



Office of the Director of
**Telecommunications
Regulation**

Telecommunications Licensing Principles: Report on the Consultation Process

Document No. ODTR 98/31R

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1. Introduction

As part of the much welcomed liberalisation process, a consultation document was issued by the Director of Telecommunications Regulation (“the Director”) on 13 July 1998 entitled “Telecommunications Licensing Principles - Consultation Paper” (the Consultation Paper)¹. The paper sought comments from interested parties on the major principles to be considered by the Director within the licensing and authorisation framework² for telecommunications services in Ireland.

The Director would like to thank all the organisations that responded to this important consultation paper, especially considering the short timescales that have been imposed as a result of the decision to bring forward the date for liberalisation of the market. The Director welcomed all the comments and considered them in detail, weighing up the different arguments presented so as to reach a decision that maximises the potential benefit to Irish telecommunications users. The Director was gratified by the level of effort and depth of consideration that went into the responses. She looks forward to future consultations and receiving further well-informed comments from the industry and user-groups.

Comments were received from the following organisations:

- Cable & Wireless
- Office of the Director of Consumer Affairs
- Eircell
- Esat Digifone
- Esat Telecom
- Forfás
- IBEC (by Phone)
- Industrial Development Agency
- Irish Multichannel Princes Holdings Limited
- Ocean Communications
- SM Communications Ltd.
- Stentor Communications
- Telecom Éireann
- Telenor Ireland Limited
- TNS
- WorldCom

This document reports of the Director’s conclusions based on the comments received. Respondents generally welcomed the position put forward by the Director. There was broad support for the direction being taken and the Director is confident that a framework for licensing broadly acceptable to all can now be realised. Inevitably there are contentious points - particular on matters of detail - reflecting the different

¹ Document No. ODTR 98/21

² The Director intends to use appropriate general authorisation procedures as well as individual licences. The term ‘licence’ should therefore be taken to include authorisations unless this is specifically excluded.

goals and objectives of respondents. The most important of these are discussed in this paper.

This document concentrates on high-level concerns relating to the principles behind the licensing regime and more detailed comments are therefore not addressed here. Nevertheless, respondents provided many helpful comments of a detailed nature which the Director has found helpful and which she will ensure are considered when licence or authorisation texts and application procedures are developed. These documents will be subject to further consultation.

This document does not attempt to analyse all the arguments and counter-arguments raised during the consultation. Inevitably not all of the views put forward by respondents can be adopted by the Director, as the differing positions cannot be reconciled. In a number of areas, for example facilities sharing and USO, the Director recognises that consensus cannot yet be reached and notes that further consultation may be appropriate and will occur as necessary.

The Director is working within the framework of EU and national legislation which governs the liberalisation programme. The licensing regime which is ultimately put in place will work within the parameters of that legislation. It is noted that there is some legislation still required to facilitate full liberalisation and the Director looks forward to seeing draft proposals published as soon as possible.

The Director is cognisant of the rapidly changing nature of the telecommunications sector and the need to regulate for a converging market. Given the short timescale available for the completion of the licensing framework in advance of full liberalisation, the Director is addressing only telecommunications licensing issues in this paper. The principles set out in this paper will not conflict with the Director's position on licensing in the converging sectors of television transmission and radio, but these are, of necessity, addressed separately.

This document sets out the Director's current position on licensing principles; the Director is not bound by this document and may amend it from time to time. This document is without prejudice to the legal position or the rights and duties of the Director to regulate the market generally. The principles set out are without prejudice to the final form and content of any licences the Director may issue.

2. Structure of the Paper

This paper is structured as follows:

- Section 3 addresses in brief the fundamental principles guiding the Director in framing the licensing regime;
- Section 4 outlines the proposed licensing strategy;
- Section 5 sets out the indicative timetable for future consultations.

3. Principles

Respondents raised few major concerns about the guiding principles that the Director described in the Consultation Paper and the broad objective of facilitating competition

which benefits consumers was accepted. Sufficient but light-handed regulation was endorsed - there should be few regulatory barriers to market entry and controls should be sufficient only to promote competition and protect public interests. The principles set out in the Consultation Paper will therefore continue to drive the Director's thinking. She notes additionally the need to ensure that the principle of proportionality is reflected in the licensing regime and the need to ensure the consistent 'regional spread' of telecommunications services.

There was disagreement regarding the Director's role in considering issues of 'market power'. This matter is discussed in Section 4.3 on fair trading but is of sufficient importance that some issues of principle need to be raised here as well.

Respondents stressed the importance of clarity in this area. Two operators argued that existing competition laws and arrangements are adequate to handle abuse of a position of market strength. They also argued that the proper means of regulating the behaviour of dominant operators is by way of ex-post investigations on a case by case basis where abuse is alleged.

The majority of respondents however expressed the view that the Director should have a significant role in regulating anti-competitive behaviour in the Irish telecommunications market and should have the power to take pre-emptive action to prevent operators who have SMP or are dominant in the market from acting in an anti-competitive manner.

There was also a concern raised about the use of the concept of SMP. The Director recognises that the consultation paper on SMP has only recently been available and hopes that the consultation on that paper will further clarify some of the issues raised. Notwithstanding the consultation, the Director notes that consistent with its use in the EU framework (within which the Irish regulatory regime must operate) the concept of SMP will continue to be of relevance in the Irish licensing regime.

4. Strategy for general licensing

4.1 Market Structure and Entry

As indicated in the Consultation Paper the Director is keen to facilitate the development of competition in all aspects of telecommunications service delivery. To this end the Director would wish to see new market entrants being given every possible opportunity to enter the competitive arena. Added to this desire is the fact that restriction of licence award is limited under EU Directives³.

To facilitate market entry, the Director intends to adopt straightforward application procedures that will not impose unnecessary burdens on applicants. Details of the limited information which applicants will be required to submit will be provided with the consultation documents describing the proposed application procedures. The Director will however subsequently require licensees to produce such information as she may from time to time require for proper discharge of her functions and for verification of compliance by licensees with licence conditions and relevant legislation.

³ See page 4 of Document No. ODTR 98/21 for expansion on this point

4.2 Licence structure

4.2.1 Introduction:

It is the intention of this paper to deal purely with the provision of ‘fixed’ telecommunications services and related infrastructure. This may include elements of radio based technology, for example satellite up-links and fixed point-to-point radio links. The Director is cognisant of the need to review existing mobile licences and intends to include this task in the future work plan for her office.

4.2.2 Services for own use

The Director notes that certain services and networks will be exempted from licensing by virtue of Section 4(a) of The Telegraph Act, 1869, as inserted by the European Communities (Telecommunications Infrastructure) Regulations, 1997 (S.I. No. 338 of 1997). The main provision is for services intended for ‘own use’ and not rendered to any other person. In this regard, it is the Director’s intention to require applicants for a telecommunications licence to demonstrate that the service they wish to provide constitutes a service to the public and does not come within any of the exemptions provided for in Section 4(a) of the 1869 Act. This requirement is intended to ensure that the benefits which accrue to licence holders (in addition to the attendant obligations) may only be claimed by providers of telecommunications services within the definition of that expression set out in the legislation. At present the law is written so as to limit the benefits which flow from holding of a telecommunications licence only to those providing relevant services. Further clarification on this issue will be included in the draft application procedures which will issue shortly.

4.2.3 Types of Licences:

As indicated in the Consultation Paper the Director intends to have a simple and transparent licence structure. Having regard to these criteria and taking into account the broad approval received from respondents, she proposes the following classes of licence:

Class 1:

Covers:

Service providers not requiring access to spectrum or numbers and not intending to build infrastructure

Type:

General licence/authorisation and registration procedure. All authorisations in this class will contain standard conditions.

Class 2:

Covers:

Service providers requiring numbers but not intending to build infrastructure and hence not needing access to spectrum or rights of access to land.

Type:

General licence/authorisation and registration procedure. Same conditions as Class 1 as well as conditions relating to the right of the Director to reclaim numbers if deemed appropriate in specified circumstances.

Class 3:**Covers:**

Operators planning to build their own infrastructure and hence potentially needing access to numbers and spectrum and also needing to avail of rights of access to land

Type:

Individual Licence. Standard conditions for all licences in this class will apply.

Class 4:**Covers:**

Operators having significant market power (SMP) in all or part of a relevant telecommunications market.

Type:

Individual Licence. This licence will contain the same conditions and terms as those contained in a Class 3 licence. However, an operator with SMP will have additional specific conditions imposed upon it as a result of its position. An operator will become a Class 4 operator if it meets certain criteria.

In practice, it is envisaged that licences will comprise modular building blocks reflecting the type of operator. For example, a Class 4 operator will have all the terms of a Class 3 operator as well as specific terms resulting from its position of significant market power. Similarly a Class 3 operator will likely have all the terms of a Class 2 operator but will have terms specific to the construction of infrastructure

It is the Director's intention to draft a licence pro forma common to both Class 3 and 4 operators. Terms that are relevant only to organisations with SMP will have triggers associated with them⁴. These triggers will relate to those organisations that the Director notifies as having SMP in line with EU requirements and her recent consultation paper on SMP (and comments to be received thereon). In this way, the licensee will avoid the need to apply for a new licence should it gain or lose SMP status in a relevant market.

⁴ It is expected that these terms will be largely directed at operators with SMP in substantially all of the telecommunications market. Further clarification will be provided when draft pro forma licences are available.

4.2.4 General points to note with regard to Licence Conditions

- With regard to USO operators, additional specific conditions/terms will be imposed on operators as appropriate within the common Class 3/4 licence framework. In this regard it should be noted that licences will have a common set of obligations and rights where USO is imposed or accepted.
- The Director reserves the right to impose specific conditions on Telecom Éireann or any other individual company within Class 3 or 4, should this be justified. However, as yet the Director has not been convinced of the need for such action.
- The Director is aware that situations may arise which require unique licensing conditions. She therefore reserves the right to review the classes in operation and implement additional ones should it be appropriate at some future date.

4.2.5 Specific Licence Conditions:

- The Director thanks respondents for their constructive comments on the issue of specific licence conditions. Comments were broadly in line with the Director's thinking as set out in the Consultation Paper and respondents raised few issues of principle apart from those covered elsewhere in this document. The Director will therefore base the licence drafts which will be made available for comment on the detailed description provided in the Consultation Paper and comments received. Work on application procedures and on the forms of licence for the various classes is currently on-going and respondents' detailed comments will be considered further in the context of these tasks.

Among the specific licence conditions which the Director will be considering will be those relating to publication of prices and furnishing of information on an ongoing basis to the Director. Publication of this type of information is considered to benefit competition. In settling the terms of any obligations imposed on licensees, the Director will be concerned to ensure that those obligations do not extend beyond the scope of what is required by relevant legislation and are proportionate to the objective sought to be achieved by the Director in imposing such obligations.

4.2.6 Licence Durations

- There was a broad range of opinion on licence durations. Taking into account the comments received the Directors proposes that the duration of licences be as follows:
 - Class 1: 5 years.
 - Class 2: 7 years.
 - Class 3 and 4: 15 years.

4.2.7 Numbers:

- The Director will ask companies to demonstrate that they reasonably require numbers sought. In addition, it should be further noted that the Director will monitor the use of number allocations by operators and reclaim unused numbers if she deems it appropriate.

- It is not expected that there will be a charge associated with the first allocation. However, this is without prejudice to the right of the Director to review this again at some future date.
- The Director will provide details of number allocation procedures shortly.

4.2.8 Fees and Levy Order:

- There will be a licence application fee - the level of this fee has yet to be set. Under EU law, such fee may only be used to recoup the administrative costs involved in processing a licence application and will not therefore be substantial.
- It should be noted that holders of licences in all classes will be subject to the Levy Order

4.3 Fair trading

The responses to the Consultation Paper indicate broad support among operators for introduction of specific obligations in relation to ‘fair trading’ – the way business is conducted. Opinion of the precise nature of these obligations differed.

Most new entrants and user organisations stressed the importance of the Director being able to guard against ‘anti-competitive’ behaviour. Having considered the comments received, the Director intends to include in **all licences** a general clause covering this point which is likely to be centred on abuse of dominance and based on EU competition law. Appropriate procedures will be developed to ensure clarity in approach and avoiding the risk of organisations facing ‘double jeopardy’.

Additionally, the Director considers that further obligations will be imposed on operators in the form of licence conditions which limits trading practices that are unfair and which may potentially be included in all telecommunications licences. In drafting such provisions the Director will seek clarity as to what will be regarded as ‘fair trading’ and the activities which will be regarded as falling short of such standard. Any general provisions, if proposed, are likely to be supplemented by inclusion in the licences of Class 4 operators of specific conditions directed at preventing certain behaviour identified as unfair trading if engaged in by operators who are regarded as having SMP in the relevant market.

The Director has noted the suggestions of respondents in relation to the types of behaviour and activities which require to be specifically prohibited. Account will be taken of these suggestions in the formulation and drafting of pro forma licences prior to further consultation. In identifying specific obligations in this regard consideration will also be given to the extent to which any such specific obligations are already expressly provided for in legislation.

Several of the respondents to the Consultation Paper referred to the need for an appropriate system whereby sanctions for failure to comply with fair trading obligations may be imposed in a fast and efficient manner. As indicated in Section 4.8 (remedies and enforcement) the Director considers it vital to the effective operation of the licensing regime that obligations imposed on licensees may be enforced in a meaningful way.

4.4 Infrastructure competition and interconnection

Respondents universally recognised the importance of the development of alternative infrastructure but were divided on how best to do this. In respect of interconnection, there was broad agreement that LRIC was an appropriate basis for calculating costs. There was strong support for unbundling interconnection services to the greatest degree possible. The Director supports this approach, as it will keep cost down for organisations deciding to build their own infrastructure.

In parallel with the consultation on licensing principles, the Director has also recently issued a number of communications on Telecom Éireann's reference interconnect offer (RIO). The Director looks forward to the publication of Telecom Éireann's revised offer in this respect. The consultation process on the RIO raised a number of issues concerning service versus network interconnection which were reiterated in comments received on the licensing principles paper. These highlighted a number of unresolved points concerning access rights for simple resellers or organisations without infrastructure which are still to be clarified.

4.5 Universal Service

It is clear to the Director from the comments received on the subject of universal service that the definition and costing of universal service is of great interest to operators. Many respondents indicated a desire for a separate public consultation on the subject.

With regard to definition of universal service it is acknowledged that the existing legislative provisions relating to universal service (drafted with reference only to Telecom Éireann) require to be amended to take account of the expected multi-operator environment which will exist after 1 December 1998 and to comply with the requirements of Directive 98/10/EC. The Director expects that the revised framework will be set out in the legislation to be introduced transposing the provisions of Directive 98/10/EC into Irish law.

In implementing the system governing universal service definition and scope, which will be developed by the Minister for Public Enterprise, the Director will be concerned to ensure that the concept of universal service as applied in Ireland is flexible both in terms of class of operators to whom it will apply and in terms of the services it comprises.

Calculation of the cost (if any) of universal service and establishment of a mechanism whereby any such cost may be shared will depend to a large extent on the legislative regime governing universal service. It will also depend on the results of a review of Telecom Éireann's costs which is currently being conducted by the Director. The Director therefore considers it premature to hold a separate consultation at this time in relation to the costing and, where appropriate, funding of USO. The Director may however decide that it is appropriate to have such a consultation at a later date.

4.6 Allocation of Spectrum

Comments submitted in relation to allocation of spectrum and in particular the differing opinions expressed as to whether it is appropriate for allocation of spectrum

to be associated with USO are noted. There is a view that organisations subject to USO should be entitled to discharge such obligations using WLL and accordingly should be entitled to radio spectrum to facilitate this. The ODTR is at present reviewing the position with regard to fixed wireless access in Ireland and will issue a separate consultation paper on this later this month.

4.7 Facilities sharing and access to public and private land

Many respondents indicated that all telecommunications operators should enjoy equal rights of access to public and private land.

Comments on facilities sharing indicated a broad consensus among operators that mandatory sharing has a limited role only and should, for example, apply only to 'bottleneck facilities'. Many operators recognised the practical problems associated with infrastructure sharing. However, the Director remains concerned that the economic benefits of sharing are not entirely overlooked. It was suggested that facility sharing obligations only be imposed on operators with SMP or alternatively that new entrants be given a moratorium period during which they would not be obliged to comply with facility sharing obligations. Many respondents believed that the Director may have an important role in resolving disputes.

Comments submitted to the Director in the course of this consultation in relation to land access and facility sharing will be relevant to the proposed new primary legislation currently being prepared by the Department of Public Enterprise. Accordingly the Director will communicate to the Department of Public Enterprise the relevant comments which respondents have submitted.

The question as to the extent to which it is necessary or appropriate for facility sharing obligations to be included as licence conditions will be largely dependent on the manner in which such obligations are framed in the proposed new legislation. The Director will consider this issue further in the light of such legislation.

4.8 Enforcement and Remedies

The responses to the consultation paper received by the ODTR indicate that there is wide recognition of the importance of an effective regime for enforcement of obligations of telecommunications operators. Respondents expressing a view generally supported the strengthening of the enforcement powers of the Director with a view to ensuring that alleged infringements may be dealt with quickly and proportionate sanctions imposed on operators found to be in breach of licence conditions or other obligations imposed under legislation. Among the sanctions proposed were the following:

- imposition of fines directly by the Director (without recourse to the courts) and calculation of such fines on the basis of a percentage of revenue;
- imposition of personal liability on officers of a company found to be in breach of its obligations;
- licence suspension and/or revocation;
- the right to undertake 'dawn-raids'.

Particular concern was expressed by many respondents that any fair trading obligations imposed be enforced strictly and that the Director be empowered to

impose appropriate sanctions for breach of such obligations including financial sanctions in an amount which is commensurate with the gravity of the offending behaviour and its affect on the market and other players therein.

The scope of the powers of enforcement of the Director is primarily a matter for primary legislation and any strengthening or alteration of the Director's existing powers will be a matter for the Minister for Public Enterprise. As such the Director will make relevant comments available to the Department.

Respondents expressed conflicting views as to whether enforcement powers should be included in forms of licence issued. The Director envisages that the conditions of licences will include provisions relating to sanctions for breach of certain obligations, including without limitation licence suspension and/or revocation. Parties will have an opportunity of commenting further on such provisions as part of the consultation process on the terms of the licences when draft licences are published for comment early in September.

5. Indicative Timetable for future consultations

An indicative timetable for further consultations in the area of licensing is set out below.

- Draft applications procedures will be available for comment late August or early September. Comments will be due by the middle of September. Final applications procedures will be notified in late September. These procedures will confirm the schedule for applications and evaluation.
- Draft pro forma licences will be available for comment in early to mid-September. Comments will be due early October. Final pro forma licences will be published in mid October.
- Licence applications are currently expected to be due at the end of October with awards being made before 1 December.

/ENDS