



Commission for
Communications Regulation

Information Notice

Consultation on draft Ministerial policy directions of 08/02/2004

ComReg response

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1 Foreword

The Commission for Communications Regulation (ComReg) welcomes the opportunity to comment on the draft Policy Directions issued by the Minister for Communications, Marine & Natural Resources on 8th February 2004.

ComReg also welcomes Ministerial support in driving competition and reaffirms its commitment to the promotion of competition which has been one of its key objectives since its establishment in 1997.

I welcome the Minister's support, contained in the draft policy directions, for many of the initiatives that ComReg has recently developed and implemented (WLR, CPS, FWA local licensing scheme, etc.). I would like to take this opportunity to recognise the valued contribution of the staff of ComReg in this challenging operating environment.

In the liberalised environment, significant value has been placed on independent sectoral regulators being impartial drivers within their respective sectors. This approach is underpinned in both European and national legislation and is reinforced in the recent Government White Paper "Regulating Better". In this context the degree to which any policy direction might, either through its focus or the degree of detail it contains, impinge on the role and function of a National Regulatory Authority (NRA) would be important.

As the independent National Regulatory Authority, ComReg has consistently carried out its functions in an objective, professional manner and looks forward to continued co-operation with the Department in this important economic sector. ComReg will continue to develop proposals to facilitate real and effective competition and looks forward to the enactment of the proposed Telecommunications (Miscellaneous Provisions) Bill in due course.

In our seeking to make a full and meaningful contribution to this consultation, ComReg's interpretation and responses are in line with our various obligations and responsibilities under both European and national legislation, and endeavour to highlight the various procedural steps that will be necessary to ensure implementation.

**John Doherty,
Commissioner.**

2 General policy direction

2.1 Competition

As ComReg has specific statutory objectives as a facilitator and promoter of competition in the electronic communications sector, and given its role as a promoter of efficiency and innovation which support competitively priced products to end-users, ComReg welcomes the Minister's reaffirmation of one of the core objectives embodied in the 2002 Act.

In recent years, the EU has been to the forefront in seeking to liberalise the communications sector and promote competition through the introduction of a range of Directives.

The new EU Regulatory Electronic Communications package consists of four Directives¹ and one Decision. This new framework has changed the way the electronic communications sector is regulated across the EU. NRAs are required under the new regulations to use competition law principles to apply ex-ante remedies to address market failure. There is also increasing weight on consistency in the application of sector-specific regulation across the EU with particular emphasis on technological neutrality.

ComReg has carried out a number of regulatory initiatives to encourage alternative technology developments in the electronic communications sector and to encourage the development of broadband infrastructure and services throughout the country. In line with the Government's objective of increasing widespread availability of broadband infrastructure and services throughout the country, ComReg has implemented a number of initiatives:

- ComReg has been to the forefront in Europe in the development of broadband service in licence exempt bands. ComReg has actively pursued the use of the 5.8 GHz ISM band for use by wireless MANs on an unlicensed basis, a move which is still being considered by the rest of Europe. In addition ComReg has also made the 2.4 GHz band and 5 GHz band available for WLANs on a licence-exempt basis
- ComReg has recently introduced a Fixed Wireless Access Local Area Licensing scheme (FWALA) to promote local broadband competition. This scheme operates in three frequency bands, 3.5 GHz, 10.5 GHz and 26 GHz. To date, 39 local area licenses have been offered to and accepted by 8 new entrants in the 3.5 GHz band. Take up in the other bands has been slow to develop. However, interest is growing in the 10 GHz band with one licence issued in the Dublin area, offering leased line services to businesses and a number of applications pending.

In relation to other areas of innovation:

- ComReg operates a test licensing scheme which affords companies the opportunity to test and develop new wireless products

¹ Directive no. 2002 /19/EC, Directive no. 2002/20/EC, Directive no. 2002/21/EC and Directive no. 2002/22/EC

- ComReg has developed a generic set of regulations which will be used to licence new wireless systems in Ireland. Such regulations can reduce the regulatory delays normally associated with the development of new licensing regimes
- ComReg also has a policy of making spectrum available on a licence-exempt basis, where possible and in this regard closely follows developments within Europe

One of the principles of the new framework regulations is the requirement for platform neutrality and non-discrimination in any decision making. ComReg would therefore welcome some further guidance on the type and nature that incentivising investment might take before being able to give a more comprehensive response.

In relation to the postal sector, ComReg considers that competition has a crucial role to play in stimulating the overall development of postal services and thereby ensuring universal service provision. We are and will continue to seek to promote the development of the sector in line with Section 12 [1] (c) of the 2002 Act.

2.2 Market analysis

Outlined below are the market analysis procedures currently being carried out by ComReg. ComReg's ability to impose a wide range of obligations will stem from the market analysis provisions in the new regulatory framework. In this ComReg can define markets taking the utmost account of the markets defined in the European Commission's Recommendation on Relevant Product and Service Markets ("*the Relevant Markets Recommendation*") and the Commission's *Guidelines on Market Analysis and Significant Market Power* ("*The SMP Guidelines*"). ComReg can only define additional markets under strict criteria defined in the *Relevant Markets Recommendation*.

Having carried out market reviews and determined whether there is SMP in a particular market, ComReg must notify other National Regulatory Authorities (NRAs) as well as the European Commission. The Commission has the power to veto ComReg's determination. A finding of SMP is generally a prerequisite to imposing regulatory obligations (although there are exemptions in limited circumstances). These obligations are set out in the Access Directive² and the Access Regulations³.

In the case where a market review has been accepted by the European Commission, any aspect of the review can be challenged through the Appeals Panel process provided for under the Framework Regulations.⁴ Recourse to judicial review may also be an option in some cases.

² O.J. L 108, 24.4.2002, p.7

³ European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, S.I. 305 of 2003

⁴ Part 2 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, S.I. 307 of 2003

When selecting appropriate remedies to address the competition problems identified in a market, ComReg has to abide by a number of principles. ComReg has an obligation to consider the objectives of Section 12 of the 2002 Act (to promote competition, to promote the interests of users and to contribute to the development of the internal market.).

Consideration must also be given to Regulation 9 of the Access Regulations, which requires that any obligations imposed by ComReg be based on the nature of the problem identified, be proportionate and be justified.

While ComReg can potentially impose remedies at the retail or wholesale level to stimulate competition, the European Commission recommends that even where there are competition problems at the retail level, regulatory controls at the retail level should only be considered where wholesale measures fail to address the specific problem identified.

ComReg welcomes continued Ministerial support for driving competition and will continue to pursue this objective in line with the principles outlined above.

3 Policy directions on the fixed market

3.1 Fixed – Broadband

ComReg welcomes the view expressed in the policy direction of the importance of a regulatory environment that underpins the development of available, affordable and competitive broadband services. ComReg endorses this viewpoint and believes that this is best achieved when regulatory and competition policies are supportive and co-ordinated with wider Government policy in the economic, industrial and regional spheres

ComReg notes the Minister's proposed policy direction requiring it to use its regulatory and enforcement tools to support Government initiatives and to remove any regulatory barriers to those initiatives that seek to develop broadband.

ComReg has delivered the following improvements to underpin the Broadband market;

- A full Service Level Agreement (SLA) regime is now in place covering provisioning, operations and maintenance of wholesale DSL services
- Provisioning times for wholesale DSL (Bistream) have improved by more than 50% in the last 12 months, from c. 18 days to c. 8 days from receipt of order
- To support DSL, especially for business customers, there is an Enhanced SLA which provides for repair outside normal working hours
- ComReg's recent ADSL Port Transfer initiative enables customers to move seamlessly from one DSL provider to another, based on consumer choice

ComReg will within its powers continue to provide its support to all initiatives involving the provision of broadband, including the Government's own initiatives in the context of their contribution to the promotion of competition, the interests of end-users and the development of the single market.

ComReg also welcomes the Minister's proposed policy direction on the goal for broadband ("*to be at or better than the EU average for end-user access to and usage of broadband by mid 2005*") and believes that such ambitions are important if Ireland is to achieve its key economic objective of becoming a leading knowledge economy.

It should be noted that Ireland now has in excess of 42,000 broadband subscribers with a number of competing providers offering attractive service packages. This in part has been facilitated by ComReg's intervention in maintaining an acceptable wholesale margin.

ComReg's role in this context is primarily one of a facilitator. As such ComReg cannot directly affect the provision or take-up of services, but instead seeks to help facilitate the entry of service providers, who in turn choose their own positioning in the market. In facilitating market entry ComReg must follow the principles of non-discrimination and technology-neutrality. Commercial decisions regarding the

targeting of individual market segments, the delivery of services to certain regions, or the platforms by which broadband is delivered are predominantly in the domain of the service provider concerned.

ComReg is mindful of its obligations under administrative law to operate in a transparent, fair and non-discriminatory manner.

Any operator-specific support could be deemed to be outside ComReg's remit and its duty to act in a non-discriminatory manner towards all providers of Electronic Communications Networks (ECNs) or Electronic Communications Services (ECSs).

ComReg would welcome further guidance on any specific initiatives contemplated which might serve to "incentivise broadband provision on alternative platforms" to ensure that we can make a full and comprehensive response.

3.2 Wholesale and retail telephone line rental

3.2.1 Wholesale line rental

ComReg welcomes the Minister's support for its 31st March target for the introduction of a high volume Wholesale Line Rental product. The introduction of this highly complex product later this year will make Ireland only the second country in Europe to do so and reflects the considerable efforts by both the industry and ComReg. The process being implemented will ensure that the product is available to relevant operators and made accessible for consumers within the timelines. The pace at which operators choose to make it available and the product's take-up rates are clearly outside ComReg's sole remit.

In terms of the specifics, these are presently a number of work-streams underway. One of these relates to pricing. There are currently three elements involved- a charge for inter-operator testing (Service Establishment Testing), an order handling charge, and the retail margin for wholesale rental of the line. In terms of progress to date:

1. ComReg has agreed with eircom that the price for Service Establishment Testing should be zero,
2. Comreg has proposed that the Order Handling Charge should be reduced from €24.61 to €9.16.
3. The retail margin for the line rental itself has been established at 8.5% until 1st June and ComReg is currently in discussions with eircom on the appropriate level going forward.

The draft Direction proposes that ComReg will report to the Minister on the progress of this product and its success in the marketplace by 30 June. Experience of broadly comparable products suggests that other operators take a number of months from launch to familiarise themselves with its workings and to deploy significant marketing and sales effort to it. Expectations on certain aspects of the product, including pricing/margin, have risen significantly following recent press coverage and may make reaching agreement on some of these more challenging.

In terms of the effect the WLR product will have in the market place, clearly ComReg has a role in ensuring that a fit-for-purpose product is in place. The responsibility for the marketing and delivery of this product will however be dependent on the marketing/selling and promotion of this product to the consumer, the consumer's willingness to change, etc. These are clearly issues outside of ComReg's remit.

3.2.2 Retail line rental

The draft Direction also proposes that "If [wholesale line rental] is not in place by 31 March 2004 and if it is not delivering verifiable competition and lower prices by the 30 June 2004 the Minister will direct ComReg to take line rental out of the present price cap, and to set a specific rental cap no greater than CPI plus zero".

In reviewing any appropriate next steps, consideration needs to be given to the qualifications raised above in terms of both the availability from other operators and take-up of WLR. Consideration also needs to be given to both the appropriateness of the timelines and what the relevant ComReg inputs would be.

Alterations to the price cap as material as those proposed would require a change to the Statutory Instrument⁵ that sets out the price cap requirements. This would involve undergoing a lengthy process as set out in the relevant primary legislation and would include an assessment of dominance in the market and the statutory two month price cap consultation.

ComReg is currently undertaking a number of other regulatory initiatives relating to constraints in further line rental increases. As well as considering the appropriateness of any timelines for review, consideration should also be given to those that will have already been implemented and/or those that could be achieved in a shorter timescale than changes to the price cap regime. One example of this may be a review of line rental in the context of eircom's obligation for cost orientation.

ComReg is also already undertaking an analysis of relevant markets as required under EU and Irish law and as part of that process is required to determine what obligations it is appropriate to impose on any operator with significant market power. The output from that analysis is expected later this year, and will determine the obligations on any operators with significant market power for the future.

⁵ The Telecommunications Tariff Regulation Order, 2003 (S.I. 31 of 2003)

3.3 Interconnection/leased lines

3.3.1 Leased Lines

Recent Developments

In December 2002 ComReg mandated the introduction of a new wholesale version of leased lines known as Partial Private Circuits (PPCs). Prices were agreed and the product was launched in July 2003. Following a further review, prices for PPCs were reduced in February 2004.

PPCs are an important development in the leased lines market because they allow other operators to provide leased lines to end users by combining elements of eircom's and their own network in an efficient manner. Previously Other Authorised Operators (OAOs) were forced to use either their own infrastructure or eircom's exclusively in order to provide a particular leased line.

PPCs will allow operators to benefit from their inherent efficiencies in order to compete more effectively and, over time, should lead to more choice and reduced prices for end users. They should also encourage infrastructure development by OAOs since the latter will now be in a better position to use their own networks more efficiently.

ComReg would also like to draw attention to additional developments in the leased line area:

- Delivery times for leased lines ordered by OAOs has fallen from 22 days to 17 days in the period since October 2002 (average delivery time for 95% of leased lines ordered by OAOs)
- Customers can now exercise choice and transfer their leased lines to another operator without a break in service following ComReg's recent 'In Situ Transfer of Leased Lines' initiative

ComReg also notes the Government's own initiative in conjunction with EsatBT and ESB which is also likely to have an impact on prices to end users through enhanced competition.

Future Developments

ComReg has begun its review of the relevant leased lines markets as it is required to do under the Access Regulations. It is ComReg's responsibility to identify those markets where competition is not effective and to impose proportionate remedies to address the issues identified. ComReg will consult publicly on these matters in the second quarter of 2004.

3.3.2 Interconnection

The framework for setting interconnection conveyance rates is well established in Ireland. These rates in Ireland have been among the lowest in the EU for a number of years. ComReg will also conduct a review of interconnect markets as required by the Access Regulations in the coming months. ComReg has already indicated that it will, depending on what, if any, markets are found to be not effectively competitive, consider the introduction of a multi-year price cap for conveyance rates. The purpose of this would be to eliminate the need for annual reviews on interconnect rates and the consequent uncertainty that this process can cause in the market.

4 Policy directions on the mobile market

4.1 National and cross-border roaming

4.1.1 National roaming

Under the new regulatory framework, the provision of national roaming on reasonable terms and conditions is a remedy which is dependent upon the extent of ComReg's powers, and is linked to the ability of ComReg to designate any operator as dominant or jointly dominant in the relevant market.

Having consulted on and completed its mobile market review, ComReg may designate one or more operators with SMP. ComReg must then notify other National Regulatory Authorities (NRAs) as well as the European Commission. The Commission has the power to veto ComReg's determination of SMP.

In the case where a market review has been accepted by the European Commission, any aspect of the review can be challenged through the Appeals Panel process provided for under the Framework Regulations. Recourse to judicial review may also be an option in some cases.

As ComReg are presently in the throes of a public consultation any further responses at this time on material issues would be inappropriate. However clarification is sought from the Minister as to whether this direction is aimed at all GSM operators or solely those who may be found to have individual or collective dominance in the market.

4.1.2 Cross-border roaming

With regard to cross-border roaming and the possibility of reducing costs for people in Ireland via the markets listed in the EU regulatory framework, ComReg is participating within the Independent Regulators' Group (IRG) and the European Regulators' Group (ERG) with a view to agreeing a co-ordinated action-plan on a market review for international roaming. This is necessary, as action taken by ComReg in the wholesale market benefits roaming users and would not directly benefit end users in Ireland. Furthermore, such action can only be taken when legally (e.g. dominance is found in the wholesale international roaming market) and practically (e.g. NRAs in other countries have carried out their market analysis) possible.

Furthermore, ComReg already has in existence Memoranda of Understanding (MOUs) with the UK regulator, Ofcom, on cross-border coordination of GSM and 3G frequencies. There is also an MoU in place between Irish and UK operators aimed at improving cooperation in the border region.

The problem of inadvertent roaming can often be exacerbated by lack of coverage from one network or the other in border areas. The issue has been discussed at a number of regular Ireland/UK bilateral coordination meetings and some progress

has been made in improving coverage from respective networks on either side of the border. ComReg will continue to work with Ofcom on seeking further progress on this issue.

5 Policy directions on the postal market

5.1 Quality of service standards

ComReg has set specific quality objectives for An Post with specific reference to the transit time for single piece priority mail, in accordance with the relevant European Standard (EN:13850:2002). We are presently consulting on this issue and what the appropriate level should be going forward. We will continue to keep the Minister and his Department apprised as to progress and what, if any, remedial steps may be necessary.

6 Reporting

ComReg will continue to report to the Minister on the existing policy directions and welcomes the direction to report quarterly on the implementation of the additional directions.