



Commission for
Communications Regulation

Statement on the proposed Review of the Electronic Communications Regulatory Framework

Information Notice

Reference: ComReg 16/12

Version: Final

Date: 11/02/2016

Commission for Communications Regulation

Statement on the proposed Review of the Electronic Communications Regulatory Framework.

February 2016

Introduction

ComReg is the independent statutory body responsible for the regulation of the electronic communications and postal sectors in Ireland. Through effective and relevant regulation, ComReg seeks to facilitate the development of a competitive communications sector in Ireland that attracts investment, encourages innovation and empowers consumers to choose and use communications services with confidence.

ComReg operates in a broad legal framework, with much of ComReg's mandate, functions and powers defined in European legislation. The current 'Telecoms Package' consists of a number of Directives and Regulations.¹ The European Commission has identified four of these Directives (Framework, Authorisation, Access, Universal Service) as central to its review of the Regulatory Framework, in the context of its Digital Single Market (DSM) programme. These Directives are central to ComReg's remit and a revision of these will impact on ComReg's mission in a significant manner.

ComReg considers that the existing Regulatory Framework (Framework) has served Irish and European citizens and businesses well. The Framework has allowed for regulatory oversight and intervention that has served to encourage investment and innovation through competition (in particular through addressing legacy network monopolies and bottlenecks), has enabled appropriate management of spectrum and numbering at a local level against a backdrop of suitable European harmonisation, and has helped to ensure greater consumer protection and choice.

ComReg welcomes the Commission's DSM strategy. Technological change, evolving market structures, emerging value chains such as the Internet of Things, changes in consumer practices, in demography, in social and economic expectations, and the ever more ubiquitous nature of the digital economy mean that a review of the Framework is timely and necessary.

ComReg is a member of BEREC, the Body of European Regulators for Electronic Communications. In July 2015 the European Commission asked BEREC for its formal Opinion on a set of questions put by the Commission regarding the planned review of the

¹ <https://ec.europa.eu/digital-agenda/en/telecoms-rules>

Electronic Communications Regulatory Framework. BEREC presented its Opinion to the Commission in December 2015.²

ComReg has contributed to the BEREC Opinion, and considers the BEREC Opinion to be a key reference point for any stakeholders with an interest in future revisions of the Framework.

This document presents an overview of ComReg's position and highlights a number of specific areas where ComReg seeks change in the Framework. A number of observations made here reflect the BEREC Opinion, while other observations are additional to the BEREC commentary.

1. Scope of the Regulatory Framework

ComReg is cognisant that any amendment to the scope and aim³ of the Framework or the definition of ECS⁴ should remain sufficiently flexible to accommodate evolving services, actors and business models.

Notwithstanding the requirement for flexibility, ComReg considers that the Framework should provide certainty with respect to certain services, both new and well-established, which currently are subject to different regulatory treatment in different Member States. Such services include, in particular:

- Retail broadcasting services, which are increasingly bundled with “traditional” electronic communications services and which were recently the subject of ECJ rulings⁵;
- Premium rate services (PRS), which are subject to different regulatory regimes across Member States due to differences between the framework for ECS and, in particular, that for eCommerce; and
- Certain ‘Over The Top’ (OTT) services which are identical to or very similar to traditional ECS services

With regard to OTT services, BEREC has set out a detailed analysis of the definitional challenges⁶. In the main ComReg considers that the Framework should not be extended to capture OTT Services and ‘Digital Platforms’ except in the very limited scenarios where there is close substitutability with traditional ECS, considered from a number of perspectives including form and function. However, to understand both the nature and economic impact of

² http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/5577-berec-opinion-on-the-review-of-the-eu-electronic-communications-regulatory-framework

³ As provided in Article 1 of the Framework Directive (2002/21/EC)

⁴ Provided in Article 2 of the Framework Directive

⁵ Case C-518/11 UPC Nederland BV v Gemeente Hilversum and Case C-475/12 UPC DTh Sàrl v Nemzeti Média-és Hírközlési Hatóság Elnöksége

⁶ http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/5431-draft-berec-report-on-ott-services_0.pdf

a limited range of OTT services, regulators need extended information gathering powers to be confirmed in the revised Framework.

2. Market Analysis

In ComReg's view, termination markets (both fixed termination and mobile termination) and markets with similar 'pure bottleneck' characteristics (such as non-geographic numbers or Number Translation Codes) should be treated as special cases for the purposes of market analysis. In this respect, ComReg considers that the analysis for such markets could be simplified and performed less frequently than those markets within which competition is likely to be more dynamic in nature. An alternative approach could instead see such markets regulated outside of Significant Market Power (SMP) analysis under further-specified interconnect and general access provisions.

More generally ComReg believes that the timeframe for a full market analysis could be extended from the current three year requirement to a longer period. ComReg believes that, in all but exceptional cases, unforeseen market changes could be addressed by means of adjustments to remedies rather than requiring a full market definition and SMP analysis. This would ease the resource burden on NRAs and industry and would facilitate regulatory predictability.

3. Oligopolies

The consolidation trend in fixed and mobile telecoms is leading to more concentrated oligopolistic markets with fewer, larger operators. The electronic communications sector has traditionally contained oligopolistic (in the case of mobile networks) and monopolistic (in the case of fixed networks) markets. These market structures are reflected in the current European Regulatory Framework, which focuses on the regulation of operators with significant market power (SMP) in their markets. The Regulatory Framework explicitly accounts for the possibility of more than one operator having SMP. This is captured by the notion of collective or joint dominance where the structure of the relevant market is conducive to coordinated effects.

However, as noted by BEREC, whereas national regulatory authorities (NRAs) in Europe are experienced in regulating markets characterised by single-firm dominance, there is little precedent of findings of joint dominance and the subsequent design of regulatory remedies. The electronic communications sector is evolving and technological and market developments mean that there are now often two or more large networks serving end-users (although this can be unevenly distributed across geographic areas). This is the case in some Member States where cable networks are present and/or alternative operators have rolled out fibre networks. At the same time, the wave of consolidation in the European mobile and fixed sectors will likely

increase market concentration in some Member States. ComReg considers that the circumstances within which ex-ante regulation of oligopolies in the electronic communications sector may be required should be examined in detail by the Commission, with the associated granting of additional powers to NRAs be considered, as necessary.

4. Network access regulation

Quality of Service

The focus on providing ubiquitous high-speed networks in the EU, as set out in the Digital Agenda in the Europe 2020 strategy targets, is both understandable and welcome. To unlock the social and economic benefits of such investment, high Quality of Service (QoS) standards need to apply to such networks. Where an operator with Significant Market Power (SMP) is required to provide access to other operators on its network, it is vital in establishing a digital society that appropriate QoS standards (regarding fault rates, rates of repair, provisioning speeds and so on) apply.

ComReg considers that the provisions of Article 12 of the Access Directive⁷, might benefit from an enhanced emphasis on quality metrics at the wholesale level. This aspect of wholesale regulation might also benefit from pan-EU guidance as to the specification of an acceptable level of performance. In ComReg's experience, it cannot be assumed that an SMP provider will provide an appropriate QoS to either its own retail arm or other operators. Similarly, it also cannot be assumed that any migration to new technologies (e.g. all-IP networks) will guarantee appropriate QoS. As such, ComReg recommends that Article 12 should explicitly provide that a NRA can set appropriate QoS targets, subject to these targets being objectively justified, reasonable and proportionate.

Functional Separation

The range of tools available to NRAs to promote competition in regulated access markets where SMP is identified are set out in Article 9 to 13, inclusive, of the Access Directive. Further, Article 13a(1) of the Access Directive provides that NRAs may, "as an exceptional measure", where the appropriate obligations imposed under 9 to 13 have failed to achieve competition, impose an obligation on vertically integrated undertakings to "functionally separate". Article 13a(2) further sets out a range of requirements which must be met before an obligation of functional separation is imposed.

The current "all-or-nothing" approach to functional separation is unhelpful. ComReg considers that functional separation should be seen as lying at one end of a spectrum, with a non-exhaustive and explicit list of options for intervention available to NRAs. The current "burden of proof" and requirements set out in Article 13a(1) and (2) are, at present, too onerous generally and should be made less stringent. Such requirements could also be commensurately lower for remedies involving structural or management interventions on the spectrum towards, but falling short of, full functional separation.

⁷ Directive 2002/19/EC

5. Spectrum management and wireless connectivity

ComReg agrees with BEREC's consideration of the Framework with respect to spectrum management, but for clarity would like to emphasise the following points:

- The timing for the release of spectrum for ECS in the EU is important and ComReg supports the current process of harmonisation of the timing. However, ComReg would highlight that it is also important to set reasonable and realistic time schedules for the release of spectrum having due regard for the tasks that some Member States may have in migrating existing services from spectrum bands that are marked for release.
- The design of spectrum awards and licence conditions should remain with national spectrum authorities, which can take cognisance of the situation in and meet the needs of their Member State. The common EU objective of connectivity will best be met by ensuring each Member State can move as quickly as it can, and manage its spectrum as efficiently as it can.
- While the desire to make more spectrum available for ECS as soon as possible is understandable, it is important to consider that the vast majority of coordination of spectrum use occurs at the global and regional levels, through the ITU and CEPT. Neither organisation produces decisions on the use of spectrum which bind its members and the speed to market of new wireless services depends more on the development of (globally defined) common standards for equipment (and the interoperability of equipment and networks) than it does on the coordinated availability of spectrum.

6. Consumer Rights - Sector-specific regulation for communications services

While ComReg considers that general consumer law could play a more significant role in the protection of the rights of end users of ECS, sector-specific rules will continue to be necessary to ensure end-user protection. Existing provisions regarding contracts, switching and transparency should be retained and enhanced. With respect to existing sector-specific regulation for ECS, ComReg considers the following points relevant:

- Disabled Users Rights.
 - While pan-European legislative measures, applicable across all sectors, could ensure that disabled end users of ECS could avail of general services such as accessible billing, complaints procedures, customer care contact details, websites etc. there is likely to be a requirement to retain certain ECS-specific rules, for example, such as accessible top ups for mobile end users.

- Facilitating Change of Provider (“Switching”)
 - The current provisions set out in Article 30 of the Universal Service Directive (USD) need to be updated and future-proofed to accommodate the switching of bundled services, particularly if retail broadcast services are included within the scope of regulation in accordance with the recent ECJ rulings.
 - In light of the requirements of Article 30(4) of the USD which provide that end users must be able to port to a new undertaking and activate that number within one working day, the revised framework should specifically disallow any contractual requirement for end users, who have served their required minimum contract period, to serve a “notice period” before being allowed to switch provider.
 - ComReg considers that the current provisions of Article 30(5) of the USD, which requires that undertakings offer users contracts of 12 month duration is not effective and should be modified. In ComReg’s experience, some undertakings comply with this requirement by offering contracts of 12 months duration but such contracts are likely to have unattractive terms, compared with contracts of 18 or 24 months duration both in terms of monthly cost or other conditions.
 - In Article 30 (4) of the USD the current focus is on number portability which is historically linked to voice switching only. The focus should be widened to include all elements of a bundle, specifically switching of broadband and TV services, within the shortest possible time and at most within one working day.
 - ComReg observes that increasingly complex bundles may be engineered to dissuade switching. This could involve bundling non-ECS products e.g. content services, hardware etc. in a manner which would discourage switching. For example, a consumer might lose access to his/her music or films and box sets if they decide to switch provider.

- ComReg considers that the provisions of Article 20(2) of the USD, which provides that NRAs are able to specify the format of notifications of modification of contract conditions is an important sector-specific rule that should be maintained.

- ComReg believes that the interests of consumers could be further enhanced with the inclusion of consumer compensation provisions, including the express provision of refunds, as a remedy to non-compliance by an electronic communications provider.

- Article 28 (2) of the USD, which provides NRAs with the power to block, on a case by case basis, access to numbers or services by reasons of fraud or misuse and to require that in such cases providers of ECS withhold relevant interconnection or other services revenues is an important and necessary tool for NRAs. However, ComReg also considers that where the Article is currently silent on the matter of what should become of any funds that are withheld, the Article should be developed to ensure that it provides that end users should not be billed/charged in the event of fraud or misuse and that service providers are obliged to fully refund end-users from any withheld revenues.

7. **Universal service regime**

Scope of Universal Services (US)

ComReg supports BEREC's position that the scope of US should remain flexible to account for differing circumstances across the Member States of the Union. The scope is technologically neutral and flexible enough to allow Member States to adapt it to their respective national situations, such as the phasing out of payphones and printed directories. However, ComReg considers that it would be beneficial to NRAs and undertakings in general if the Framework was to make it explicit that the reference to "functional internet access" (or any other term which may replace this) in the USD does not preclude the inclusion of high-speed broadband commensurate with the Digital Agenda for Europe targets within the scope of US. Any revision to Article 4 of the USD dealing with "access at a fixed location and provision of telephone services", should consider that US voice and broadband connections may be provided via more than one connection.

Unfair Burden

Little direction is provided to NRAs under the Framework in calculating the net cost of US, in considering whether there has been an unfair burden, and in establishing a sharing mechanism. ComReg considers that further thinking, including any lessons or precedents resulting from legal challenges by undertakings and subsequent ECJ rulings in relation to funding US on the basis that it represented an unfair burden, should be reflected in the revised Framework. This would provide greater clarity for both NRAs and designated undertakings and would help to avoid unnecessary litigation. In general more specific definition and assessment rules for unfair burden and sharing mechanisms in the Framework would be beneficial and would create improved certainty for stakeholders on how any obligations to provide and/or fund universal service impacts them, financially or otherwise.

8. **Institutional set-up: financial penalties and appeals**

Power to impose financial penalties

ComReg wholly endorses BEREC's position that NRAs' independence and effectiveness is determined by its ability to enforce regulation. The Framework generally leaves enforcement provisions to Member States (i.e. national legislators) to develop, but this can lead to significant disparities in terms of NRAs' ability to take effective deterrent action, for instance through the application of proportionate financial sanctions and penalties. For instance, Article 10 of the Authorisation Directive gives Member States the discretion to empower the relevant national authority to impose "*dissuasive financial penalties where appropriate*". ComReg considers that the Authorisation Directive (or some other appropriate provision within the Framework), should be amended to confirm that the power to impose dissuasive financial penalties should

be given to the sectoral NRA, rather than the Member State, in a similar manner to the provisions of the Electricity Directive⁸ and Gas Directive⁹.

Reviews on Merit

The current rules for appeals against regulatory decisions (as set down in Article 4 of the Framework Directive) do not always enable NRAs to efficiently carry out their duties and can thereby undermine the NRAs independence. Article 4 of the Framework Directive is appropriate for an inquisitorial legal system, but can lead to irregular outcomes in an adversarial legal system used in common law countries including Ireland.

ComReg does not contend that it is infallible nor that its decisions should not be subject to appeal. However, because the appeal process is governed by national law and with no framework, procedures, timetable or policies laid down at EU-level, appeals can be lengthy, extremely resource-intensive and very costly, and can also significantly interfere with an NRA's ability to carry out its range of other duties and functions. ComReg considers that there is a need to carry out a review of Article 4 in this regard and, in particular, to give consideration to putting in place timetables or policies that could streamline the appeals process. ComReg also considers it appropriate that the Framework should include the concept that appeal bodies afford "*curial deference*" to the expert NRAs, whose expertise is hard to replicate in appeal bodies. The intensity of national judicial reviews over NRAs' decisions - and the potential lack of consideration of Commission's recommendations within national appeals - may result in distortive effects across the Union.

ComReg, therefore, considers that the provisions of Article 4(1) of the Framework Directive should be enhanced to ensure that the decisions of appeal bodies do not result in distortive effects by ensuring that any decisions by the NRA could not be replaced with the appeal body's own decision from a review *de novo* but only that the following orders be available to the appeal body:

1. an order affirming or setting aside the whole or any part of the decision of the NRA, and
2. an order remitting the case to the NRA to be reconsidered, either with or without the hearing of further evidence as directed by the appeal body.

9. Fraud and Misuse of Number or Services

The current provisions (Article 28(2) of the Universal Service Directive) can work well for misuse cases within a Member State - to protect undertakings and end users through the blocking of revenues. However, it is not applied uniformly across the Union. The use of the terms "fraud and misuse" have caused difficulties in that not all NRAs are the relevant authority with powers to investigate and prosecute fraud. While all NRAs would likely consider they can investigate and prosecute misuse, the lack of a definition of misuse impacts the effectiveness of the provision by potentially creating ambiguity and a basis for challenge. A clearer definition of misuse without reference to fraud would be of benefit to all member states.

⁸ Directive 2009/72/EC

⁹ Directive 2009/73/EC

In addition, investigations can be complicated in cases where NRAs seek to investigate the activities of foreign-based providers operating in the NRA's jurisdiction. Improved coordination would protect national undertakings in the revenue chain in cases where other NRAs failure to act is potentially to the detriment of those undertakings complying with a blocking decision. A more coordinated approach is needed for enforcement of regulatory obligations to address domestic and cross-border misuse of national numbering resources and services. This should include a better definition of when intervention is appropriate and any approach needs to be coherent with the rules for regulating PRS, some of which may be Information Society Services¹⁰ and potentially subject to eCommerce regulation.

¹⁰ As defined in Directive (EU) 2015/1535, which recently codified Directive 98/34/EC, as amended