatory regime set an admittedly crude threshold of +/- 25% market share for SMP: it was however clear and quick to apply, and the markets moved forward. Dominance is a far less certain concept developed in case law rather than positive legislation. While the European Commission has sought to help with detailed guidelines on how it should be applied, it is still uncertain and unclear in practice.

There was a reasonably clear expectation as to the result of a challenge in respect of the old SMP definition, or indeed most regulatory law. However, it is not clear how new framework ‘dominance’ challenges would be decided and equally importantly, how long they would take. The minimum time estimate tends to be about 2 years in the Member State Courts followed by 2 years in the Court of Justice. Some competition law cases have taken very much longer. The HB/Mars case involving ice-cream fridges in Irish shops which was resolved very recently having started in

the late 1980s. I am concerned that these kinds of difficulties may make NRAs cautious and perhaps unwilling to act as they would ideally wish to do. There are key matters to be tackled, but beyond that, regulators may weigh very carefully the benefits of interventions if they feel they could take years to be confirmed.

It is not only communications where the process of competition law may need changing. By the time the Microsoft/Netscape case had wound its way through the US Courts, Netscape was gone. With the increasing growth and importance of technology based services which tend to have critical bottlenecks, it is time to look again at the process of competition law.

Tax law may give a useful example of what might be done. It is also a very contentious area and much case law and precedent builds up around the original legislative texts. However, every now and again, Ministers for Finance sweep away the accretions with a new clean Finance Act text for individual taxes. A similar process could apply to competition law, key provisions for which would need to be set down in more detail in the first instance.

Conclusion

So what advice would I give to those who are considering becoming a regulator?

Gain a rapid understanding of the market and its dynamics – or lack of dynamics, as the case may be - and a cool-headed understanding of what new technologies and services may actually achieve in that market.

Recruit a dedicated, professional staff, research issues well and understand stakeholders' views through systematic consultation, but then take the necessary risks – 'ships may be safe in harbour, but that is not what ships are for'.

Know your stakeholders and build relationships with them, while retaining your neutrality and independence of action.

Remember your key client is the consumer and their needs require a competitive forward looking industry.

Thank you.