



Office of the Director of  
**Telecommunications  
Regulation**

# **Telecommunications Licences**

## **Report on the Consultation**

**Document Number:** ODTR 98/49

**October 1998**

**Oifig an Stiúirthóra Rialála Teileachumarsáide****Office of the Director of  
Telecommunications Regulation** Abbey Court, Irish Life Centre, Lower Abbey  
Street, Dublin 1. Telephone: + 353 1 804 9600 Fax: + 353 1 804 9680 Web:  
[www.odtr.ie](http://www.odtr.ie)

**1.**

## Introduction

This document concludes a series of consultations relating to the development of a licensing regime for the liberalised era that will apply from 1st December 1998 and is prepared in response to “Licence Conditions: Consultation Document”, ODTR 98/40, issued by the Director of Telecommunications Regulations (the “Director”) at the end of September. That consultation document set out the Director’s proposed approach to licensing and sought comment on the general approach and the draft licences.

The Director welcomes the valuable and carefully considered comments which have been made and wishes to thank all of those who submitted responses. The Office of the Director (“ODTR”) has examined them in detail.

Written comments were received from the following:

- Cable & Wireless
- Cablelink
- Competition Authority
- Eircell
- Esat Digifone
- Esat Telecom
- ITL
- Ocean
- Telecom Éireann
- TNS
- Torc Telecom
- Worldcom

This document is the result of the Director’s evaluation of consultation responses. Its purpose is to explain what of significance has changed from the drafts, and to provide a summary commentary on those changes that are material. Although the Director was unable to accept all of the comments made, all were considered.

In parallel with the consultation, ODTR and its advisors have also been checking the draft licence texts against the legislative background. This review has highlighted the need for a few revisions to ensure consistency. Any such changes are also described in this document.

This document should be read in conjunction with the following documents:

- “Pro Forma General Telecommunications Licence”, ODTR 98/50.
- “Basic Telecommunications Licence: Conditions”, ODTR 98/51.

These documents set out the final licence texts which should not be subject to any further amendment before the 1<sup>st</sup> December 1998.

Readers should also refer to the *revised* guidance notes and application forms as follows:

- “Telecommunications Licences: Guidance Notes for Applicants”, ODTR 98/44R;
- “Application form for a Basic Telecommunications Licence”, ODTR 98/45R;
- “Application form for a General Telecommunications Licence”, ODTR 98/46R.

ODTR 98/44, 45 and 46 were issued in draft at the beginning of October in the interests of advising potential licence applicants of the anticipated process, but were provisional to allow for additional changes resulting from the licence consultation. A few changes have been made, and those of significance are summarised in section 6 of this report.

The Director notes that the time available for this consultation has been dictated by the overall timescales for the liberalisation process. She appreciates that many respondents would have welcomed more time for the process and is very grateful for the considerable effort given to the consultation process at a time when all players are busy preparing their own commercial plans for the new era.

It is not expected that any further amendments should be necessary to the texts of documents ODTR 98/50 and ODTR 98/51 before 1<sup>st</sup> December. Should the need arise, for example to ensure consistency with regulations transposing the revised voice telephony directive (98/10/EC), this will be notified to the market immediately and a revised text issued.

Amendments to the licence texts made after 1 December will be subject to the amendment procedures referred to in the licences and set out in the Postal and Telecommunications Act, 1998 (the “1983 Act”) and its amendments. The Director will consider representations for amendments at regular intervals where a change would be to the significant benefit of Irish telecommunications users.

In addition, the Director intends to initiate a consultative review of the effectiveness of the new licensing regime in November 1999, or earlier should this be appropriate. The process will also consider the impact of any new legislation impacting the industry.

This report on the consultation is not a legal document. This document and the licences to which it refers are without prejudice to the legal position or the rights and duties of the Director to regulate the market generally.

## **2. Structure of this document**

The document is structured as follows:

- Section 3 makes a number of general observations;
- Section 4 considers changes to the draft conditions of the Basic Telecommunications Licence;
- Section 5 considers changes to the draft General Telecommunications Licence;
- Section 6 considers changes to the application procedures and application forms.

A number of conditions are common to both the Basic Telecommunications Licence and the General Telecommunications Licence. Where the same changes is to be made in both licences we have, for the sake of brevity, provided the commentary once only in section 4.

In this document, a reference (including its number) to a “draft licence condition” refers to the appendices attached to ODTR 98/40. A reference (including its number) to a “condition” or “new condition” refers to the final licence texts.

### **3. General Observations**

#### **3.1. Appeals**

Many respondents were concerned about the procedures for revoking, shortening or suspending a licence, and were in particular concerned about the process being initiated before an organisation was given a chance to remedy the situation or provide representations about the alleged breach.

An additional stage in the process has therefore been included beyond the legal requirements. The new process is described in both licences starting at new condition 4.1.

#### **3.2. Anti-competitive behaviour**

A number of respondents were concerned about the Director’s proposals in regard to regulating anti-competitive behaviour. These measures include both general fair trading and specific conditions.

The issues raised in respect of a general fair trading clause proved too complex to resolve within the timeframe and accordingly the Director does not at present intend to implement a general fair trading condition. However, the Director does not accept that all specific measures are adequately handled by existing Competition Law. Indeed, because she no longer intends to include general fair trading conditions she will include additional safeguards concerning misuse of data and access to limited facilities. Particular problems relating to these matters were drawn to the attention of the Director by a number of respondents. These specific conditions are fundamental tools to regulating the telecommunications industry. Modifications to draft conditions and new conditions (see section 5.7) are discussed below.

#### **3.3. Proportionate power**

Draft licence terms did not include explicit reference to legal obligations of the Director to act, for example, in an objective and proportionate manner where required by law. This caused concern to some respondents. Exercise by the Director of her

powers are subject to general legal constraints and this should be noted when considering licence texts.

### **3.4. Transition**

Some respondents felt that there was a need for a transition period to allow time for compliance. The Director will consider representations for appropriate transition periods and has included new condition 3.5 allowing for a reasonable (but in any case less than three months) transition period.

### **3.5. Definition of Voice Telephony.**

There were a number of comments regarding the applicability of the licences and what services were covered by each task. These comments largely focused on the issue of what constitutes voice telephony which can only be provided under a General Telecommunications Licence. This results from the structure of EU and Irish law and cannot be avoided. The definition of voice telephony is given in legislation and a clarification was issued by the Director in September 1997<sup>1</sup>. Having reviewed the issues and the background, it is clear that the issue may require decisions on a case by case basis. This matter does not require changes in the licences but there will be amendment to the licence application guidance notes.

### **3.6. Upgrade of licences**

There will be nothing to stop a holder of a Basic Telecommunications Licence subsequently applying for a General Telecommunications Licence should it wish to commence providing voice telephony services or needs numbers for allocation to end users.

### **3.7. Subsidiaries and Group Licences**

Clarity was sought by a number of respondents regarding who would be covered by licences and in particular whether a licence might be extended to subsidiaries. The Director is concerned to ensure that there is clarity as to who is the licensed legal entity carrying on the telecommunications business. She is also concerned to ensure that a company cannot set up a group structure with the intention of avoiding extra conditions that are triggered by the designation of an operator as one with Significant Market Power (SMP).

The Director requires that all entities (individuals or companies) providing a service should be licensed. This is in line with general licensing practice and will ensure that licences are 'personal'. It also means that the entity has direct obligations to the Director.

---

<sup>1</sup> Decision D1/97, Voice Telephony in the Irish Telecommunications Market, ODTR 97/11

The Director has also inserted new condition 2.4 that is intended to ensure that companies within a group cannot escape SMP obligations that would have applied if the activity had have been undertaken by another member of the group. The activities captured by this new condition are limited to licensed services in the relevant market on which SMP is designated.

### **3.8. Dominance**

A few respondents still believe that dominance rather than SMP is a more appropriate trigger for certain additional conditions. The Director maintains her stance in this area for reason already stated which are represented below.

The European Union (EU) licensing framework specifically allows a national regulatory authority (NRA) to impose additional conditions to control SMP. The same is not the case for dominance, which is a condition that can only be determined ex-post and relates to a particular time and a particular market. The Director believes that dominance cannot ordinarily act in a trigger capacity. SMP, like dominance, is a feature that will evolve with market sophistication. Companies may lose SMP designation and hence may be relieved of more onerous conditions. Also, as is indicated in the ODTR's paper on SMP (ODTR 98/47), market share alone may not be sufficient justification for an SMP designation.

Notwithstanding this, some respondents argue that Telecom Éireann's unique position resulting from its historic monopoly suggests that the Director should issue an individual licence to Telecom Éireann. The Director believes that the all encompassing framework is more appropriate, not least because of its flexibility. The Director also believes that adequate safeguards exist through the SMP triggered conditions. She does not see a proportionate or objective case for using a separate form of licence for Telecom Éireann rather than the proposed form with its additional SMP-based conditions.

### **3.9. Interconnection**

A number of respondents sought clarity on what interconnection rights and obligations they would have. Some reiterated the need for different rates for those constructing infrastructure and those providing services on third-party provided networks. Rights and obligations to interconnection are set out in relevant legislation notable the European Communities (Interconnection in Telecommunications) Regulations - SI 15 of 1998. The regulations require Telecom Éireann to provide interconnection to relevant licensees providing telecommunications services to the public. The regulations also permit differential rates, but only where objectively justifiable reasons exist.

Potential licensees may wish to refer to the reference interconnect offer available from Telecom Éireann that covers network to network interconnection.

### **3.10. Universal service obligation**

It is the Director's intention to rely on Directive 98/10/EC (often referred to as the revised Voice Telephony Directive) and its transposition into Irish law which is expected to occur by way of regulation in the near future. Specific conditions (such as those intended for inclusion in Part 5 of the draft General Telecommunications Licence) are therefore not included in the licences.

## **4. Changes to the draft conditions of the Basic Telecommunications licence**

### **4.1. Subsidiaries and Group Licences**

As described in section 3.6 of this report, the Director seeks to clarify the situation regarding affiliates. Condition 2.4 has been added to ensure that a licensee inherits any SMP obligations of an affiliate within its own licence in cases where both offer licensed services in the relevant market in respect of which the affiliate has SMP.

### **4.2. Compliance**

Draft condition 3.1 concerning the obligation to comply with the direction of the Director until such time as a final determination is made by a Court has been deleted as being overly restrictive.

Draft condition 3.3 on the supply of annual reports has been deleted as the provision of information is adequately handled by draft condition 3.2.

Draft condition 3.4 (now condition 3.2) on the Director's right to publish information has been clarified to emphasise the Director's legal obligation to protect certain confidential information.

Draft condition 3.5 (now condition 3.3) has been amended to clarify who may carry out the audit and to state specifically that the licensee should bear the cost of the audit.

New condition 3.5 has been added allowing the Director to set an appropriate transition period.

### **4.3. Changes and Enforcement**

A new appeals process for breaches is set out in new conditions 4.1 to 4.8. This in effect introduces an additional stage in the process whereby the Director gives notice that she believes a breach has occurred. There will then be a period of 14 days during which representations may be made and a further period for the Director to consider these representations before initiating the formal process laid down in the 1983 Act.

Draft condition 4.1 (now condition 4.8) has been amended in a number of respects. Sub-paragraph (3) making the national interests a justified reason for licence withdrawal has been deleted. A new sub-paragraph (new condition 4.8. (f)) has been added to make a finding under the Competition Act a possible reason for revocation or suspension.

Draft condition 4.3 on licence foreshortening has been deleted as it is now incorporated into new conditions 4.2 to 4.7.

New conditions 4.5 requires the Director not to initiate certain revocation procedures unless she considers the breach is material or persistent.

#### **4.4. Public Service Conditions**

Draft condition 5.1 in the Basic Telecommunications Licence and its mirror draft condition 6.1 in the General Telecommunications Licence require publication of standard terms and conditions (which need not include price). The Director notes that only simple publication is needed; the condition is not intended to be onerous on operators.

The provision of directory enquiries services is only relevant to voice telephony operators. Hence draft condition 5.10 requiring this of all operators has been removed from the Basic Telecommunications Licence.

Certain codes may be allocated to Basic Telecommunications Licence holders and a new condition 5.10 has been added to the Basic Telecommunications Licence requiring operators to whom such codes are allocated to comply with appropriate conditions.

#### **4.5. Fair Trading**

Fair trading is a fundamental concern of all players in, and users of, the telecommunications industry which is dominated by an incumbent operator that has, until 1st December, a protected monopoly in voice telephony. It is generally acknowledged that it is an appropriate area for the Director to seek to control.

Concern was raised about coherence with existing law and clarity for industry players. The practicality of the approach proposed in draft condition 6 in the Basic Telecommunications Licence and the identical condition 7 in the General Telecommunications Licence was raised by some respondents. Upon advice and reflecting on the concerns raised, the Director has decided to remove the general fair trading clause from all licences that will be operational from 1st December. The reason for this is the avoidance of potential conflicts of approach which in the Director's opinion are sufficiently serious as to warrant the deletion of the condition at this time. The Director nevertheless believes that this type of condition is appropriate for the market and will engage in further consideration of the issues in order to develop an effective way of handling the problem.



#### **4.6. Facility sharing**

Some concerns were raised that the facility sharing issue was of sufficient magnitude as to justify a separate consultation. The Director recognises these concerns but considers it best to await the Infrastructure Bill to be introduced to the Oireachtas in the coming months. The Director has powers to arbitrate on infrastructure sharing. However the issue of trench sharing had been highlighted as important and the Director does not consider that draft condition 9 in the draft Basic Telecommunications Licence and draft condition 10 in the draft General Telecommunications Licence (as modified - see below) are onerous on infrastructure operators. She therefore intends to leave the condition in the licences.

The Director nevertheless recognises the concerns of some respondents that any request to trench share should be reasonable and should not delay the operator of whom the request is made. The condition has been modified (now condition 8 in the Basic Telecommunications Licence and condition 9 in the General Telecommunications Licence) to reflect this concern. Additional condition 8.2 in the Basic Telecommunications Licence (and mirror condition 9.2 in the General Telecommunications Licence) has been added to allow the Director to issue general guidance in this matter. Reference should also be made to new condition 21 of the General Telecommunications Licence on access to limited facilities.

### **5. Changes to the draft conditions of the General Telecommunications Licence**

Changes to draft conditions 1 - 10 are as set out in section 4 except where indicated to the contrary or where reference is made only to the Basic Telecommunications Licence.

Draft condition 5.3 concerning universal service obligations has been amended to require designated operators to comply with appropriate USO regulations.

In addition, draft condition 6.10 has been modified to include the obligations on organisation not to use for any other reason information provided to support a directory enquiry service.

#### **5.1. Duration**

There were some suggestions that the General Telecommunications Licence should be for 20 years. Comments were also made on automatic renewal. The Director has decided to leave the term as it stands and not to insert a renewal clause. The Director understands the case for continuity, but it is premature and inappropriate in such a fast moving industry to make decisions now for a period so far ahead. It may be expected that the licensing regime would be subject to review taking into consideration investment requirements and the needs of consumers at an appropriate time.

## **5.2. Quality of Service and Publication of Performance Data**

Draft condition 12.1 (now condition 11.1) on the licensee's obligations to comply with orders from the Director on quality of service has been tightened to require the Director to take note relevant European standards. Respondents also commented that obligations to comply with certain quality of service parameters should be limited to certain services. The condition is now restricted to basic telephony and digital leased line services and other services as may be added from time to time following a consultative process.

## **5.3. Access**

As many respondents point out, carrier pre-selection and number portability are both due to be implemented in Ireland by 1 January 2000 and they requested greater clarity on how this will be implemented. However, the details of how this implementation will occur have yet to be agreed. This explains the general nature of the access condition (draft condition 13 now condition 12) as drafted and the reason for not making more specific reference at this time. The ODTR will commence consultation on both carrier pre-selection and number portability after liberalisation has occurred.

Some respondents also suggested that the access conditions should apply to all infrastructure operators. The Director intends to continue to apply the condition only to operators with SMP in the fixed telephone network and services market as such operators are able to control the rights of access to customer. Furthermore, if a customer changes to a new operator Telecom Éireann may have in place the infrastructure to win back the customer and can in any case stress the full service capabilities that it can offer. The Director therefore does not accept the argument that the measure disproportionately impacts Telecom Éireann. The Director confirms that issues of this type may be raised and considered by her during any consultation on carrier pre-selection and number portability.

## **5.4. Retail Price Control**

Elements of draft condition 14 concerning retail price control were of concern to Telecom Éireann. It felt that aspects of the condition would fetter its ability to compete in certain markets where competition was operating effectively either now or at some future point. Reflecting on these and other comments received the Director has modified the condition. The effect of these modifications is to:

- Limit the notification period to 14 days or such other period as set out in legislation;
- Permit the Director to exclude certain services from the obligation where these are considered to be open to adequate competition (see new condition 13.5).

However, the Director believes that publication is important for services where competition against Telecom Éireann remains undeveloped. She also firmly believes

that discounts schemes and special offers (except where these relate to excluded services) should be notified and published.

The manner in which a pricing scheme will be reviewed has been amended. Draft condition 14.3 (now condition 13.2) has been modified to exclude the reference to directions by the Director not to proceed with a price change. However, the Director has now included as a licence condition (condition 13.4) the obligation that prices be transparent, objective, non-discriminatory and cost-oriented as appropriate. The failure to comply with this condition will enable the Director to impose specific measures and directions to ensure compliance.

### **5.5. *Approval of Subscriber and Customer Contract***

Draft condition 19 (now condition 18) relates to approval of subscriber and customer contracts. Consumer protection may suggest that the condition should be applied to all operators. However, the Director believes that customer care and service levels will be a major determinant of market success; new entrants will need to match their offerings to the quality of significant operators and condition 11 (former draft condition 12) exists to provide a minimum level of service. In the light of these factors, she considers that it would be unnecessarily onerous to extend this condition to all operators.

### **5.6. *Selling practices***

Draft condition 20 (now condition 19) considers selling practices. Again there is an argument to support a more general application of this condition. However the Director believes that extending the applicability of this condition to all operators is overly onerous. She nevertheless believes that it should be retained for operators with SMP in the fixed market as such operators benefit most strongly from their existing customer relationships and developed account management structures. Such operators are therefore most likely to gain from unreasonable selling practices.

### **5.7. *Misuse of data and access to limited facilities***

Points about misuse of data and ‘pinchpoints’ by SMP operators were made by a number of respondents. New conditions 20 and 21 have been added to capture other types of behaviour that should be controlled in the case of SMP operators.

Obligations not to misuse information about customers (including interconnecting operators) is covered by new condition 20. An example of a concern of this type is where an operator analyses customer usage profiles to identify and target heavy Internet users with its own Internet service. Another example would be where an interconnecting operator requested a large increase in interconnection capacity in particular location indicating new customers or an imminent marketing campaign and where the network services group of the SMP operator would pass this intelligence to its retail group.

Condition 21 considers access to limited facilities that can often prevent new operators from providing service. The condition is of particular importance until such time as the forthcoming Infrastructure Bill is enacted. It should be noted that this condition is not intended to require unbundled access to the local loop to all operators.

### **5.8. *Undue Preference and Undue Discrimination***

Draft condition 22 prevented undue preference and undue discrimination. Again the comment was made whether this was necessary or whether it should be applied more widely. The Director believes that any organisation having SMP should be subject to this condition in the market in which SMP is designated since it is here that preference and discrimination can become a means of benefiting from SMP.

## **6. Application Procedures**

As was mentioned in the introduction to the guidance notes and applications were issued in draft to help companies advance their applications. The results of this consultation highlights the need for a number of changes as follows.

### **6.1. *Applicability of Licences***

Irish law requires that a provider of voice telephony must operate under a licence issued under section 111(2) of the 1983 Act. This means that the operator cannot operate under a Basic Telecommunications Licence. The guidance notes explicitly linked voice telephony with numbers allocable to users. However, this linkage is overly simple given the definition of Voice Telephony and having reviewed the issues and the background, it is clear that the issue may require decisions on a case by case basis. Guidance note provide further details.

### **6.2. *Group working***

The guidance notes now include reference to group operations.

### **6.3. *Conditions and declarations***

Conditions are now included in the Basic Telecommunications Licence application form.

Declarations include statements that the applicant will comply with the lawful directions.

#### **6.4. Information requests**

Question 3.1 has been modified to ask how access to the service will be provided.

Question 4.1 has clarified that infrastructure should include all switching and transmission resources under the control of the applicant.

Applicants are also now asked to indicate if they require a transition period and if so for which conditions. New Question 5.5

As the activities of an SMP's affiliates may be covered by that company's licence, it is now necessary to ask questions about the group structure of applicants. New Question 6.1