



Office of the Director of
**Telecommunications
Regulation**

Significant Market Power in the Irish Telecommunications Sector

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Introduction

In preparation for the full liberalisation of the telecommunications market on 1 December 1998, and the development of the regulatory framework for that liberalised market, the Director of Telecommunications Regulation (“the Director”) has engaged in a wide range of consultations on relevant issues.

In July 1998, the Director published a Consultative Paper *Significant Market Power in Telecommunications* (ODTR, 98/25). The purpose of this Consultative Paper was to obtain the views of interested parties on a proposed methodology and approach to determining organisations with Significant Market power (“SMP”) on relevant markets. There are obligations on the Director in EU and national legislation to make certain notifications in relation to organisations with SMP on specific telecommunications markets. Furthermore, the legislation¹ recognises that there may be a need for specific licence conditions designed to control SMP. The definition and determination of SMP is therefore important, as it defines those organisations that have to comply with obligations set out in legislation and that may have to comply with additional licence conditions linked directly to that position of SMP on a relevant market.

The purposes of this document are as follows:

- Firstly, to respond to submissions received from interested parties. The main points of the submissions are summarised, some points of confusion are clarified and the role of SMP in the regulatory regime generally is outlined. In particular, since the SMP consultation paper was issued, the ODTR has published draft pro-forma licences (Document Number ODTR98/40) setting out clearly the licence conditions which will be included in licences of organisations with SMP. Many respondents to the SMP paper specifically requested this clarification.
- Secondly, this paper summarises developments since the consultation, including the revision by the ODTR of the proposed licensing regime and the publication by the European Commission of draft guidelines on the measurement of SMP.
- Thirdly the document sets out the methodology by which SMP has been determined by the ODTR.
- Finally, the Director’s determination of which organisations are determined as having SMP on the relevant markets is made.

The determination of SMP operators will be repeated in 1999 after the Irish telecommunications sector has been fully liberalised, and annually thereafter, or as the Director considers necessary. Calculating SMP before full liberalisation (although very necessary) has complicated the process and made some approximations and estimations necessary, particularly when calculating the market shares of the national interconnect market. The ODTR has taken account of these factors.

When publishing the consultation document in July 1998, the ODTR was concerned to ensure consistency with any approach adopted by the European Commission in measuring SMP. The Commission was not at that stage in a position to provide guidance measurement parameters, but the ODTR was aware of proposals by the Commission to publish such guidelines and hoped to be in a position to incorporate those guidelines into any final methodology and determination. The European Commission issued a discussion paper Determination of organisations with significant market power (SMP) for implementation of the ONP Directives (ONPCOM98-39) on 18 September 1998. This document is very much a preliminary discussion document and the European Commission will not publish a final recommendation on what may or may not be included in the calculations for some months. Those final guidelines may of course differ from those set out in the discussion document.

The approach adopted by the ODTR differs in some respect to the approach set out for discussion in the latest European Commission paper on SMP. Where possible, the ODTR has calculated SMP using both the ODTR calculations and the proposed European Commission calculations. Adopting

¹ Directive 97/13/EC on a common framework for general authorisations and individual licences in the field of telecommunications services, para 4.6 of Annex.

the European Commission approach changes no determination.

The SMP consultation document in July 1998 described a methodology for determining SMP that consisted of two levels of analysis. The level 1 analysis examined market shares on the relevant markets as described in the Directives; the level 2 analysis examined market power on a set of markets *associated* with the markets analysed at level 1.

In this first determination of SMP, the level 1 analysis, supported by general market information, provides clear-cut results. The supporting level 2 analysis is therefore not very relevant and is not presented this year. As the Irish market becomes more competitive and complex, and as the determination of SMP is further developed, it is expected that the level 2 analysis will be relied on to a greater extent.

This document is structured as follows:

- Section 2 summarises the main points resulting from the consultation process and clarifies points of confusion;
- Section 3 outlines the role of SMP in the licensing process and in the regulatory regime generally;
- Section 4 provides details of the methodology for determining SMP, describes the level 1 analysis and names the operators with SMP;
- Section 5 concludes the paper and summarises the results, and future actions.

This decision may be reviewed by the Director from time to time in accordance with her duty to regulate the market generally.

Section 2: The Consultative Process

On July 31st, the ODTR published a consultative document on SMP and invited comments. This section briefly summarises the responses received from this process and clarifies some points raised.

Responses

Responses were received from the following parties.

- Cable and Wireless
- Eircell
- Esat Digifone
- Esat Telecom
- NTL Telecommunications
- Ocean
- OPTA
- PostGEM
- Southern Health Board
- Stentor
- Swiftcall
- Switchcom
- Telecom Éireann

- Telemedia
- Telenor
- WorldCom

The main concerns raised by respondents were that:

- The consultative process did not allow sufficient time for detailed responses;
- The determination of SMP does not require such an elaborate framework and is not a priority at this time;
- Concern was expressed that SMP might be “married” with competition rules in a way that would weaken the impact of SMP provisions or that might impose inappropriate burdens on new entrants;
- The role of SMP in the regulatory process was unclear and in particular it was unclear how SMP fits into the licensing structure; and
- Concern was expressed with the Level 1 and Level 2 analyses by some respondents, but welcomed by some others. A common fear was that SMP could be designated on the basis solely of having a 25% market share at Level 2, resulting in sector-wide (i.e., Level 1) obligations.

In addition, detailed comments were received from a subset of respondents on the proposed Level 2 market definitions. Broader definitions of the market were suggested generally. Examples included:

- Upstream and downstream markets in mobile are in the same market (because of vertical integration);
- Analogue and digital mobile services are in the same market (because they are very close substitutes);
- Leased lines are part of the local loop market and that different capacities of network are in the same market (because of high supply substitutability);
- Fixed and mobile telephone services are in the same relevant market (because of increased substitutability in the future);
- All network is in the same market (because of anticipated increases in supply substitutability with new investment); and
- Call termination and origination are in the same market (because they are perfect complements or because of call-back possibilities).

In some instances, particularly with call termination, the opposite view favouring a narrow market was also strongly expressed.

Opinions on whether value or volume market shares should be used were diverse. Relatively few comments were received on how market power at Level 2 should be determined. Yet, the possibility of predatory behaviour concerned most respondents, even those that also argued strongly that SMP should not be connected with competition rules.

Most respondents believed that the determination of SMP should somehow distinguish new entrants from established operators, or that operators with strength in several of the Level 1 markets should be treated differently than those with strength in one area of the market. A particular concern was that a firm with a high market share in a niche market could be determined as having SMP.

Other more diverse and general comments were also received and have been incorporated into the clarification below.

Clarification of Points of Confusion

At several points, it was evident that there was some lack of clarity on aspects of the determination of SMP. In some cases, respondents asked for direct clarification of these questions. In others cases, underlying confusion was the most obvious inference derived from certain comments. This sub-section briefly clarifies some of the most important points.

- 1) SMP is determined on the four Level 1 markets as specified in the directives. It is unlikely that operators who do not have 25% market share on a level 1 market would have SMP, but that possibility cannot be ruled out completely. The Level 2 analysis is one factor used to assist in deciding whether any deviations from the 25% threshold are necessary.
- 2) The ODTR's treatment of SMP will not substitute for the application of competition rules. However, the approach will endeavour, where possible, to promote effective competition and thus SMP should be seen as a complement to the competition rules.
- 3) SMP has two distinct roles within the regulatory process in Ireland. First, SMP operators will be notified to the European Commission in accordance with the relevant directives and will be subject to the obligations set out in the relevant legislation. Second, it is proposed that SMP operators will be subject to extra licence conditions, as outlined in a recently issued consultation paper *Telecommunications Licences Consultation Paper* (ODTR 98/40).
- 4) Value of turnover is the fundamental measure of market share used, supplemented by volume market shares in some cases. Several Level 1 markets are sectoral and thus include many different products (e.g., network plus service) so that only value market shares can be calculated. In contrast, the lack of accounting separation means that volume market shares must be used in interconnection and network markets. Information on unused capacity is required to measure potential competition but will not be used in the calculation of market shares.
- 5) The market power analysis at Level 2 is *ex ante* in the sense that we ask whether market power exists and could be exploited now or in the future. A competition analysis is *ex post* in the sense that it asks whether market power existed and was exploited at some point in the past. The use of the term *ex ante* does not mean that SMP will be based on anticipated market power in the future that does not exist now.
- 6) The analysis of relevant markets at Level 2 is not constrained by the Level 1 description of those markets. For example, the inclusion of leased lines in the local loop at Level 2 indicates how a market at Level 2 (local loop) may span more than one market at Level 1 (fixed telephony and leased lines). Most respondents agreed with this treatment of leased lines at Level 2.
- 7) The market definitions in the consultative document were proposals only. The comments received in response to the question of whether alternative definitions would be more appropriate have been taken into account in the preparation of this document. The information requested on the questionnaires is not made redundant by any alteration of these definitions because it can be aggregated or dis-aggregated as required.
- 8) A questionnaire that accompanied the consultation document was issued to all licensed operators. The information obtained from this questionnaire is essential for the determination of SMP. The Director will maintain the confidentiality of all commercially sensitive information. However, certain information will be published for reasons of transparency. In particular, market shares will be identified particularly where they are large.

Section 3: The Role of SMP

Before outlining how SMP is to be determined in the Irish Telecommunications markets, it is useful to outline the dual role of SMP in the regulation of telecommunications.

First, the Interconnection, Leased Lines and Voice Telephony Directives imply a direct role for SMP. This involves the notification of those operators with SMP to the European Commission. Such operators will then have obligations under the directives and the corresponding regulations transposing the directives into Irish law (the voice telephony directive has not yet been transposed into Irish law).

Second, the licensing regime will make use of SMP as a trigger for certain conditions in licences. The Licensing Directive envisages such conditions in para 4.6 of Annex 1. The proposed SMP conditions for fixed telecommunications licences are detailed in the Telecommunications Licences Consultation Paper (ODTR 98/40) of September 1998.

Direct Role of SMP under the Directives

Any operator designated with SMP as a result of the determination process would be subject to a number of obligations outlined in:

- Council Directive 97/33/EC on Interconnection in Telecommunications and the European Communities (Interconnection in Telecommunications) Regulations, SI No. 15 of 1998;
- Council Directive 97/51/EC on Leased Lines and the European Communities (Leased Lines) Regulations, SI No. 109 of 1998; and
- Council Directive 98/10/EC on Voice Telephony and Universal Service for telecommunications in a competitive environment (yet to be transposed in Ireland).

The obligations imposed on organisations which are designated as having SMP under each of the directives and corresponding regulations vary according to directive and regulations. It is possible however to identify a common set of principles governing the obligations imposed by each of the different EU and national legislative provisions referred to above. In general an SMP operator will be required to:

- Meet all reasonable requests for access to its network (including access at points other than the network termination points offered to the majority of end-users) and to meet all reasonable requests for services;
- Adhere to the principle of non-discrimination both in terms of ensuring that similar conditions are applied in similar situations to organisations providing similar services and of ensuring that the access and services provided to others are subject to the same conditions and are of the same quality as those provided for the SMP operator's own services or those of any subsidiary or partner of the SMP operator;
- Ensure that the access or service provided meets certain specified quality of service standards, to keep records and furnish to the Director and in certain instances publish details of the compliance with those performance standards;
- Ensure that charges for access / services are cost-oriented, transparent, unbundled and independent of the application to which they are put;
- Operate a cost accounting system which is suitable for implementation of the tariff requirements imposed on SMP operators;
- Publish details of the terms and conditions subject to which access or as the case may be services are provided.

For the most part the SMP obligations imposed under the directives and regulations are directed at providers of fixed telephony services and/or networks (including providers of leased lines). However certain of the provisions of the Interconnection Directive and the Interconnection Regulations apply also to providers of mobile telephony networks and/or services where such operators have SMP on the national market for interconnect. Moreover consideration is currently being given by the Commission to extension of the SMP obligations imposed on mobile operators.

Role for SMP in Licensing

The Director is carrying out a wide range of consultations in preparation for a fully liberalised telecommunications sector after 1st December 1998. A key issue for the liberalised market is the licensing regime that will apply from 1st December. A recently issued consultation paper *Telecommunications Licences Consultation Paper* (ODTR 98/40) sets out the specific licence conditions that may apply to SMP operators. The licensing regime described in this latest paper

differs from the regime that was proposed when the SMP consultation process began in July 1998. The reasons for this are set out in ODTR 98/40. The effect of the changes is to reduce the number of classes of licences to two. The text of the licences will be finalised following a review of comments received.

Mobile Licences

Only the terms and conditions for fixed telecommunications licences are addressed in the Telecommunications Licences paper. Mobile licences are specifically excluded from that paper and therefore licence conditions related to SMP on either the mobile market or SMP by a mobile operator in the national market for interconnection are not addressed at this time.

It is proposed to examine all mobile licences with a view to ensuring they are compatible with the Licensing Directive by 1 January 2000. During that review the Director will examine the relevance of SMP on the mobile market and SMP by mobile operators in the national market for interconnect. The possibility of having conditions in mobile licences related to SMP will be considered.

Within the current timetable for liberalisation it is not envisaged that this task will be undertaken before December 1998.

Section 4: Determining SMP

Level 1 Analysis

This analysis takes as its basis the four markets referred to in the Interconnection Directive and also the Leased Lines and Voice Telephony Directives. These are:

- **Fixed Public Telephone Network and/or Services**
- **Public Mobile Telephone Services and/or Networks**
- **Provision of Leased Line Services**
- **National Interconnect Market**

In general, market shares at Level 1 are measured using the value of turnover. All revenue figures are from the financial year April 1997 to March 1998. Level 1 markets represent sectoral activities with many different products and services. These cannot be added together in volume terms, however they can be added in value terms

Volume market shares are used as necessary. First, they are used instead of value market shares at Level 1 if the latter are not available for any reason. For example, this is the case with the interconnect market where adequate information is not presently available to determine revenues due to interconnect. Second, volume market shares are examined at Level 1 where this is appropriate (e.g., leased lines, number of subscribers), but are not reported unless they suggest a major discrepancy in the relative sizes of operators that is not accurately reflected in the value shares.

Level 2 Analysis

The Level 2 analysis examines the telecommunications sector in three stages as follows:

1. **Define Relevant Markets:** The sector is divided into a set of relevant markets (not constrained in any way by the Level 1 market definitions). Each market determined at Level 2 is associated with one or more Level 1 markets.
2. **Identify Market Concentration:** The market structure of these markets is examined and any that are “concentrated” are identified.

3. **Examination of Market Power:** Market power is examined on all concentrated markets. On other Level 2 markets, market power is only examined in exceptional circumstances; for example where there is a possibility of a cartel existing.

The examination of market power relies on two factors, namely:

- Barriers to entry to the market; and
- The level of competition or rivalry on the market.

Market Power

The existence of market power requires that **both** a barrier to entry exists **and** rivalry on the market is weak. If there is a barrier to entry, strong rivalry should in principle give rise to prices that are competitive. Similarly, if entry is easy this will discipline any lack of rivalry on the market. Often however it is the case that the factors that give rise to barriers to entry are correlated with those that restrict rivalry as, for example, where there is only one operator licensed to operate on a market. Market concentration does not play any role in the determination market power: it is to be used solely as a screening mechanism.

In this first determination of SMP, the level 1 analysis provides clear-cut results in most cases. The supporting level 2 analysis is therefore not very relevant this year. As the Irish market becomes more competitive and complex, and as the determination of SMP is further developed, it is expected that the level 2 analysis will be relied on to a greater extent.

Determination of SMP

The determination of SMP uses the results of the Level 1 analysis along with more general market information acquired from the questionnaires.

Firstly, the 25% threshold is considered. It is stated that² :

An organisation shall be presumed to have significant market power when it has a share of more than 25 % of a particular telecommunications market in the geographical area in a Member State within which it is authorised to operate.

Deviations from this threshold are possible. An operator with a market share below 25% might have SMP or an operator with a market share above 25% might not. The directives give the following list of factors that are to be taken into consideration: These are:

1. The operator's ability to influence market conditions;
2. The operator's turnover relative to the size of the market;
3. The operator's access to financial resources;
4. The operator's experience in providing products and services in the market; and
5. The operator's control of the means of access to end-users.

Fixed Public Telephone Network and Services – Level 1

The fixed public telephone network and services are defined in the Interconnection and Voice Telephony Directives.

The ODTR methodology for measuring this market or "sector" is to use total value of the market measured by retail revenue. Revenue on the market consists of that collected from residential and business retail customers for:

- Rental of fixed lines and telephones;
- Conveyance of outgoing calls;
- Connection of fixed lines.

² Interconnection Directive at article 4, this is also reflected in regulation 5 of the Interconnection Regulations, regulation 5 of the Leased Line Regulations and in article 2.2i of Directive 98/10/EC.

The European Commission draft guidelines on measuring SMP suggests the exclusion of revenue from rental of terminal equipment. The data collected by the ODTR includes all rental charges. For future analyses, specific information will be requested for rental of terminal equipment, i.e. handset rental. However, this data cannot be separated out in this first determination. Given the results set out below, the ODTR considers that this change would not alter the final determination.

At this stage of the development of the Irish market, both methodologies yield similar results. There are 9 licensed telecom operators generating revenue in the fixed market. Using the ODTR measurement parameter, Telecom Éireann, has a value market share of 96% of revenue.

– **Telecom Éireann is the sole candidate for SMP on this market.**

Telecom Éireann has a market share well in excess of 25%; it has the ability to influence market conditions at both the upstream and downstream levels; it has high turnover relative to the size of the market, it has a strong presence in other (usually complementary markets) that strengthen its access to financial resources; it has more experience in providing products and services in this market than any other operator; and it has control of the means of access to the majority of end-users.

– **Telecom Éireann has SMP in the Fixed Telephone Network and Services market.**

Leased Lines – Level 1

Value market shares on the leased lines market is measured by revenue collected from residential and business retail customers and from sales to other licensed operators for connection and rental of national and international leased lines. In collecting data, difficulty has been encountered in identifying revenues arising from the re-sale of leased lines, which were leased from third parties in the first instance. This is because re-sale of leased lines is usually offered as part of a “total solution” package. This will be corrected in future data collection exercises. For the current designation, it has only been possible to count revenue collected by the owner of the leased line. Revenues include both the initial connection fees and the annual rental fees.

Telecom Éireann has 100% of the market. This results from the fact that resale of leased lines is not included. However, even if the resale of leased lines is worth the same amount as the total revenue that Telecom Éireann receives from selling leased lines to other service providers, Telecom Éireann would still have over 70% of the market. It is considered that resale does not presently affect the market share of Telecom Éireann.

– **Telecom Éireann is the sole candidate for SMP on this market.**

Telecom Éireann clearly has the ability to influence market conditions; it has high turnover relative to the size of the market, it has a strong presence in other (usually complementary markets) that strengthen its access to financial resources; it has more experience in providing products and services in this market than any other operator; and it has control of the means of access to the majority of end-users.

– **Telecom Éireann has SMP in the leased lines market.**

Mobile Public Telephone Network and/or Services – Level 1

In this market, the ODTR has taken an approach similar to that used for measuring the Fixed Public Telephone Network and Services market. In the Irish market, mobile operators are vertically integrated network and service providers, as in the fixed market. The ODTR approach of using retail measures would therefore appear appropriate and consistent with other measurements.

The ODTR measurement parameter is value market share using revenue collected from residential and business retail customers for the following:

- Rental of mobile telephones;
- Conveyance of outgoing calls;
- Connection of mobile telephones;

- Handset sales;
- Disconnection charges;
- Revenue from roaming (retail charges for making and receiving calls while roaming).

There are two operators in the mobile market. Using the above measurement, the largest, Eircell, has 78% of the total revenue, with Esat Digifone having the balance of 22%.

The draft guidelines issued by the European Commission suggested that since *“it is not appropriate to include in any calculation of market size the activities of organisations that are only mobile service providers and not mobile network operators ... the most appropriate measurement parameter appears to be the revenues for terminating calls to customers on mobile networks”*. This suggests that market share should be measured by calculating revenue received for terminating calls only. As stated above, this is not currently considered necessary or consistent with the ODTR measurement techniques applied in the fixed market. However, for this first determination of SMP, the Commission suggested approach has also been applied at level 1.

The results of applying the measurement parameter suggested in the Commission discussion document is that Eircell has an estimated 75.6% of the market and Esat Digifone 24.4% of the market.

– **Using either measurement parameter, Eircell is a candidate for SMP on this market.**

Eircell’s market share significantly exceeds 25%. It has market power both upstream and downstream, the ability to influence market conditions and high turnover relative to the size of the market. Via its ownership by Telecom Éireann it has good access to financial resources; it has more experience in providing products and services in the market than any other operator; and it exercises control of the means of access to a majority of mobile end-users.

– **Eircell has SMP in the Mobile Public Telephone Network and/or Services Market.**

The National Market for Interconnection – Level 1

SMP on the national market for interconnect has proven difficult to measure. This is particularly true when trying to assign an interconnection value to own network calls. No determination on the rates for national interconnection calls has yet been made by the Director. Furthermore, to arrive at an accurate figure for the value of termination of own network calls, it would be necessary to estimate what network elements were used to terminate those calls. While data is readily available on the destination of own-terminated calls, the network elements used in routing those calls are not. In Ireland where the fixed market will not be fully liberalised until 1 December 1998, this is particularly important because fixed-to-fixed interconnect largely comprises Telecom Éireann’s self-delivered traffic.

In this market, volume market share is the most reliable data. Volume market share includes:

- Traffic from the mobile operators to Telecom Éireann’s network;
- Traffic from Telecom Éireann to the mobile operators’ networks;
- Mobile own network traffic;
- Telecom Éireann’s own local and national traffic.

Incoming international calls should be included but all operators were unable to supply the necessary data.

Telecom Éireann has 94% of the volume of the national interconnect market.

It is not possible to apply accurate value measurements to this traffic for the reasons set out above. If, for illustration purposes, the rates that applied to the mobile operators from February 1997 are applied to Telecom Éireann’s own network local and national calls, Telecom Éireann would have 81% of the national interconnect market. If the rates published by Telecom Éireann in its RIO of August 1998 are applied, Telecom Éireann would have 77% of the national interconnect market.

The European Commission guidelines differ from the ODTR measurements in that the guidelines suggest that self-terminated traffic by mobile operators should not be counted, and self-terminated traffic by fixed operators should be measured as local termination only. Using this measurement parameter and the prices offered to mobile operators from February 1997, Telecom Éireann has 70% of the national market for interconnect.

Using either measurement, neither mobile operator appears to have more than 25% of the national market for interconnect. Given the limitations of the data at this stage, it is not considered appropriate to reveal market shares for the mobile operators in this market.

Neither Eircell nor Esat Digifone has 25% of the market so neither is formally a candidate for SMP. This is true using either the ODTR methodology or the measurement parameters suggested by the Commission in its draft guidelines.

- **Using any of the measurement parameters, Telecom Éireann is a candidate for SMP on this market.**

Telecom Éireann has a market share in excess of 25%; it has the ability to influence market conditions and particularly in call termination; it has high turnover relative to the size of the market, it has a strong presence in other (usually complementary markets) that strengthen its access to financial resources; it has more experience in providing products and services in this market than any other operator; and it has control of the means of access to the majority of end-users.

- **No mobile operator is designated as having SMP in the interconnect market.**
- **Telecom Éireann is designated as having SMP in the interconnect market.**

Section 5: Conclusion

The designation of operators with Significant Market Power on 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 ODTR has carried out an extensive examination of the relevant markets and developed a methodology for measuring SMP which is set out in this paper. Since that methodology was developed, the European Commission has produced a draft discussion document (on 18 September 1998) on guidelines for measuring SMP. It is clear that a considerable amount of discussion is required at European level before any common guidelines can be developed. In the meantime, it is essential for European regulators generally, and the ODTR in Ireland, to make clear designations in relation to SMP so that operators can understand and comply with their rights and obligations.

The ODTR will participate actively in the debate on the common guidelines on SMP at European level. In the interim, the ODTR has applied the Commission proposed guidelines to the measurement of SMP in the Irish market and has concluded that this measurement currently yields the same result as the ODTR analysis. There is no reason therefore to delay the designation of organisations with SMP. This document sets out that designation.

The designation of SMP is as follows:

- **Telecom Éireann** has SMP in the **fixed, interconnect** and **leased line** markets
- **Eircell** has SMP in the **mobile** market
- No mobile operator has SMP in the **interconnect** market

The designation of SMP will be re-examined in 1999 when the Irish market has been liberalised.

/ENDS