



Office of the Director of
**Telecommunications
Regulation**

**Significant Market Power
in the Irish Telecommunications Sector**

Decision Notice: **D 15/99**

&

Report on the Consultation Paper ODTR 99/59

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1. Introduction

The Director of Telecommunications Regulation ("the Director") is responsible for the regulation of the Irish telecommunications sector. The greater part of this sector regulation originates from European Community legislation subsequently transposed to national law.

The Open Network Provision (ONP) framework requires National Regulatory Authorities (NRAs) to designate certain operators as having Significant Market Power (SMP). Operators with SMP face additional obligations aimed, inter alia, at controlling the exercise of their market power.¹ The Director is the competent body in Ireland to make such designations and the ODTR is under obligations in both EU and national legislation to make notifications of those operators with SMP.

Following a consultation and review² of the sector in 1998, the Director made the first designation of operators with Significant Market Power ("SMP") in October of that year. In Decision Notice D4/98 Telecom Eireann (now eircom) was designated as having SMP in the fixed, leased lines and interconnection markets. Eircell was designated as having SMP in the mobile market.

In D4/98 the Director signalled her intention to review SMP notifications at regular intervals to take account of competitive conditions. This Decision Notice D15/99, contains the designations made by the Director as a result of the review carried out by the Office of the Director of Telecommunications Regulation (ODTR) in the current year. In particular, the Director designates the following operators as having SMP:

- **eircom** in the **fixed network and services** and **leased line** markets
- **Eircell** and **Esat Digifone** in the **mobile** market
- **Eircom** and **Eircell** in the national market of **interconnection**

Any operator designated with SMP as a result of the determination process is subject to a number of obligations. These obligations arise from certain European Directives establishing the ONP framework and the corresponding regulations transposing them into Irish legislation as follows.

- Council Directive 97/33/EC on Interconnection in Telecommunications ("the Interconnection Directive") as transposed by the European Communities (Interconnection in Telecommunications) Regulations, SI No. 15 of 1998 ("the Interconnection Regulations");
- Council Directive 97/51/EC (amending Council Directives 90/387/EEC and 92/44/EEC) on Leased Lines ("the Leased Lines Directive") as transposed by the European Communities (Leased Lines) Regulations, SI No. 109 of 1998 ("the Leased Lines Regulations"); and

¹ Condition 4.6 in the Annex to EU Directive 97/13/EC.

² See Significant Market Power- Consultation Paper ODTR 98/25 and Decision Notice D4/98 Document ODTR 98/47 published at the ODTR web site: www.odtr.ie.

- Council Directive 98/10/EC on Voice Telephony and Universal Service for telecommunications ("the Voice Telephony Directive") as transposed by the European Communities (Voice Telephony and Universal Service) Regulations, SI No. 71 of 1999 ("the Voice Telephony Regulations").

The obligations imposed vary depending on the relevant directive and regulations and also the market in which SMP is designated. These markets are defined in the relevant legislation and can be summarised as follows:

- the market for fixed public telecommunications networks and services;
- the market for leased line services;
- the market for public mobile telecommunications networks and services;
- the national market for interconnection;

Throughout this document, these markets are collectively referred to as the SMP markets and are the basis on which SMP obligations are applied.

In this paper, the ODTR sets out the report on the Consultation process, together with the decisions of the Director with regard to the determination of operators with SMP in the Irish telecommunications market.

The structure of the paper is as follows:

- Section 2 summarises responses received to the Consultation Paper and sets out the ODTR's position with respect to issues identified in the consultation;
- Section 3 presents this year's determination of operators with SMP; and
- Annex 1 describes the calculation methods employed by the ODTR in the determination of SMP in the relevant SMP markets.

2. Report of the consultation

2.1. Background to the consultation

Following the review of the sector in 1998, the Director made the first designation of operators with SMP in October of that year. The designation was based on a Level 1 analysis of the four SMP markets defined in the EU Directives and transposed into national legislation. A Level 1 analysis provided a sufficiently clear cut result and it was not necessary to undertake a more detailed Level 2 analysis.

For 1999, the Director considered that some modifications to that approach were needed in the light of the Explanatory Note on the determination of SMP (the "SMP Explanatory Note") issued by the European Commission in March 1999. In addition, other modifications were identified and proposed, in order to simplify the process and provide greater overall transparency. In summary, these other modifications were

- not to compute volume shares as well as value shares in the Level 1 analyses, but rather to proceed directly to a Level 2 analysis when value shares are sufficiently close to 25%³;
- no longer to distinguish between analogue and digital mobile telephony; and,
- where necessary, to define Level 2 markets using economic principles of market definition, with regular consultation to ensure that these market definitions reflect any changes that occur in competitive and technological circumstances.

In October 1999, the ODTR issued a Consultation Paper *Significant Market Power in Telecommunications* (ODTR, 99/59) setting out the Director's proposals in relation to these issues⁴. The consultation period ran from October 13th to November 9th. The Consultation Paper sought views of interested parties on the approach to be adopted in determining organisations with SMP.

Respondents were invited to comment on all aspects of the consultation paper, with specific responses sought on:

- proposed methods for calculating Level 1 market shares;
- combining analogue and digital mobile networks/services;
- defining Level 2 markets;
- candidate Level 2 markets;
- assessing competition within Level 2 markets; and
- the possible role of SMP in triggering licence conditions.

The Director would like to thank the organisations that responded to the Consultation Paper. Those comments have provided valuable input into the Director's consideration of these issues and have facilitated the Director in reaching conclusions on the proposals set out in the Consultation Paper.

Responses were received from the following parties:

- ACCess Telecom
- ALTO (Association of Licensed Telecommunications Operators)

³ See section 2.2.3 which deals with value and volume considerations in more detail

⁴ The Consultation Paper "*Significant Market Power in Telecommunications (ODTR 99/59)*" should be read in conjunction with this Decision Notice.

- Cable & Wireless Communications
- Cargo Community Systems
- The Competition Authority
- Eircell
- eircom
- eircom ESOP Trustee
- Esat Digifone
- Esat Telecom
- GTS Ireland
- Hibercall
- Irish Multichannel
- MCI WorldCom
- NTL/Cablelink
- OCEAN

Except for the Competition Authority, all respondents are industry representatives.

2.2. Key issues arising from the consultation process

2.2.1. The scope of SMP obligations

Many respondents expressed the view that SMP was (or should be) an instrument for regulating the former monopolist, and should not be applied to other operators, regardless of their market position. This view is not sustainable within the European regulatory framework and national law. The Director is required by law to designate operators as having SMP based on a set of criteria that must be applied in a non-discriminatory manner to all operators. SMP related conditions are designed to assist competitive entry into the market in so far as they are placed on the incumbent. In so far as they may be placed on other players who have gained substantial market share they benefit the process of competition, thereby leading to benefits for customers.

Some respondents were concerned that the approach proposed in the Consultation Paper might result in an extension of the scope of SMP obligations beyond those envisaged in the original ONP framework Directives. In particular, there was concern that operators might be designated as having SMP in a Level 2 market that might extend beyond a relevant

market as set out in the ONP Directives. These concerns may be based on a misinterpretation of the role of the proposed Level 2 analysis (see section 2.2.2 below). The relevant European Directives and corresponding national Regulations are clear that SMP determinations are made with respect to certain specified markets. They also set associated obligations on operators with SMP with respect to those markets; therefore, these obligations apply to operators with regard to an entire Level 1 market, or not at all.

However, this does not prejudice the ODTR's powers to set licence conditions for operators that are triggered by SMP (or other) criteria that may apply to other services outside these SMP markets, within the constraints established by the Licencing Directive. The possible role of SMP in triggering licence conditions is discussed in section 2.2.8.

In determining whether an operator should be designated as having SMP in a Level 1 market, the Director is in no way restricted from looking at the competitive situation with regard to a specific subset of services within an SMP market, or looking at services which may substitute for services within an SMP market. The Level 2 analysis proposed by the ODTR is intended to provide a transparent framework for such an assessment.

2.2.2. Level 1 and Level 2 analysis

Many respondents expressed concerns about the two-stage approach being unnecessarily complicated. These concerns may be based on a misperception of the role and the nature of the proposed Level 2 analysis.

The proposed Level 2 analysis is intended to provide guidance in cases where the market share of an operator in a Level 1 market (corresponding to an SMP market) is close to the critical value of 25% and there is a significant fear that the formulaic application of a 25% cut-off could lead to an inappropriate designation (or lack thereof). Only in these cases would Level 2 analysis be undertaken. Thus, Level 2 may become increasingly important in future years as competition develops and entrants gain market share. However, the Director considers that in the interest of transparency procedures should be laid out clearly even if they may not need to be applied widely at present.

In this respect, a number of respondents pointed out that the 1999 Communications Review of EU telecommunications regulation⁵ currently underway may lead to significant changes in the regulatory framework. Although the precise nature of these changes is still unclear at present, there seems to be a move towards an approach that is based more firmly on economic considerations. In any case, recommendations for changes arising from the 1999 Review would take some time to be implemented. The Director considers the framework for Level 2 analysis set out in the Consultation Paper is a valuable means of incorporating economic principles within the existing regulatory framework but will continue to monitor the progress of the 1999 Communications Review.

⁵ "Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review" Communications from the Commission to the European Parliament, the Council, the Economic and Social Committee of the Regions

Some respondents considered that the application of economic principles, and in particular Level 2 analysis, was incompatible with either the ONP framework or guidance on implementation of the framework issued by the European Commission. The Director considers that the proposed approach is entirely consistent with both the ONP Directives and their transpositions into national law. The factors that the Director shall take into account when making a determination, for example under the Interconnection Regulations include, amongst others, an organisation's ability to influence market conditions and the control exercised or capable of being exercised by an organisation over the means of access to users. These factors would be crucial for a finding of market power in appropriately defined Level 2 markets. By implication, the assessment of market power in Level 2 markets could not be based on the formulaic application of a market share threshold. Moreover, the determination made with regard to the Level 1 market (at which level an SMP designation must be made), would also need to take account of the number and importance of various Level 2 markets within which an operator enjoys market power as well as the degree of such market power.

For the avoidance of doubt, the Director does not consider the Level 2 analysis to be an application of competition law. The Level 2 analysis is based on economic principles, which by their very nature are similar to those used under competition law.

2.2.3. Proposed methods for calculating Level 1 market shares

The two main concerns expressed with regard to measurement of market sizes and market shares were related to the time period for which information was collected through the questionnaire, and the use of value rather than volume measures.

Timing

Regarding the issue of timing, there is clearly a trade-off between reliability and actuality. In order to have comparable information across operators, the Director considers that data needs to be collected for the same time period across all operators. The substantial delays experienced in receiving accurate information from operators in the course of this exercise suggests that there would be severe difficulties with asking for more contemporaneous information. However, the Director will consider the possibility of bringing forward a subsequent determination.

Two respondents commented that the determination of SMP should be undertaken on a forward-looking basis. If Level 1 markets shares were close to 25% and materially affected by the period over which data was gathered, then this would in any case trigger a Level 2 analysis. The Director proposes to use a forward-looking approach in any Level 2 analysis, since designations would be made on the basis on entrenched, rather than transient, market power. We discuss this issue below in section 2.2.6.

Value vs volume measures

Although the majority of respondents welcomed the general use of value measures in calculating Level 1 market shares, there was some concern that such measure may paint a

distorted picture when combining services with significantly different costs, as would be the case when looking at the national market for interconnection. Some respondents pointed out that mobile call termination charges will always be higher than fixed call termination charges because of the underlying cost differences, and therefore call termination revenues would overstate the market share of mobile operators in the interconnection market. The suggested alternative was to calculate market size and market shares on the basis of call termination volumes rather than revenues.

However, the Director considers that the use of volume measures is seriously flawed and would create large distortions as a result of these very cost differences. In general, all other things being equal, networks charging higher call termination charges may receive fewer call minutes. Therefore, increasing the price of call termination would have the perverse effect of *decreasing* the market share of the operator concerned. Therefore, the use of call termination volumes as a measure would systematically *understate* the market power of higher cost operators.

Moreover, significant cost differences are sustainable only if the services are sufficiently heterogeneous. In this case value measures were generally acknowledged by respondents to be a practical way of calculating market sizes and shares.

Finally, it should be noted that the SMP Explanatory Note recommends the computation of market share in the interconnection market on the basis of value.

Decision 2.2.3.1.

Level 1 analysis will be conducted by calculating market shares on the basis of revenues only.

Use of call termination revenue

The Consultation Paper advanced the specific proposal that call termination revenues be used as a measure of market power in the fixed public telephony networks and services market. A similar proposal was put in relation to the measurement of market power in the mobile public telephony networks and services market.

With regard to both proposals there was broad agreement from the respondents that this is the most appropriate method to use. Two respondents disagreed with using a revenue measurement only rather than considering revenue and volume measures, as discussed above.

Two respondents raised a concern over how a notional value for self terminated traffic would be determined. The approach adopted is that set out in the SMP Explanatory Note. The number of calls/minutes terminated in the network is multiplied by an appropriate interconnection charge for call termination.

Decision 2.3.3.2.

In accordance with the SMP Explanatory Note the Director considers the use of call termination revenues is the most appropriate measure of market power in the fixed public telephony networks market and the mobile public telephony networks and services market.

2.2.4. Combining digital and analogue mobile networks

Most of the respondents agreed with the proposal to combine digital and analogue mobile networks. Two respondents felt that digital and analogue mobile networks should be considered separately. One of these respondents believes that it is the Commission intention that digital and analogue are separate networks and should be treated as such for the purposes of measuring SMP in the mobile and interconnection market, even where owned and operated by the same undertaking.

The Director disagrees with this view. The term "public telecommunications networks" is used in a generic sense throughout the Interconnection Directive. While the distinction is made between fixed and mobile public telephone networks in Annex I of that Directive, it does not make a distinction between analogue and digital networks within the mobile network market. Likewise, the SMP Explanatory Note contains no reference to considering analogue and digital mobile networks separately for the purposes of the interconnect market.

Indeed, it is evident from the Interconnection Directive, and the relevant Directive and Regulations in general, that it is the organisation which is providing or is authorised to provide public telecommunications networks on which the obligations fall, with distinctions between markets being made according to the definitions in Annex I. Therefore, the combined involvement of that *organisation*, not its *networks*, in the relevant SMP market needs to be assessed in determining SMP.

Decision 2.2.4

For the purposes of the mobile telephone networks and services market digital and analogue mobile will be treated as a single market.

2.2.5. Defining Level 2 Markets

In responding to the proposals made in the Consultation Paper on Level 2 market definition, the most prevalent concern expressed by respondents was that SMP obligations might be

applied piecemeal to Level 2 markets, thereby extending the scope of regulation. This is discussed in Section 2.2.2 above.

The economic principles of demand and supply substitutability and homogeneity of competitive conditions constitute a flexible framework for defining markets for the Level 2 analysis. In fact, they allow the inclusion of any other products or services lying *outside* the original Level 1 markets, but falling within the same economic market by virtue of demand substitutability, supply substitutability or homogeneity of competitive conditions. One respondent claimed that the reference to these economic principles was insufficiently elaborated. The Director thinks that further elucidation or justification of these concepts is unnecessary given the widespread use of similar principles under competition law

2.2.6. Assessing competition within Level 2 markets

The Director wishes to clarify that the assessment of market power in Level 2 markets would not be based on the formulaic application of a market share threshold of 25%. Instead, the factors that the Director shall take into account when making a determination include, among others, an organisation's ability to influence market conditions and the control exercised or capable of being exercised by the organisation concerned of the means of access to users. These factors are crucial for a finding of market power in appropriately defined Level 2 markets.

All respondents were in general agreement that the analysis of competition within a particular market should be forward-looking and focussed on entrenched market power. The Director believes that Level 2 analysis provides a sufficiently flexible approach to satisfy this concern and take account of trends in market conditions. It is anticipated that SMP designations would only be made where market power could be expected to endure for some time to the detriment of customers, competitors or entrants.

Three respondents expressed the view that the list of factors to be considered in assessing market power within Level 2 market concentrates too much on price competition and places too little emphasis on non-price competition, such as in quality and coverage. Whilst it is relevant to consider issues such as quality and coverage in the provision of telecommunications services, these may also form part of a strategy of differentiation by operators, as well as a means of competition. The Director believes that, although competition in quality and coverage are relevant considerations, primary attention should be given to competition on price in the assessment of competitive conditions.

One respondent commented that the Director has been unclear about the factors to be used in the analysis of barriers to entry. The Consultation Paper provides a non-exhaustive list of the possible factors to be considered. A number of respondents provided additional suggestions. The Director considers these suggestions to be sufficiently close to those already listed in the Consultation Paper or in the factors the Director is obliged to consider, listed in Regulation 6 of the Interconnection Regulations.

One respondent expressed a concern that the Director might fail to take into account the closely related concept of “barriers to expansion”, i.e. the ability of an operator to expand in response to gaining market share from its competitors. This is an important factor but it refers primarily to competition *within* the market rather than to an analysis of barriers to entry. The extent to which participants in a market have incentives and ability to win customers from their competitors is a relevant consideration in a Level 2 analysis.

Therefore, the Director would propose to consider the issue of “barriers to expansion” within any Level 2 analysis where this would be appropriate.

Opinion was widely varied on appropriateness of the factors listed in the Consultation Paper to be considered in the analysis of barriers to entry. The Director agrees that economies of scale and scope are not barriers to entry *per se*. Nevertheless, it is relevant to consider whether there are scale and scope advantages available to incumbents that would not be available to entrants, even if these entrants expanded the scale and range of their activities. Some respondents do not accept that first-mover advantages might give rise to barriers to entry. The Director accepts that any analysis of first-mover advantages must be undertaken with care, but nevertheless it is a relevant consideration when assessing the extent to which new entrants or potential entrants constrain the behaviour of established operators.

One respondent considered that switching costs are not a barrier to entry but can reduce the degree of competition among operators. This is indeed true. The Director would wish to take into account switching costs in assessing the competitiveness of any Level 2 retail market. However, there is a particular concern that operators might take steps to increase switching costs and lock in existing customers, for example through loyalty discounts. Such steps would constitute a deliberate strategy of erecting entry barriers.

Two respondents believe that the analysis of barriers to entry should be more focussed on legal/regulatory constraints. The Director accepts that these are relevant considerations, but they should not receive undue weight.

One respondent commented that the existence of price-cost margins could be evidence of superior efficiency rather than market power. The Director accepts this point and would not seek to draw conclusions in any Level 2 analysis from price-cost margins or other measures of profitability without giving due consideration to the question of efficiency differences. However, whilst it is possible that efficiency differences can exist between operators in the short run, effective competition should provide incentives for less efficient operators to strive for greater efficiency and cut costs to catch up with more efficient competitors. Therefore, the existence of *sustained* efficiency differences or *entrenched* excess profitability without an appropriate competitive response from less efficient operators may in itself be *prima facie* evidence of ineffective competition.

Decision 2.2.6

The Director welcomes the suggestions made by respondents regarding the assessment of competition within Level 2 markets. The Director considers that the generic factors to be taken into consideration when deciding whether a barrier to entry exists in the market or in assessing if there are conditions of competition within a marketplace are sufficiently clearly set out in ODTR 99/59

2.2.7. Candidate Level 2 markets

Although some of the respondents disagreed with, and commented on, the proposed candidate Level 2 markets, no concrete alternatives were suggested.

The Director considers that the candidate Level 2 markets do take account of “transactional complementarities” which, according to one response, would result in wider cluster markets, for example combining access, local, national and international calls. The fact that some (but not all) operators are active in more than one Level 2 market, and are offering their services as bundles, should not have any bearing on market definition.

For the avoidance of doubt, Level 2 markets are not confined to those lying entirely within Level 1 markets. The principles of market definition would require the inclusion of services that are substitutes (on the demand or the supply side) for services within a Level 1 market regardless of whether such services would be captured by the definition of the respective SMP market. At present, the candidate Level 2 markets do not extend beyond Level 1 markets, but technological developments may well change this situation.

Level 2 markets in mobile public telephony networks and services

In the Consultation Paper, it was proposed not to define Level 2 network markets for mobile telephony. This proposal was based on the current network configuration and service offerings in the mobile sector.

Most respondents agreed with this proposal. One respondent agreed but not for the reasons set out in the consultation paper. Rather, this respondent disagreed in principle with the Level 2 approach.

Two respondents pointed out that the market share for interconnection needs to be computed separately for analogue and digital networks. This question is considered separately in Section 2.2.4.

Level 2 markets in leased lines

Regarding the proposed split of the leased lines market, some respondents pointed out that there may be considerable supply side substitutability between leased lines of different capacities. The Director agrees that technological changes will have a substantial impact in this area, and it will be necessary to keep these market definitions in particular under review. A separation of markets for leased lines of different capacity would be justified, however, if there were a gap in the chain of substitution.

Decision 2.2.7

The Director has decided to adopt the candidate Level 2 markets proposed in the Consultation Paper. However, given the pace of both development in the marketplace and technological change, the Director recognises that these candidate Level 2 markets will need to be reviewed on a periodic basis.

2.2.8. SMP and the licensing regime

As part of this consultation process, the Director also sought views on whether, and if so how, licence conditions designed to control market power should be applied to telecommunications markets outside Annex I of the Interconnection Directive.

In general, respondents were critical of the use of SMP as a trigger for licence conditions, although there was acknowledgement of a need for some licence obligations to be triggered by possession of market power. Respondents suggested a range of alternatives, including

- an incumbency test or special licence to be applied to eircom alone,
- use of dominance rather than SMP as the trigger criterion, and
- adoption of a mechanism similar to the Market Influence test applied by OFTEL in the UK.

The Licensing Directive requires the Director to treat all operators in a non-discriminatory and proportionate manner. The Director considers that an incumbency test or application of a specific licence to eircom would be discriminatory and disproportionate to the aims of the licensing arrangements.

In any event, there is specific provision in the Licensing Directive for inclusion of licence conditions designed to control SMP, and although there are initial signs that the European legal framework may change with respect to the test employed, the outcome of the 1999 Review is uncertain. The Director does not consider it appropriate to switch to a new licensing criterion at this time. Any such move might lead to adoption of a short-lived measure subject to legal uncertainty. However, the Director intends to review the appropriate trigger for licence conditions once the outcome of the 1999 Review is known.

Although SMP will remain the trigger for additional licence obligations, there remains the question of how far such conditions should apply to services that fall outside the Annex I market definitions. Suggestions have ranged from making all services of an operator with SMP in the Fixed Public Network and Services market subject to additional obligations to limiting any obligations to only those services that fall within the market over which an operator possesses SMP.

The Director wishes to make sure that licence obligations triggered by SMP are an effective instrument in protecting and promoting competition whilst safeguarding SMP operators from unnecessary intervention. Applying SMP-related obligations to all activities of an operator would appear to be disproportionate, while applying them only to services within the Annex I definitions could leave telecommunications services that are closely related to those falling within the definitions and over which an SMP designated operator possesses market power outside the regulatory net, potentially leading to a distortion of competition.

To avoid the problems inherent in these two alternatives, the Director proposes to extend the scope of licence obligations to services that, although falling outside the markets as set out in Annex I of the Interconnection Directive, are close substitutes, either in demand or supply, for services within such markets. The Director plans to put forward more specific proposals on this issue early next year.

3. Determining SMP

Given the current stage of development of the telecommunications sector and the continued powerful position of the incumbent after the first year of operation of the liberalised telecommunications market, the determination of SMP for 1999 has been made on the basis of the results of the Level 1 analysis. These results were unambiguous and it was not necessary to proceed to a Level 2 analysis in any case.

3.1. Fixed Public Telephone Network and Services

Following the consultation exercise, the Director has decided that for the purposes of the Voice Telephony Regulations, shares of the market for voice telephony services should be assessed on the basis of *retail revenues* excluding the revenues related to the supply of terminal equipment. This method is in accordance with the SMP Explanatory Note issued by the Commission. Shares of retail revenues provide a simple and reasonably effective measure of retail market power. Based on this method, eircom is the sole candidate for SMP in this market at the retail level with a market share of 95%.

The Interconnection Regulations require an assessment of market power at the *network level*. The SMP Explanatory Note suggests that, for the purposes of the implementation of the Interconnection Directive, it is best to use *revenues from terminating calls* to calculate market shares for both fixed public telephony networks and services. This measure should include a notional value for self-terminated own-network traffic and the termination of interconnection traffic received from other networks. Following the consultation exercise, the Director has decided to adopt this approach.

Based on this method, eircom is the sole candidate for SMP in this market at the network level with a market share of 94%.

3.2. Mobile Public Telephone Network and/or Services

For determining shares of the mobile public telephony network and/or services under the Interconnection Regulations, the Director has decided to use the same approach as in the fixed public telephony networks, that is, the revenues from terminating calls. This measure should also include a notional value for self-terminated own-network traffic and the termination of interconnection traffic received from other networks. Again, this is in complete agreement with the method proposed by the SMP Explanatory Note.

Based on this method, Eircell and Esat Digifone are both candidates for SMP in the mobile market, with 64% and 36% respectively of the market.

3.3. Leased Lines

Following consultation, the Director has decided that for the purposes of the Leased Lines Regulations, shares of the leased lines market be measured in terms of *shares of revenues from customers* (be they domestic or business customers or other operators).

On this basis eircom has 95% of the market and it is the sole operator designated as having SMP in the leased lines market.

3.4. The National Market for Interconnection

The Interconnection Regulations require the assessment of SMP in the national market for interconnection. After consultation, the Director has decided that Level 1 market shares are best measured by call termination revenues. Call termination revenues are calculated in the same way as for the fixed and mobile public telephone network/services markets under the Interconnection Regulations, namely including:

- calls terminating on networks (including fixed public telephony networks, mobile public telephony networks and leased lines) within Ireland regardless of their origin;
- an imputed value for self-terminated calls; but
- excluding traffic conveyed but not terminated by operators..

This procedure has already been used for the determination of SMP in the interconnection market last year. It is also in line with the approach suggested by the SMP Explanatory Note. On this basis, the market shares of eircom, Eircell and Esat Digifone are as follows.

Operator	1999	1998⁶
Eircom	36%	70%
Eircell	39%	23%
Esat Digifone	23%	7%
All other operators	2%	0%

The market shares of eircom and Eircell are sufficiently large to lead to designation of SMP in the national market for interconnection on the basis of a Level 1 analysis alone. The market share of Esat Digifone is below 25%. Some consideration was given to carrying out a Level 2 analysis. Such a level 2 analysis requires:

⁶ A number of different measurement parameters were considered in 1998 as, at the time of the determination, the SMP Explanatory Note had not been published. The figures in the 1998 column represent the most comparable measurement method to that used in 1999.

:

- the identification of economic markets lying within (or crossing the boundaries of) the national market for interconnection;
- consideration of competitive conditions within these markets on a forward-looking basis.

As identified in the Consultation Document, the national market for interconnection consists of a wide range of network services of different types. In particular, interconnection services supplied by fixed operators are differentiated according to the *level* of the network at which interconnection is provided. It is possible therefore to distinguish (at least) between double tandem interconnection, single tandem interconnection and primary interconnection (call termination). These fixed interconnection services are likely to be of limited substitutability on either the demand or supply side.

However, with respect to interconnection with mobile, by the very nature of a mobile network, it is not currently possible for an interconnecting operator to self-supply some of the conveyance and switching activities that a mobile operator undertakes. This arises because the location of the mobile customer is not known to the originating operator. Thus, mobile interconnection services are provided as a single undifferentiated *bundle* and cannot at present be unbundled

Therefore, the Director decided not to pursue an examination of unbundled level 2 markets in this case as mobile interconnection services are incapable of being unbundled at present. However, the Director also recognises that technological and market circumstances may change to allow this analysis to be carried out in the future.

3.4.1. A forward-looking assessment of competitive conditions

Any forward looking approach to the assessment of market power requires that:

- market trends be assessed to see whether Esat Digifone's current market power is greater than or less than that suggested from Level 1 market shares computed from historic data; and
- the extent to which any market power exercised by Esat Digifone in the national market for interconnection is transient or likely to endure for some time.

Based on an examination of market trends it is evident that Esat Digifone has increased its market share of the mobile market to date on the basis of subscriber numbers. Termination rates have remained unchanged in the intervening period and eircom has reported a significant increase in the level of originating calls that are being terminated on mobile networks. Thus it is likely that Esat Digifone has also increased its share of termination revenues in the interconnect market. However, without repeating the SMP exercise it is impossible to determine the level of the increase to date and whether this increase is sufficient to push Esat Digifone's market share above 25%.

The assessment of the transience of market power in the interconnection market will be influenced by a number factors including:

- The development of fixed to mobile traffic.
- The impact of the introduction of a 3rd operator into the market.
- The trend in mobile termination rates.

The outcome of the SMP exercise for 1999 may have a significant impact on the dynamics of the interconnection market for mobile. If this is the case, Esat Digifone's share of the market in value terms over the next year could change dramatically. The Director does not wish to prejudge market developments and does not want to regulate on the basis of a particular scenario believing that this is likely to be inflexible and may prove heavy handed.

3.5. Other relevant factors

Regulation 5(7) of the Interconnection Regulations requires the Director to consider the “market power” of the organisations concerned, that is the ability to influence market conditions. In addition, the Director is required to take account of a number of additional factors under Regulation 6 of the Interconnection Directive. These are:

- the turnover of the organisation concerned;
- the control exercised or capable of being exercised by the organisations concerned of the means of access to end-users;
- the access to financial resources of the organisations concerned;
- the experience of the organisations concerned in providing products and services in the market.

All of these factors were considered separately for eircom and Eircell. The conclusions drawn from these considerations support the result of the Level 1 calculations.

Given that Esat Digifone's market share is below the 25% based on the Level 1 calculations, the presumption would be against designation of Esat Digifone. However consideration also needs to be given to the factors outlined above. The conclusions are that Esat Digifone is well established in the market place with substantial turnover and good access to financial resources. Its experience in providing products and services is shorter than either Eircell or eircom, but it is well capable of launching leading edge services. The control it exercises or is capable of exercising on the means of access to end-users, although below 25% in market share terms, is complete in relation to its customers at any time. However, unlike the current fixed market, it faces a very substantial competitor for providing that access in Eircell. Developments in relation to termination pricing in the future may cause this assessment to change.

4. Conclusion

The designation of operators with Significant Market Power in relevant markets is very important for the regulatory regime and for the operators concerned, as it brings with it certain obligations in national and EU legislation and is also used as a tool in the licensing regime. The Director has made the designations in this Decision Notice on the basis of the Level 1 analysis and a review of Level 2 analysis has taken into account the relevant factors that she is obliged to under the appropriate legislation.

The designation of SMP will be re-examined when changes to competition conditions in the Irish telecommunications market recommend so.

Designation 4.1

eircom is designated as having SMP in the public fixed telephony services market with a market share of 95% (1998: 96%).

eircom is designated as having SMP in the public fixed telephony networks market with a market share of 94% (1998: 96%).

Designation 4.2

In the mobile public telephony networks and services market Eircell and Esat Digifone are designated as having SMP. Eircell has a market share of 64% (1998: 76%) and Esat Digifone has a market share of 36% (1998: 24%)

Designation 4.3

eircom is designated as having SMP in the leased lines market with a market share of 95% (1998: 100%).

Designation 4.4

In the national market for interconnection Eircell and eircom are designated as having SMP. Eircell has a market share of 39% (1998: 23%) and eircom has a market share of 36% (1998: 70%).

Note: Market share calculations have been based on March figures.

Annex 1: Calculation of Level 1 market shares

Leased Lines

Shares were calculated on the basis of revenues accruing to network operators for the supply of leased lines to customers or other operators. Where a leased line was resold, the revenue was counted against the original supplier of the leased line rather than the reseller.

Fixed public telephony network/services (retail level)

Market shares were calculated on the basis of all retail revenues. This included line rental, connection and call charges, but excluded charges related to terminal equipment.

Fixed public telephony network/services (network level)

Mobile public telephony network/services (network level)

National market for interconnection

In these markets, shares were measured using call termination revenues. These were calculated by taking the sum of the following:

- Receipts from sales of primary interconnection to other operators;
- Sales of other interconnection services, including single and double-tandem interconnection as well as termination of incoming international traffic, valued at the average price of primary interconnection; and
- Self-terminated calls valued at the average price of primary interconnection.

The average price of primary interconnection was calculated by dividing receipts from sales of primary interconnection to other operators by the number of minutes of primary interconnection provided. This was undertaken separately for peak, off-peak and weekend periods.

The volume of self-terminated own-network traffic was calculated by subtracting the volume of traffic received from other operators for termination on the relevant operator's network from the total volume of traffic terminated on the relevant operator's network.