Towards a new framework for Electronic Communications infrastructure and associated services; The 1999 Communications Review

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1. Introduction

The ODTR is the National Regulatory Authority for the regulation of the telecommunications sector in Ireland and was set up under legislation which is the responsibility of the Minister for Public Enterprise. The ODTR welcomes the opportunity afforded by the European Commission to contribute to the debate on the development of the future regulatory regime for the communications sector.

The exercise currently engaged in is both welcome and timely. The existing EU framework has provided an effective and supportive regime and has facilitated the liberalisation of most European telecommunications markets by now. In fact under that regime, those markets have developed so rapidly that the existing framework has been tested to the limit and now needs to evolve quickly. While in Ireland the liberalised market is only some 14 months old[1] competition has already started to deliver benefits for the end-users with falling tariffs, innovative services and a greater range of choice of service provider.

However having achieved this goal the focus now must be on developing that competition to ensure that all end-users derive the full benefits that a liberalised telecommunications market has the potential to deliver.

This paper sets out the ODTR response to the various issues raised in the Commission paper, following the layout of the Commission's own document. In addition, the ODTR supports the response to the Commission provided by the Independent Regulator's Group[2]. For that reason, certain issues that are covered in detail the IRG paper are not re-addressed in this paper.

2. Overview of ODTR Response

2.1 Overall objective

The telecommunications sector is critically important to the development of the EU economy and its position internationally. It is essential that the industry has the scope to develop, but we should not forget that the key focus must be the user/consumer interest, not simply that of the industry. One example of effective regulation which took into account the balanced needs of users and industry is the GSM standard. Initially the standard may have limited the options for manufacturers and operators but it gave consumers a seamless service across the EU (and elsewhere), rapid development of technology and substantial diversity in operator and service offerings. It also ultimately benefited the industry as is clear from the huge expansion in GSM services across Europe. The ODTR believes that this is the type of balancing act that the new framework must concentrate on.

2.2 Light handiness

Effective regulation must seek to avoid too heavy and wide-ranging control that discourages continuous new entry to the sector and stifles investment and risk. It must listen to, understand and take account of the industry viewpoint, but it should not listen only to the industry, for 'regulatory capture' has a poor record of delivering what users need now and into the future.

2.3 Harmonisation

The relative level of market development differs as between Member States, but in many there is clearly a still immature, but vibrant and rapidly growing industry. The new

[1] Market liberalised on 1 December 1998
[2] Copy attached at annex A

framework should be firmly rooted in the reality of the market and its evolution relative to users' needs for the best that competition should offer.

The development of regulatory guidance by the Commission, together with the increasing maturity of the more recently liberalised markets, should result in substantially greater convergence between the regulatory regimes in the Member States assisting the process of European integration in this key sector. It is not likely that any alternative approach will yield results as quickly or effectively.

2.4 Regulatory tools

The existing regime has its shortcomings, but it is clearly more than an 'industry charter' with a few consumer measures tacked on. The new regime must likewise operate in a fundamental way to ensure that competition intensifies and gains further momentum and that consumers benefit at the earliest possible date. In our view, it is essential that NRAs have the set of regulatory instruments and powers to provide for this, and that the new regime should contain "sunset clauses" and "forbearance clauses" enabling regulators to identify when and where it is appropriate to withdraw regulatory measures in their markets.

2.5 Certainty/flexibility

In preparing this response to the Commission's proposals, the ODTR is mindful of the balance that needs to be achieved in any future regulatory regime. On the one hand operators need the clarity and certainty that a prescriptive regulatory package will deliver to aid its decision-making process for investment purposes. However there is also a need to ensure that any new regime is not so prescriptive that it impedes innovation or undermines the ability of NRAs to react to market developments.

2.6 Conclusion

Measures to enhance the current legislative framework should focus primarily on the interests of consumers. In the long term this aim will be served by the development of sustainable, effective competition, which is the best way to foster improved quality of service, with lower and more transparent tariffs and the best possible choice of innovative offerings. However, it is the view of this office that effective competition will not be achieved in certain markets for some time. To enhance consumer welfare in such markets and encourage the move to full competition, it is essential that NRAs retain a basic set of regulatory powers. Flexibility should be built into the regulatory framework to allow NRAs to withdraw regulation as competitive forces become effective in particular markets.

With regard to the proposals set forth in the Commission's document "Towards a new framework for Electronic Communications infrastructure and associated services" this response will now concentrate on addressing the specific issues raised by the Commission.

3. Objectives and Guiding Principles

3.1 Reason for the 1999 Review

The ODTR believes that the setting out of clear objectives and guiding principles is a valuable exercise and welcomes the Commissions approach generally. However, in its discussions with various interested parties, the ODTR has perceived a lack of understanding of the underlying logic for the 1999 review which perhaps could be articulated even prior to the setting of objectives and principles. From its involvement in discussions on the 1999 review, this Office considers that the underlying logic of the Commission is to create a "glide path" from the existing regulatory framework, which has facilitated the initial liberalisation of markets, to a regulatory regime appropriate for competitive markets, that is where horizontal competition law should govern most activities in the sector. The Commission however,

recognises that the transition to competitive markets may be uneven and that during that development period regulatory measures will be necessary to encourage competition, and consumer welfare will continue to require protection. The Commission further recognises that where markets do not become competitive, a continuing concentration on the consumer may be necessary.

To achieve this transition the Commission proposes in general terms to take the broad and sweeping regulatory regime that was appropriate for a monopoly environment, and refine it considerably to allow for the gradual and targeted relaxation of regulation where markets become competitive. In some cases, this leads to a more complex regime that allows for the identification of markets and the measurement of competition in those markets. Various parties have perceived this approach as unnecessary and invasive and argue that due to the nature of the telecommunications sector, an operator that has a position of power in the traditional market for telephony has, de facto, power in all telecommunications markets. This line of argument suggests that those operators should be subject to regulation in all markets, and regulation should only be lifted when market power has disappeared in the traditional market. In the meantime, it is suggested that regulatory controls should not be imposed on any other operators. The ODTR considers that such an approach is not adequate for a rapidly developing telecommunications sector and believes that the Commission's approach is proportionate and appropriate. As the markets become more complex, so too the application of regulatory tools to that market will of necessity be complex, but complexity is not an argument for avoiding a very necessary block of work.

3.2 Policy Objectives

The ODTR supports the Commission's stated policy objectives, in particular the prominence given to the European Citizen in any future regulatory package. While acknowledging the importance attached to the consumer issues in the policy section of the document this Office is of the view that the actions proposed later in the document dealing with consumer and user issues will fall somewhat short of achieving this stated objective. This issue will be dealt with in more detail later in this response.

3.3 Regulatory Principles

Concerning the 'Regulatory Principles' proposed, again this is a welcome development. While the existing Directives have stated aims, this Office welcomes the proposal contained in this document to set out a 'benchmark' against which future regulation by NRAs and by the Commission can be assessed. This will contribute positively to regulatory certainty for market players.

There are certain specific issues which the ODTR considers need to be further examined by the Commission in regard to these 'Principles'.

3.3.1 Clearly defined policy objectives, and minimal regulation

While this Office welcomes the Commission's proposals that future regulation should be based on '*clearly defined policy objectives'* and '*should be the minimum necessary to meet those objectives*' there are certain practical issues that need to be considered further.

- Competition will develop at a different pace in Member States and within Member States certain sectors of the communications market competition will develop at a faster pace than others. NRAs need the flexibility to respond to the changing environment. In particular, in certain markets NRAs will need to have a more active role in aiding the development of competition than in others and must therefore be empowered to respond in such circumstances. The requirement for regulatory actions to be justified as being in line with the stated principles and objectives will provide a clear framework for such actions.

- Where markets are shown to be sufficiently competitive NRAs should be obliged to make use of 'sunset clauses'. This would enable NRAs to withdraw certain regulatory requirements as competition develops.
- Consumer protection measures will continue to be needed in any new regulatory regime. NRAs should be empowered to intervene in such areas where the market is not yet working effectively.
- Where competition does not lead to the provision of key services to all at affordable prices, basic rules should ensure that there is such provision in a way that minimises distorting effects.

These issues are addressed in greater detail in later sections of this response.

3.3.2 Legal Certainty

The ODTR agrees with the Commission that a balance needs to be struck between retaining flexibility for regulators to respond appropriately to market developments and delivering the regulatory certainty that underpins investor confidence. There are three key issues the Commission should consider:

- Harmonisation of approach by NRAs in Member States to regulatory issues will provide pan-European operators a level of certainty currently not available in respect to certain issues. The ODTR believes the IRG forum could provide an important contribution towards the development of such a harmonised approach.
- The new Framework Directive will need to provide sufficient direction to all players (NRAs, Operators and Users) as to where it will be appropriate to use 'soft law'. To this end the Commission should set out where it expects guidance will be necessary, what it will cover and who will be responsible for preparing it.
- The right inter-institutional arrangements will also aid this process by identifying more clearly the roles of the various parties responsible for the regulatory framework.

3.3.3 "Technologically neutral"

This office supports the principle of technological neutrality and believes that this is an area where the existing framework has been most challenged. Old technologically bounded definitions, in particular in relation to distinctions between voice and data, are now irrelevant and should be removed. It is possible however, that where objectively justified, regulation may be applied differently due to **competitive** differences in markets which are related to technology – this should not be confused with technology specific regulation.

3.3.4 "Enforced as closely as possible to the activities being regulated"

The ODTR supports the Commission in regard to this proposal. The ODTR is of the opinion that NRAs at local level are best placed to monitor the market forces at work, while at the same time acknowledging that the 'market' in future may not be contained within national boundaries. It is likely that cross-border issues will arise and for this reason provision should be made to allow for the closer co-operation between NRAs in such cases, in particular allowing for an efficient exchange of information.

4. Licensing and Authorisations

The motivation behind the Commission's proposals on licensing and authorisations is fundamentally sound and this Office believes that the principles of non-discrimination, transparency, proportionality and objectivity should be maintained in the new legislative regime. This Office also agrees with the Commission's proposals to restrict the circumstances

in which individual licences may be issued and agrees with the use of general authorisations as the basis for licensing communications networks and services.

However there are certain areas where further consideration needs to be given to address the practical application of the Commission's proposals. Individual licenses may still be necessary to give authority to use scarce resources, particularly where such spectrum is awarded subject to complex performance criteria. Also where it is necessary to restrict the use of spectrum to a limited number of players, individual requirements are likely to be necessary to ensure efficient use.

While the harmonisation of spectrum allocation is to be welcomed, this Office does not accept that general authorisations will be sufficient to manage this scarce resource - obligations on those allocated spectrum in such circumstances may need to be individually tailored for example to avoid interference.

It is also important to ensure that the use of general authorisations does not compromise the ability of the NRAs to collect market data, enforce relevant conditions (such as consumer protection, security obligations etc.), and to recover administrative costs, including appropriate costs of enforcement and litigation.

This Office supports the Commission's proposals to separate authorisations to provide services and specific authorisations to operate infrastructures that involve the use of scarce and public resources and with the Commission's approach towards the licensing of audio-visual services and associated services and infrastructure.

5. Access and Interconnection and Specific Competition Issues

This section includes the ODTR response on both the Commission's proposals on access and interconnection and on specific competition issues. These two matters are central to the objective of regulation of the telecommunications sector and are inextricably linked. In particular, the ODTR believes that the proposals on thresholds for intervention have the greatest impact of all of the proposals.

5.1 Obligation to Negotiate Access

The ODTR is of the view that it is unrealistic to believe that it will be sufficient to place SMP players under an "obligation to negotiate" access or interconnection. The asymmetric bargaining positions of the operators involved will usually leave little incentive to the SMP operator to reach an agreement on interconnection with, for example, a newly established operator. That is, the proportion of business lost and resulting negative network externalities from the lack of an agreement will be a lot greater for a small operator that fails to interconnect with the SMP operator than for the SMP operator who fails to interconnect with the smaller operator. Clear ground rules regarding negotiation and pricing need to be established at European or National level. Otherwise, NRAs will be swamped with disputes as competition develops further. In addition, this limited obligation to negotiate may not be sufficient to ensure interoperability as suggested in the paper when it is stated that it is important that "rules for access and interconnection ensure interoperability and are essential to allow competition to become established."[3]

5.2 Measurement of Competition

The Commission's proposals state that the decision to lift a particular *ex ante* obligation would be taken in accordance with criteria laid down in Community legislation, such as market power and the degree of competition in the relevant market. The Review then refers

[3] The 1999 Communications Review, p.25.

forward to section 4.7.2 ("Dominant Position and Significant Market Power"). While section 4.7.2 suggests guidelines for market power tests, guidelines for the assessment of effective competition within a market are not set out. These guidelines for market power tests must be accompanied by an equally clear definition of the process by which the state of effective competition should be analysed. Otherwise, effective competition may be interpreted as simply the absence of operators with market power (i.e., SMP or dominance). In addition, guidelines would greatly assist harmonisation of approaches across different NRAs.

5.3 Market Definition

The ODTR is in broad agreement with the Commission proposal to define "relevant markets" using economic principles rather than static definitions. This is consistent with the approach used in European competition law, which should make for a cleaner transition away from sector specific regulation as markets become effectively competitive. It should also facilitate the intended move towards technology neutral regulation.

However, the ODTR believes NRAs must have flexibility in the definition of these markets according to national circumstances and in cases that can be objectively justified. For example, the regulatory framework will presumably be applied to new member states joining the European Union. Some new members will doubtless possess quite competitive telecommunications sectors, but others will have further to go in the liberalisation process.

5.4 Dominant Position and Significant Market Power

Despite the importance of this issue, there is a lack of argument or detailed economic analysis to support the Commission's proposal to replace the single threshold measure – SMP – with two thresholds – SMP and dominance. In addition, there does not appear to be any link between either of these two concepts and the third central concept of "effective competition". The Commission's model therefore would appear to equate "dominance" with "lack of effective competition" and therefore controls such as cost-orientation must apply where a firm has dominance and cannot be lifted, even if there is effective competition. This inflexible approach does not accord with the Commission's own principles.

The main difficulty in implementation is with the use of dominance. Dominance is not merely a higher threshold of market power than SMP, it is a legal construct designed for the targeting of certain *ex post* competition law obligations. These obligations mainly relate to prohibition of anti-competitive practices, which are in most cases quite different from *ex ante* sector specific rules. Also, the role of dominance in competition law means dominance is assessed on a case by case basis in *ex post* situations, that is, based on a "snapshot" of a market at a point in time. Employing dominance tests to trigger ex ante obligations which would apply *over a period of time*, could lead to serious legal uncertainty. For example, if, after designation of an operator as dominant and imposition of obligations, a court in an unrelated competition case came to a conclusion, based on a specific analysis at a specific point in time, that contradicted or undermined the ex-ante ruling, the resulting uncertainty and confusion in the telecoms sector could be very damaging.

It is also important if more than one threshold is to be used, to ensure that a consistent methodology is used to apply those thresholds, and the ODTR is concerned that the Commission's proposals do not deliver such consistency.

The economic principles used in assessments of market power will apply similarly in telecoms regulation as in competition policy, but it would be best to go back to these principles and design a test that fits the obligations it will trigger, rather than adopting a test designed for other purposes.

The ODTR considers the use of one threshold to be more appropriate and sees the IRG proposals in this area to be a sensible way forward.

6. Management of Radio Spectrum

This Office agrees with the Commission's objectives on the management of spectrum. Member States and/or NRAs have a crucial role to play in ensuring that maximum benefit is derived from this natural resource. The allocation, and cost associated with the use of, this resource needs to be carefully managed. Fees set at an inappropriate level could lead to undesirable outcomes, for example, unnecessarily high fees could result in operators having to recoup such charges by imposing higher tariffs on users resulting ultimately in less benefit for the citizen, while inappropriately low fees could result in inefficiency of use or hoarding by operators which could result in other players being kept out of the market.

6.1 Valuation of Radio Spectrum

The ODTR is generally supportive of the Commission's specific proposals. In supporting the principle that some economic considerations need to be introduced into the radio licensing process we would be concerned if the emphasis shifts too much towards economic considerations and away from the existing areas of consideration such as the social, cultural, technology and public security requirements.

This is a complex area that needs careful consideration, as spectrum availability is an important issue for a number of diverse sectors within the economy, such as transport, public security, broadcasting the science services and R&D. Each has its own sub-set of parameters of the above mentioned criteria. Furthermore within the communications sector an unbalanced reliance on economic criteria in the radio licensing process could be detrimental to other objectives such as increasing competition and provision of high quality services to the consumer at the lowest possible price.

6.2 Secondary Trading.

This Office does have concerns about the Commission's proposals for 'secondary trading'. In considering secondary trading it is important that there is a clear understanding as to whether the secondary trading refers to spectrum or refers to the licences which allow the spectrum to be used under certain conditions. If the secondary trading refers to the spectrum then rights of ownership to parts of the spectrum could be transferred to the holder together with the capability to extract economic rents from the market, leading to inefficient outcomes to the detriment of users. It could in particular inhibit the NRAs scope to facilitate the development of new and imaginative services by new operators or in stimulating competition. A further concern centres on an Administration's position in considering spectrum allocation at the international level; it could be compromised by a worry that existing users may seek compensations if their perceived ownership rights were affected.

It may be the case that certain Member States do have a need to deal with existing problems in the assignment of spectrum that is not currently being used to best effect. It is suggested that these could be dealt with by an EU provision, overriding national provisions, that would enable the appropriate authorities to conduct periodic reviews of assigned spectrum and to cancel assignments that are not being used in accordance with the principles of efficient spectrum use. The acquisition of property rights in spectrum by existing (and possibly future) users as distinct from licence rights to use over a specified number of years, subject to performance, appears to the ODTR to amount to a retrograde step in the move towards opening up markets.

6.3 National vs. pan European assignment and licensing

In considering national vs. pan European assignment and licensing the 1999 review mainly addresses satellite services. Satellite services have allocations in numerous bands within the ITU table of allocations. In some cases the bands are allocated to satellite services on a sole basis (i.e. Mobile Satellite Service) while for other bands the allocations are on a shared basis with terrestrial services. Where a band is allocated to a satellite service on a sole basis then it would be appropriate to consider a role for a pan European licensing approach. However where a band is allocated to both a satellite service and a terrestrial service a pan European licensing approach could inhibit the development of national communications infrastructure. The licensing of satellite services in bands which are allocated to both space services and terrestrial services should remain with the national regulator.

6.4 European Role

One final concern relates to responsibility at European level for spectrum issues. The 1999 Review indicated that following the green paper and consultation on radio spectrum it is proposed to form a spectrum policy group while at the same time COCOM will also have a role. It appears that both committees will include radio spectrum within their respective briefs. The briefs for the respective committees need to be clearly defined so as to avoid duplication in the handling of spectrum issues.

7. Universal Service

It is a matter for Member States to determine the scope of Universal Service. However, the ODTR supports the Commission's proposals not to amend at this time the definition and scope of Universal Service while allowing flexibility for expansion and redefinition at national level, subject to the requirement not to distort competition.

This Office considers that NRAs should continue to have responsibility for determining which market players will bear universal service obligations and for determining the reasonable level of costs (net of any benefits) which arise from those obligations. The burden of proof of any net cost, should there be one, should rest with the USO provider.

8. The Interests of users and Consumers

The Commission states that in many cases, the best way of protecting consumers is to ensure that they have choice and the means to make informed choices between competing services. Many problems which consumers experience in practice also occur in other sectors of the economy and can be dealt with by means of horizontal consumer law. This Office supports the Commission on these points and supports the Commission's stated approach of light handed regulation in this area. Already within some sectors of the communications market user and consumer issues are adequately catered for.

However, as mentioned in the introduction to this response this Office is not convinced that all sectors of the telecoms market are sufficiently competitive to deliver the best deal to users and consumers at this time. One key to ensuring that users and consumers are afforded some degree of protection is information. Even where there are a number of competitors in a market, competition may not be fully effective because consumers cannot readily compare different offers. If price comparisons are impossible, for example due to excessive complexity of tariffs, then price competition is undermined. In the course of preparing this response this Office met with the user and consumer groups who expressed a strong concern in relation to information in respect to tariffs and quality of service.

Voluntary action in this area by market players would be preferable, but in practice market players may not have an interest in promoting transparency and even where individual players

provide information on their own offerings, comparisons between players may still remain an issue. The ODTR believes NRAs need to be empowered to act in such situations. This should provided for the power to require production of information which facilitates transparent comparison and to recover from all relevant market players the reasonable costs of making that information available in an accessible form.

In addition, NRAs should be empowered to intervene for the protection of consumers in areas where competition is not yet effective or where even a competitive market would not provide adequate protection (e.g. protection of privacy). A basic level of quality of service for some essential services should also be mandated, which would not restrict the simultaneous availability of services of higher quality for those who prefer it.

Finally, in the interest of removing barriers to entry and promoting sustainable competition, it may in some circumstances be necessary to scrutinise the retail prices of SMP players, in order to prevent price squeezes or other forms of anti-competitive pricing. For reasons of regulatory certainty and speedy process, ex-ante regulation should remain an option. Prohibitions on bundling, prohibitions on (unfair) discrimination and imposition of accounting separation are other tools that are appropriate in certain circumstances and these tools must remain available to NRAs**.**

9. Numbering, Naming and Addressing

Numbers, names and addresses are essential resources for the development of new services and the ODTR welcomes the requirement for supervision of numbering/addressing/naming plans by NRAs. The ODTR currently manages the numbering plan for Ireland.

The ODTR agrees that more dialogue and co-ordination is required between the bodies involved at European and Member State level, particularly to ensure the co-ordination of European positions in international bodies.

9.1 Convergence of communications infrastructure and associated services

The ODTR believes that since the internet is a global network, certain naming and addressing issues are currently best dealt with by ICANN (Internet Corporation for Assigned Names and Numbers) and the other global structures that reflect the global interests in Internet development. However, we share the Commission's concerns about fragmentation of the administration functions and welcome the proposal to keep the matter under review.

In particular, interworking of IP networks with PSTN and ensuring service interoperability may drive more effective co-ordination.

9.2 Numbering, naming and addressing at EU level

The ODTR has in the past supported the European Telephony Numbering Space (ETNS) on the basis of the '388' country code and it has been supported by the incumbent operator in Ireland. However, we believe that the concerns of other Member States and telecoms operators about the viability of business cases for such services should be studied in more depth and reported upon to aid the final decision making process.

Beyond a narrow sub-set of value added services, it is difficult to see how the broader context of a unified numbering environment for Europe would work in practice for telephony services, given the well established and diverse numbering arrangements in Member States. However, at the current stages of development of IP networks and the Internet, there may be some scope for harmonisation. The ODTR agrees that more dialogue is required between the

bodies involved in numbering, naming and addressing at global, European and national level to establish long-term ownership and responsibility issues.

9.3 Number portability

While the ODTR is generally supportive of the Commission's views on number portability, it does not appear appropriate that particular attention should be given to such specific issues in a document which is designed to carry out a review of the overall EU framework. This is a very specific issue which could be dealt with under one of the broader headings and in accordance with the general principles and objectives.

Notwithstanding this, the ODTR agrees that it would be in the user interest to make Mobile Number Portability available and would in particular welcome further cost-benefit studies by the Commission.

The Commission's concerns for full interoperability of Member States' centralised number portability databases are not fully understood and this may, once again, be due to the fact that this is a detailed implementation issue requiring considerable technical discussion at working level and is therefore not appropriate to a framework review. In particular, the objective appears to be the to facilitate pan-European services whereas the requirement of interoperability between national databases is only a small sub-set of facilitating cross-border portability. Issues such as the effects on the operation of pre-existing number portability management systems require considerable further investigation before any decision could be taken.

9.4 Telephone numbering and competition

The ODTR welcomes the proposal that the rules of national numbering plan management should be strengthened to confirm the rights of the NRA to withdraw the use of a number allocation where such changes clearly contribute to the efficient use of the number resource. More co-ordination by NRAs on specific issues of European interest, such as the potential shortage of codes within the International Mobile Subscriber Identity (IMSI), would also be welcomed.

Other points made by the Commission appear, once again, to be detailed implementation issues more appropriate for discussion at technical working group levels in appropriate fora. This is particularly necessary due to a certain lack of clarity in the suggestions. For example, in relation to point codes, the ODTR, as NRA, currently allocates International Signaling Point Codes (ISPC), which allows operators establish an international gateway, i.e. the provision of cross-border services. The incumbent currently allocates National Signaling Point Codes (NSPC), which identifies a switch in a national context. It is difficult to see how the allocation of NSPC has any cross-border service implications, since charging for such services is on the basis of number analysis in billing, not on the basis of signaling messages between exchanges.

10. Institutional Arrangements

The ODTR welcomes the fact that consideration is being given at this time to streamlining the decision-making process at European level. However we share the concerns expressed in the IRG response as to whether the proposals, as currently set out in the Commission's document, represents the most constructive way forward. In particular, we are concerned as to whether the HLCG will, for the wide range of functions envisaged, be able to operate at the pace needed in today's communications environment. The composition of the HLCG has the potential to add further to the complexity of the decision making process.

To this end this Office endorses the proposals contained in response by IRG with regard to the role IRG can play in aiding the development of the legislative framework. ODTR wishes to assure the Commission of its full support on this matter.

This Office also supports the Commission on the need for greater clarity on the relationship between the NRA and the various other bodies that currently have some role to play in the implementation of the existing regime (e.g. Competition Authority, Data Protection Commissioner, Ministry). Again this office is supportive of the position proposed in the IRG response.

10.1 Independence of NRAs

Confidence in the ability of NRAs to act independently is a critical factor is aiding regulatory certainty. The motivation for independent NRAs has changed somewhat from when the existing legislative regime was constructed since when most EU states have privatised their incumbent telecoms operators.

The concern now is to ensure consistent and timely application of the legislative framework in a manner that benefits competition and users. Independence, and the perception of independence, will promote public confidence and credibility and lead to greater acceptance of decisions of regulators which in turn promotes stability and certainty and aid investor confidence. To achieve this end result, three essential components of independence must be in place - security of tenure, financial security and institutional independence. The first can be achieved in the statutory framework for appointment, the second by ensuring no control over the financial resources of the regulator and the last requires the ability of the Regulator to create an efficient working institution including staffing the organisation to the level that meets its requirements.

This Office also recognises that independence can be underpinned by appropriate accountability measures. A statement of the roles of the different parties (NRAs, Ministries, Competition Authorities) set out in a clear unambiguous manner will aid this process.

10.2 Competencies of NRAs

The ODTR welcomes the Commission's proposals to introduce measures leading to greater standardisation of the responsibilities of NRAs. This should help ensure greater clarity for market players and also avoid the duplication of work as a result of the overlap of responsibilities between different authorities in the same Member State. A standardisation of the roles of NRAs should also aid harmonisation and ultimately lead to a more effective HLCG.

10.3 Cross-border issues

The Commission has suggested two areas where it thought HLCG would be able to assist with trans-national issues. These were:

- Cross-border cases where more than one NRA had an interest;
- Problems of an inconsistent approach to licensing by NRAs.

The ODTR agrees with the IRG position that in the first case, the IRG could develop a model scheme for NRAs to use in resolving such cases bilaterally. The second issue should not arise if Directives, complemented by harmonised guidance as necessary, are sufficiently clear. Furthermore IRG could take on the role of monitoring any such guidance to ensure that it remains relevant and up-to-date.

As mentioned earlier, NRAs should be empowered to allow the exchange of confidential information to enable cross-border disputes to be dealt with as efficiently as is practicable.

11. Conclusion

In conclusion, the ODTR welcomes the opportunity to submit this response to the Commissions 1999 Review document. The comments and suggestions in this paper and the IRG submission, to which ODTR is a party, represent the views of the ODTR on the proposals put forward to date and some suggestions for moving the Commission's proposals forward in a constructive and effective fashion. The ODTR is available to comment further or explain any of the issues set out in this paper if the Commission wishes.

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Annex A

IRG SUBMISSION TO THE EUROPEAN COMMISSION ON ITS REGULATORY REVIEW OF COMMUNICATIONS LEGISLATION

IRG SUBMISSION TO THE EUROPEAN COMMISSION ON ITS REGULATORY REVIEW OF COMMUNICATIONS LEGISLATION

Introduction

In the framework of the Independent Regulators Group (IRG), independent national telecommunications regulators[1] have formed a common position on the 1999 EU Review of communications legislation. Following a request from the Director General for the Information Society, IRG now submits its views to the Commission as a contribution to the consultative process launched by the Commission's Communication "Towards a new framework for Electronic Communications infrastructure and associated services" in November 1999.

IRG commends the Commission for its analysis and for the work carried out so far. It believes that the existing framework of EU and national legislation has provided a valuable and effective basis for sectoral regulation and the development of competition in the telecommunications sector to date. It further believes the approach taken by the Commission in identifying the need for change and the specific proposals now under consultation to be broadly the right one for the interests of European consumers and business users of electronic communications. In an era of fast-moving markets, it is clear that the rights and obligations on market players need to be expressed in more general terms than in the present Directives, in order to promote regulatory coherence and avoid obsolescence. Although the justification for special sectoral rules appears likely to remain for the foreseeable future, it should be possible to lighten regulation as competition broadens and deepens in certain markets across Europe. The approach that the Commission has taken will allow the rules to evolve as necessary and will avoid a disruptive step-change when the new Directives take effect.

To provide the market with the necessary degree of regulatory certainty, it is of the utmost importance that the high-level policy objectives and complementary regulatory principles are clearly and precisely articulated and adhered to at all times. This of course means that the measures in Directives must be justifiable in terms of those objectives and principles; and also that regulators must be prepared to justify the actions they take against those objectives and principles.

Moreover, the need for regulatory certainty in this rapidly evolving period makes it even more important than hitherto that there is effective harmonisation of approach by regulators. As the Commission recognises, the problems faced in national markets will not be uniform across Europe at any one time. Accordingly, national regulators need flexibility to apply the appropriate rules to deal with the particular circumstances they face, consistent with a common framework of objectives and principles. The

[1] In this document, the shorthand "national regulatory authority" (NRA) is used to refer to the independent authorities which are members of IRG. A brief description of the Independent Regulators Group and its members is at Annex H.

Commission has seen that the risk of divergent national approaches to common problems can be minimised partly by “soft law” mechanisms to complement clear rules in European legislation; partly by effective co-ordination mechanisms amongst the entire regulatory community; and partly by appropriate consultation and exchange of views between the regulators and interested parties. These are difficult issues. IRG offers its assistance to the Commission in getting them right.

For the moment, while IRG supports the broad thrust of the Commission’s proposals, it believes it can enhance them on the basis of the day-to-day experience of its members with the operation of the current rules. Its suggestions are summarised in this paper and set out in detail, with reasoning, in the attached Annexes A-G.

IRG offers the Commission whatever help it may need over the coming months and years to ensure that the new regulatory framework is well-designed, both at conceptual and detailed levels, and that appropriate inter-institutional procedures are in place and effective.

Summary of main proposals by IRG of issues to be taken into account by the Commission in drawing up draft legislation

General

1. IRG agrees with the Commission that the revised rules need to be expressed in more general terms than at present, in order to promote regulatory coherence and reduce the risk of obsolescence. The counterpart to this increased flexibility is the need for clear guidance on interpretation of the rights and obligations of market players and the duties of NRAs. Without suitable guidance, there will be insufficient regulatory certainty. Guidance will also assist the achievement of a harmonised regulatory approach in keeping with a single market. When it publishes its legislative proposals, the Commission should set out clearly the areas where complementary guidance will be needed, what it will cover and which organisations will be responsible for preparing it.

Regulatory objectives and principles (Annex A)

2. The Commission's proposed principles are sound but presently formulated in a very general way. They should be articulated in more detail, both as an aid to discussions during the Review process and as ongoing guidance on the exercise of NRA responsibilities. IRG offers some thoughts in the Attachment to Annex A.

3. When it publishes draft legislation, the Commission should also publish an accompanying commentary, justifying each of its proposed measures against the specified objectives and principles.

Licensing and authorisations (Annex B)

4. The Commission's proposals to restrict the circumstances in which individual licences may be issued are sensible. Nevertheless, individual licenses may still be necessary to give authority to use scarce resources, including rights of way. Where it is necessary to restrict the use of spectrum to a limited number of players, individually tailored requirements are likely to be necessary to ensure efficient use or to avoid interference. This is so, whether spectrum allocation has been harmonised at Community level or not. Universal service obligations must also be defined on an individual basis.

5. Increased use of general authorisations must not compromise the ability of NRAs to collect data from a wide range of market players (for example, for assessing the state of competition in a market); to enforce, efficiently and reliably, data protection, other consumer protection measures or security obligations on market players; to grant rights of way; or to recover reasonable administrative costs.

Thresholds for intervention (Annex C)

6. The "significant market power" test should continue to be used as a threshold for allowing the possibility of regulatory intervention on interconnection and access issues and to curb abuses of market power in retail markets. If NRAs could only intervene where a market player has a dominant position, then it is unlikely that the policy objectives proposed by the Commission would be achieved in full. Those markets where there is a strong vertically integrated player or where there are a small number of players coupled with high barriers to entry are unlikely to become effectively competitive without regulatory intervention. Equally, there is a high risk that consumers will not get the "best deal" in terms of low prices, high quality and maximum value for money.

7. The definition of "significant market power" in a "relevant market" could be revised as proposed in the Attachment to Annex C. This will help to ensure that any NRA intervention is justified and proportionate.

8. NRAs need to have flexibility to define national "relevant markets" and assess SMP in those markets, where national circumstances demand it and subject to the established principles used by competition authorities, as summarised briefly in the Attachment to Annex C.

9. NRAs need considerable flexibility to select the right set of regulatory instruments for the circumstances under consideration but should be prepared to justify their choice, in the light of the objectives and principles proposed by the Commission.

10. Obligations imposed on market players should be reviewed at appropriate intervals in order to ensure that they remain relevant and proportionate. NRAs should be empowered by the Directives (whether by use of sunset clauses or the principle of forbearance) to lighten or remove obligations which are no longer objectively justifiable.

11. Many NRAs prefer a single threshold rather than the dual threshold (SMP/dominant position) approach proposed by the Commission. In order to avoid over-regulation, the Commission could issue guidance concerning the circumstances under which the more onerous obligations (e.g. LRIC-based charges) could be imposed.

Interconnection and Access (Annex D)

Proposals 12-15 and Annex D have been drafted on the assumption that there will be a single threshold for intervention - SMP

12. The Commission is right to propose as much reliance as possible on commercial negotiation. But its belief that it will be sufficient to place SMP players under an "obligation to negotiate" access or interconnection is unrealistic. Market players with SMP will have no incentive to reach agreement unless the ground rules for NRA resolution of a dispute are clear. They need clarity about NRAs' approach to interconnection and access. Equally, market players without SMP should not be encouraged to take unreasonable negotiating positions in the hope that these will be upheld by the NRA. To ensure a consistent approach throughout Europe, the basic rules should be set out clearly in Directives; any complementary guidance should be harmonised.

13. In order to facilitate effective competition, NRAs may need to select from a wide range of regulatory instruments. IRG's preliminary proposals on procedures for assessing SMP in interconnection and access markets and on the instruments which NRAs need to have available are in the Attachment to Annex D.

14. A final view cannot be taken on the procedures and instruments mentioned above in the absence of guidance on their use. Otherwise, the correct balance between flexibility and regulatory certainty cannot be established. IRG will offer a draft of such guidance to assist discussions as the Review progresses.

15. The Commission's proposal for specific rules in Directives requiring carrier select for mobile operators with SMP should be withdrawn. NRAs will have powers to impose such a requirement, where the market circumstances justify it, under the generic regulatory approach proposed by the Commission. A Commission Recommendation in this area may be appropriate.

Implementation of the Universal Service Obligation (Annex E)

IRG does not offer any suggestions on the definition of the Universal Service Obligation as this is a political matter. The proposals below are restricted to harmonisation mechanisms and to the implementation of whatever obligation is defined.

16. The definition of the minimum scope of the Universal Services should continue to be harmonised at European level. Member States should have discretion to expand the scope of USO at national level, provided that this does not distort competition.

17. The Directives should provide an explicit mechanism to allow for timely evolution of the definition of universal service, in line with the needs of society and the evolution of the market.

18. NRAs should be responsible for determining which market players will bear universal service obligations, for defining those obligations and for determining the reasonable level of incremental costs (net of any benefits) which arise from those obligations.

19. Where USO can be delivered in different ways, the NRA should make the choice on the basis of efficiency of delivery and of technological neutrality.

20. NRAs should ensure that operators of infrastructure used to deliver a universal service should grant access so as to permit the development of competition in the universal service.

Retail markets and other consumer issues (Annex F)

21. The Commission states that in many cases, the best way of protecting consumers is to ensure that they have choice and the means to make informed choices between competing services. Moreover, many problems which consumers experience in practice also occur in other sectors of the economy and can be dealt with by means of horizontal consumer law. IRG agrees with both these propositions. Nevertheless, there are circumstances where this approach will not deliver "the best deal" for consumers, as required according to the Commission's proposed policy objectives. Intervention in retail markets may therefore be necessary in order to facilitate market entry and sustainable competition on the one hand, and on the other hand to protect consumers where market forces fail. NRAs need to be equipped with appropriate tools to deal with such problems, albeit that interventions should be relatively infrequent.

22. In the interest of protecting new market entry and sustainable competition, it may in some circumstances be necessary to take steps to prevent SMP players from operating price squeezes or other anti-competitive pricing. Usually such problems would arise from leverage of market power in wholesale market into the retail market. For reasons of regulatory certainty and speedy process, ex-ante regulation should remain an option. Prohibitions on bundling, prohibitions on (unfair) discrimination and imposition of accounting separation are other tools which are appropriate in certain circumstances. The same tools may also be appropriate to protect consumers in segments of the retail market where an SMP player faces little competition in practice. In this case, retail price controls may also be necessary.

23. Even where there are a number of competitors in a market, competition may not be fully effective because consumers cannot readily compare different offers. Proportionate measures to promote the transparency of tariffs and transparency of quality of service offered to domestic

consumers and very small business customers can therefore be fully justified. Although voluntary action by market players would be preferable, in practice market players are unlikely to have an interest in promoting transparency. NRAs therefore need reserve powers to require production of information in a form which facilitates transparent comparison and to recover from all relevant market players the reasonable costs of making that information available in an accessible form. (Similar measures aimed at the large business market are less likely to be justifiable.)

24. Finally, instruments should be available to NRAs for the protection of consumers in areas where even effective competition can not provide it, for example privacy, the availability of single bills covering services provided by several players and price caps for services or market segments that are subject to little competition. It may also be necessary to guarantee the availability of a standard quality of service for some essential services, without restricting the simultaneous availability of services of higher or lower quality for those who prefer it.

25. Instruments available to NRAs need to be very flexible in all the above areas as the problems encountered in practice will tend to vary considerably across Europe and over time. Nevertheless, intervention in this area requires careful justification on a case-by-case basis against the policy objectives and principles proposed by the Commission. As the effectiveness of regulation of wholesale markets increases, the need for regulation of retail markets should decrease.

Institutional issues (Annex G)

26. IRG believes that dialogue between Commission and NRAs is essential. If a High Level Communications Group (HLCG) is set up, then members of IRG will participate actively. An HLCG may be an appropriate vehicle for broad strategic discussions about the direction of regulation and for interaction with the European Parliament.

27. However IRG doubts whether the HLCG will be an appropriate forum for making progress on detailed practical matters. For example, HLCG seems likely to be too large and diffuse a body to be able to resolve disputes between consumers and operators. Nor does HLCG seem appropriate for consideration of the details of application of Community legislation.

28. IRG considers it important that there is good co-operation between the national regulators and the Commission on practical questions of the application and interpretation of rules in Directives. The practical experience and expertise of national regulators will be a valuable input to the preparation of guidance on such matters, for example Recommendations. IRG is ready to provide such input and hopes the Commission will invite IRG to do so. Efficient mechanisms need to be put in place to obtain input from the market players and other interested

parties on draft guidance. Further consideration needs to be given to the mechanism for such co-operation.

29. IRG can put in place guidance on model arrangements for the resolution of cross-border issues bilaterally between the relevant NRAs.

30. Member States should put in place adequate arrangements to ensure coherence in the administration of European communications law and competition law. The Commission should issue guidance on the interpretation of what is adequate.

31. Certain Member States have no legal tradition of widespread application of "soft law". Current EC law and principles do not prevent Member States from converting EC soft law, for example, Commission Recommendations, into binding national rules. The future Directives must allow for the continuation of this practice.

32. NRAs will need a power, absent from existing Directives, to allow the exchange of confidential information sufficient to enable either party to perform their duties under the Directives. In some cases, such exchange is forbidden by national law; the authority of European law is necessary to over-ride this.

IRG ANALYSIS OF THE KEY ISSUES

ANNEX A: OBJECTIVES AND PRINCIPLES

Problem with the current framework

1. It is obvious that clarity of objectives and principles is essential to the design of a successful regulatory regime. Without them, it is almost inevitable that the lengthy process of negotiation will lead to an amalgam of ideas, some useful, others not, rather than a clear coherent framework. The present framework is a case in point. It is mostly good – but could have been a lot better if unambiguous written objectives and principles had been incorporated in the legislation at the outset.

The Commission's proposals

2. The Commission's proposed Objectives and Principles are in one sense beyond criticism. Few will disagree with any of them. NRAs should have no difficulty in committing themselves to abiding by them. However, the Commission's ideas in this area need to be developed in 2 ways before they will contribute much substance.

3. First, the principles in particular are too general. They can mean all things to all men. They need to be worked out in more detail. IRG has carried out an analysis, as set out in the Attachment to this Annex.

4. Second, although it appears that the Commission proposes to legislate to ensure that NRAs abide by these objectives and principles and can be called to account if they do not, it equally needs to apply the same discipline to itself. All of the Commission's proposals should be accompanied by a short assessment of how they will help to achieve the objectives and abide by the principles. A few of the published proposals appear to fail the test.

ATTACHMENT to ANNEX A – HIGH-LEVEL REGULATORY PRINCIPLES

The Commission has proposed regulatory principles along the following lines:

1) **Regulation should be based on clearly defined policy objectives,** fostering economic growth and competitiveness thereby promoting employment and ensuring objectives of general interest where they are not satisfied by market forces.

2) **Regulation should be kept to the minimum necessary to meet those policy objectives.**

3) **Regulation should further enhance legal certainty in a dynamic market.**

4) **Regulation should aim to be technologically neutral**

5) **Regulation may be agreed globally, regionally or nationally but should be enforced as closely as is practicable to the activities being regulated**.

Further development of these principles is appropriate, as below:

1. *"Based on clearly defined policy objectives"*

This principle should apply both to the development of the legislation and to its operation by the NRAs. For each of its legislative proposals, the Commission should publish a commentary on how that proposal contributes to the achievement of the objectives and is consistent with the principles. For their part, NRAs should be under an explicit obligation to exercise any flexibility in line with the principles and so as to further the objectives.

2. *"Kept to the minimum"*

This is a sound principle but not very useful without further considerable articulation. The following help to qualify the principle appropriately:

- Where competition is increasing but not yet effective, regulatory action to promote more vigorous competition is appropriate provided that regulation does not undermine incentives for efficient investment in infrastructure by incumbents or new entrants or incentives to innovate in the provision of services. Such action should be commensurate with the increase in competition which can be achieved.

- The maximum degree of reliance should be placed on harmonised horizontal (competition and consumer protection) law.

- Sector specific regulation to prevent abuse of market power should not be applied to markets where there is effective competition. Sector specific guidance on interpretation of general competition law may remain appropriate under these circumstances.

- The basic competition rules in the Directives should be qualified by threshold conditions so that they apply proportionately to market players consistent with the achievement of the agreed regulatory objectives.

- The basic rules should make appropriate use of „sunset clauses“ whereby certain basic rules are reviewed. There would be a presumption against retaining such a provision but it would be open to individual NRAs to make a determination in favour of retention for a further period, where this was necessary to achieve the agreed regulatory objectives.

- NRAs should be empowered by the Directives to make a formal determination to disapply certain basic rules (in advance of the operation of any relevant sunset clause) when certain specified criteria are satisfied. It would be necessary for the NRA to establish that the satisfaction of those criteria meant that the rule was no longer necessary in that Member State for the achievement of the specified regulatory objectives.

- Where competition does not lead to the provision of agreed services to all at affordable prices, basic rules should ensure that there is such provision in a way which minimises distorting effects.

- Market players should be encouraged to take initiatives to develop codes of practice in those areas where a common approach is necessary so as to minimise the need for formal regulation. NRAs will however need reserve powers to impose such codes where they cannot be developed voluntarily on appropriate timescales or where they are not followed sufficiently widely or effectively.

3. *“Further enhance legal certainty in a dynamic market”*

The right balance between flexibility for regulators to respond appropriately to market developments, on the one hand, and regulatory certainty, on the other hand, is of the utmost importance. The key issues here are:

- Getting the balance right between basic rules (internal to Directives) and guidance (outside Directives)

- The right inter-institutional arrangements to achieve harmonised interpretation of the basic rules

In order to aid discussion on its forthcoming legislative proposals, the Commission should set out where it expects guidance will be necessary, what it will cover and who will be responsible for preparing it.

4. *"Aim to be technologically neutral"*

Different networks or technologies may be treated differently by regulation; but only to the extent justified to meet the regulatory objectives. For example, the basic competition rules relevant to mobile networks should be the same as those relevant to fixed networks. They may well be applied differently in practice, for example because of differences in the competitive situation.

5. "*Agreed globally, regionally or nationally, but should be enforced as closely as possible to the activities being regulated*"

In practice, this means that decisions should generally be taken by national regulatory authorities, acting in accordance with their close understanding of the relevant local markets. Effective mechanisms for mutual exchanges of experience, cross-fertilisation of ideas and development of harmonised guidance can be set up to promote a common regulatory approach throughout Europe. Arrangements can be put in place for regulators to co-operate bilaterally on cross-border issues.

ANNEX B: LICENSING AND AUTHORISATIONS

The Commission´s proposals

The Commission states that the principles governing the granting of individual licenses and general authorisations in the current regime remain valid and should be incorporated in the new framework. These principles are non-discrimination, transparency, proportionality and objectivity.

The Commission proposes for the new framework that national regulators use general authorisations to authorise all communications networks and services with the exception of situations where operators require the use of scarce resources. In these cases, Member States would continue to use specific authorisations (individual licenses). However, the Commission mentions that specific authorisations will not be necessary in the event that spectrum allocation has been harmonised at European level.

The Commission recognises that there is no need for a linkage between authorisation to provide a service with the authorisation to use scarce resources, such as spectrum. Scarce resources can be contained in specific authorisations separate from the general authorisation to provide services.

The Commission addresses the issue of licensing of broadcasters and states that this would imply two separate authorisations, one relating to operation of the network infrastructure and the transmission of broadcasting signals and the other concerned with the content of broadcast transmissions.

The Commission intends to establish procedures to agree on a set of EU-wide categories of authorisations, which would be applied by all Member States, to ensure greater consistency of national licensing regimes.

The views of IRG

- IRG agrees that the principles currently governing the Licensing Directive remain valid.

- IRG supports the use of general authorisations as the basis for licensing communications networks and services with specific authorisations (individual licenses) reserved for granting rights to use scarce resources (including property in situations where access rights are limited) and for setting out the consequential obligations.

- Increase use of general authorisations must not compromise the ability of NRAs to collect data from a wide range of market players (for example, for assessing the state of competition in a market); to enforce efficiently and reliably data protection and other consumer protection measures, security

obligations on market players; to grant rights of way; or to recover reasonable administrative costs.

- IRG believes that general authorisations will not be sufficient in cases where spectrum allocation has been harmonised at European level. The obligations applying to those who are allocated spectrum in such circumstances may need to be individually tailored.

- IRG agrees that it is necessary to break the linkage between authorisation to provide services and specific authorisation to operate infrastructures that involve the use of scarce and public resources. Vertical integration can otherwise be the unintended result.

- IRG believes that Directives should set out with the maximum clarity the rights and obligations of the market players and the duties and limits to flexibility of the NRAs.

- IRG agrees with the Commission´s approach towards the licensing of audio-visual services and associated services and infrastructure.

ANNEX C: THRESHOLDS FOR INTERVENTION

Problems with the current rules

1. Everyone agrees that regulation ought not to go beyond what is necessary to achieve the stated objectives. But this principle, in the form articulated by the Commission, is of limited use in designing an appropriate regulatory framework.

2. In the current regulatory framework, the rules can be categorised into 4 types:

- Rules which apply ex ante to all players of a certain type (e.g. rules which apply to all providers of public voice telephony services)

- Rules which apply ex ante to all players deemed to have the ability to undermine fair competition and aimed at preventing or deterring them from doing so (e.g. rules which apply to those assessed as having "significant market power")

- Special rules which apply ex ante to those players designated as providers of universal service; and provision for complementary rules to allow universal service providers to recover their costs from their competitors

- Rules applied by competition authorities in order to solve a specific competition problem; these may be applied ex ante (merger control) or, in the case of undertakings having a dominant position, ex post.

3. This fundamental structure is sound. But some of the detail is less satisfactory. For example, distinctions are made between fixed and mobile services which are unsupportable in the medium term. Perhaps the biggest problem lies in the nature of the current definition of significant market power (SMP). The definition is over-prescriptive and inflexible. Moreover, it would not allow the smooth evolution towards greater reliance on competition law which the Commission advocates.

The Commission's proposals

4. The Commission has recognised that the present regime has shortcomings. It proposes to address these by refining the definition of "significant market power" to make it, at the same time:

- More coherent with competition law;
- More responsive to market developments; and therefore
- More future-proof

5. In addition, it proposes to apply specific ex-ante rules to players having a "dominant position", the term to be interpreted in the same way as for competition law. Under this approach, dominance and SMP are related concepts, both indicative of the ability to undermine effective competition. A dominant position would simply indicate a greater ability than possession of SMP to undermine effective competition. Accordingly, the rules applied to dominant players would be more onerous than those applied to SMP players.

6. "Relevant markets" (in each of which SMP or dominance is to be assessed) will no longer be prescribed in Directives but will be defined from time to time in line with the principles of European competition law. This will avoid ossifying the definitions of the "relevant markets", one of the problems referred to above. The Commission would issue guidance for the NRAs on making the assessment of "relevant markets". In practice, it appears that the Commission's model is that they will issue from time to time a list of "relevant markets", after consultation. They would not expect NRAs to depart very much from that list, if at all. The NRA role would be confined mainly to assessing which (if any) national players had SMP or a dominant position within those markets which the Commission had identified.

The views of IRG

7. IRG believes that the Commission's approach is broadly reasonable. In particular, obligations imposed on market players should be reviewed at appropriate intervals in order to ensure that they remain relevant and proportionate. NRAs should be empowered by the Directives (whether by use of sunset clauses or the principle of forbearance) to lighten or remove obligations which are no longer objectively justifiable.

8. However, there are a number of areas of concern:

- In deciding the markets which are relevant for the assessment of SMP, the NRA needs to focus on the national state of competition. Any market may exhibit a large variation in the state of competition across Europe. While NRAs will wish to pay the utmost regard to any Commission Recommendation in this area, they will need the power to interpret it in the light of national circumstances and to consider additional markets whenever that is objectively justified. In both sets of circumstances, NRAs would follow principles of market definition well established by competition authorities.

- Many of the markets which cause concern in practice are those where a player controls scarce resources or access to a facility which it is not economic, or not possible, to replicate. The approach to market definition must allow for rights of access to be granted in such cases in order to permit competition in services which depend on such access.

- The Commission's proposal is that players designated as having SMP will be "obliged to negotiate" with other players (e.g. for interconnection or access). They propose further that NRAs should have power to resolve disputes and, in some circumstances, to act on their own initiative to grant rights to other players. The Commission appears to expect that disputes will be few. This is unrealistic. Unless clear ground rules have been laid down, either at European or national level, disputes will be the norm. SMP operators have no incentive to negotiate reasonably unless the ground rules are clear.

- NRAs need flexibility to select the appropriate regulatory instrument to deal with the circumstances at hand. This means that the Directives need to empower NRAs to take a range of actions against SMP or dominant operators; but not to be prescriptive about which actions are chosen, provided they can be justified objectively.

- There needs to be complementary harmonised guidance on the approach adopted in practice by NRAs, both to provide market players with an adequate degree of regulatory certainty, to allay concerns about over-use by regulators of wide-ranging powers and to promote a coherent approach by the different NRAs. Provided that an early start is made, 3 years ought to be sufficient for guidance to be prepared which struck the right balance between flexibility and legal certainty.

- The Commission appears to believe that most of the rules currently applied to SMP players should in future be applied only to dominant operators. This would not be appropriate. Where there is a strong vertically integrated player or a small number of players coupled with high barriers to entry, effective competition is unlikely to develop in many cases if NRAs are unable to intervene effectively. This is the case even where there is no single player which has a dominant position in that market. Mobile markets provide one example of this, markets for control of access to television services another.

- The Commission proposal is complex. Some NRAs feel uncomfortable with a requirement to assess market players against 2 levels of market power – SMP and dominance – at the same time as assessing the relevant market. It may be best to leave flexibility in the legislation to apply <u>any</u> of the regulatory instruments to SMP operators. Equally, the legislation would authorise NRAs to use discretion <u>not</u> to apply one or more of the instruments in any case where the individual circumstances justified such forbearance.

9. IRG has developed an approach to the identification of relevant markets and definition of SMP in those markets, as set out in the Attachment to this Annex. The definition of SMP should be distinct from that of dominance. All players who would be dominant for the purposes of competition law would have SMP for the purposes of communications legislation. But not all SMP players would necessarily be dominant for the purposes of competition law.

ATTACHMENT to ANNEX C – ASSESSMENT OF SIGNIFICANT MARKET POWER

Significant market power will be defined along the following lines:

1. An NRA can designate any provider of electronic communications networks or associated services as possessing Significant Market Power (SMP) in respect of one or more Relevant Markets. A Relevant Market for this purpose will be defined having regard to the principles of EU competition law. In defining Relevant Markets, an NRA will be bound by relevant judgements of the European Courts and will pay due regard to relevant decisions and guidance of the Commission. In essence, the principles employed for defining Relevant Markets will comprise;
   - *demand substitutability;*
   - *supply substitutability; and*
   - *homogeneity of competitive conditions.*

2. A market share of 25% of the relevant market will be taken to indicate that a market player may have SMP. An NRA may determine that an organisation with a market share of less than 25% or more of the Relevant Market has SMP or that one with a market share of 25% or more of a Relevant Market does not have SMP. In making such a determination, the NRA shall take into account, inter alia, the organisation's actual ability to influence market conditions and the barriers to new entry to that market.

3. Each NRA shall make an initial determination of SMP for Relevant Markets falling within its jurisdiction and notify this determination to the Commission. Such determinations may be reviewed at regular intervals of not less than [x years] (an appropriate frequency is to be set by each NRA) to take account of changes in competitive conditions or movements in the boundaries of Relevant Markets.

4. The framework for designation of SMP shall not restrict the ability of NRAs from time to time to:
   (i) find that a Relevant Market is effectively competitive and that, therefore, no player in that market has SMP;
   (ii) adjust the definition of a Relevant Market in the light of market developments.

Comments

A linkage to a competition law basis in the process for defining Relevant Markets for SMP would considerably strengthen the robustness of the regulatory framework. It has several particular advantages:

- It would be technologically neutral, as markets would be defined mainly by demand and supply substitutability rather than technical characteristics of services. For example, a set of broadband services considered by customers to be substitutes might be included in the same Relevant Market. Equally, if at some point fixed and mobile voice telephony services were to converge, they could be considered to fall within a single market for SMP purposes.

- All electronic communications infrastructure and associated services could be included. New services could be taken into account without delay or legislative action.

- The method is more consistent with antitrust principles and practice, which would assist NRAs in keeping decisions in line with competition law and would make for a seamless transition between sector specific and general regulatory regimes for markets where effective competition becomes established.

- An element of certainty for market participants would be provided by the use of a well established and familiar methodology for market definition. Requiring NRAs to set country-specific frequencies for reviews would give further certainty while accommodating the variety of market development and structure that exists among European countries.

The definition of individual markets would be a matter for individual NRAs, but certain "candidate" markets, defined with regard to competition principles, could be set out in a Commission Recommendation, with the co-operation and input of NRAs. This would not restrict the entitlement of NRAs to define further appropriate markets or sub-markets in their jurisdiction. This approach has several advantages:

- It provides certainty on the key markets to which legislative controls may apply;

- It provides a degree of certainty on a number of other markets that may be specified in soft law. However, such markets can be more easily amended as the markets change;

- It provides individual NRAs with an appropriate tool to disapply or introduce appropriate regulation based on an objective measure at national level.

ANNEX D: INTERCONNECTION AND ACCESS

Problems with the current rules

1. The present rules deal broadly satisfactorily with a number of interconnection and access issues. Despite having been in force for only 2 years, they do not deal with all such issues which arise at present. In particular, it is unclear whether the rules on special network access (e.g. Art. 4(2) of the Interconnection Directive) provide for local loop unbundling, where justified. In the digital television field, some problematical gateways (access to encryption services) are regulated; other equally problematical gateways (access to the Application Programming Interface) are not.

The Commission's proposals

2. In the light of this experience, it is very likely that new competition problems will arise over the next few years which are difficult to foresee clearly now. The Commission has therefore diagnosed that a generic approach to interconnection and access is necessary, providing the tools for regulators to deal with whatever problems are apparent in practice. These generic rules would replace all the existing specific interconnection and access rules in the Interconnection, Voice Telephony and Advanced TV Standards Directives. Inter alia, the new generic rules would set out the basis for regulation of:

- Carrier selection and pre-selection
- Access to the local loop
- Access for Mobile Virtual Network Operators
- Right of carriage of services on broadband cable networks
- Right of service providers to obtain access to network services in order to provide competition in retail services which depend on those network services
- Sharing of ducts and poles
- Access to encryption and other services necessary for effective competition in digital television services

3. Curiously, departing from its own recipe, the Commission has proposed specific rules to enforce carrier select on mobile operators with SMP.

The views of IRG

4. IRG believes that the generic approach provides the right way forward. Consequently, the Commission is wrong to propose specific rules for mobile carrier select. If this is a sensible remedy for a specific competition problem (and a number of NRAs already believe that it is), it will be possible for NRAs to impose that remedy in accordance with the Commission's generic approach.

5. Other problems with the Commission's proposals, as articulated so far, were discussed under "Thresholds for Intervention".

6. Accordingly, IRG has revised and developed the Commission's proposals in order to take account of the above concerns. IRG's preliminary scheme is at the Attachment to this Annex. It requires harmonised guidance to be developed on identification of "relevant interconnection and access markets", on assessment of "significant market power" and on choice of the appropriate regulatory tools (LRIC-based prices, non-discrimination etc) for the circumstances under consideration. It will not be sensible to attempt to finalise the scheme until a draft of such harmonised guidance is available, to ensure that the balance between flexibility and regulatory certainty has been struck correctly.

ATTACHMENT to ANNEX D - INTERCONNECTION AND ACCESS – BASIC OBLIGATIONS

1. The Commission will, from time to time, issue Recommendations on the assessment of "relevant markets" for interconnection and access and on the assessment of "effective competition" in those markets.

2. Every [2] years, an NRA is obliged to review whether competition in interconnection and access markets is effective. The NRA will consider whether the relevant markets described in the Commission's recommendations satisfy the criteria set out in the Attachment to Annex C, in the national circumstances. The NRA may adopt market definitions other than those set out in the Commission's Recommendations in the following circumstances, subject to the principles set out in the Attachment to Annex C:

   a) The NRA may consider geographical or other subdivisions of any market identified by means of Commission Recommendations;

   b) The NRA may consider a service market other than those identified by means of Commission Recommendations, where there is not effective competition in the appropriate geographical market within the NRA's jurisdiction.

3. Where competition in an interconnection or access market is not effective, an NRA shall consider whether one or more market players has Significant Market Power in that market. It shall consult interested parties on any finding of SMP.

4. A player with SMP is obliged to negotiate in good faith with another party seeking access or interconnection. If that other party is unable to obtain access or interconnection on terms it considers to be reasonable, it shall have the right to refer the dispute to the NRA for resolution. The NRA shall, under normal circumstances, rule on any such dispute within [6 months]. In considering any such dispute, the NRA may require either party to produce relevant information within such reasonable timescale as it may determine.

5. The NRA shall publish guidance, after consulting interested parties, on the approach it will take in any such dispute. The NRA's primary duties will be to facilitate effective competition in the end-user market and to ensure end-to-end interworking of communications services.

6. The NRA may also, on its own initiative, determine that any of the rules in paragraph 7 shall apply to an SMP operator, if such action is justified in the light of the duties mentioned in paragraph 5 and expedient to provide regulatory certainty to market players.

7. The NRA will take all of the steps below to the extent necessary to satisfy the duties mentioned in paragraph 5.

a) The NRA may oblige the SMP player to grant a right of access or interconnection;

b) The NRA may specify the basis of charges for access or interconnection;

c) The NRA may specify the basis of non-financial terms of access and may in particular specify the method by which access is to be granted;

d) The NRA may require the SMP player to provide any service, or provide access to any facility, which is necessary to give practical effect to the right of access; and may specify the basis on which such service (or access to such facility) is to be provided;

e) The NRA may make rules controlling unfair discrimination by the SMP player between different parties seeking access or interconnection;

f) The NRA may make rules controlling unfair cross-subsidy of another service of the SMP player by the relevant access or interconnection service;

g) The NRA may oblige the SMP player to prepare separate accounts according to a prescribed basis;

h) The NRA may make rules preventing SMP players from using technologies which would prevent competitors from taking advantage of a right of access or interconnection, for example because access to necessary IPR are not generally available on reasonable terms;

i) The NRA may make rules requiring use of standard interfaces or controlling use of proprietary interfaces by the SMP operator;

j) The NRA may make rules forbidding bundling of services by the SMP operator;

k) The NRA may require the SMP operator to make available information necessary to allow the other party to take advantage of the right of interconnection or access.

8. An SMP player is presumed to have an obligation to grant access or interconnection on cost-oriented terms where:

   - There is little competition in the relevant market; or

- The player's control of access to certain facilities or resources puts it in a position to prevent effective competition in the relevant market.

9. The NRA may forbear from applying any of the rules in paragraphs 7 and 8 if it determines that:

   a) both effective competition in the relevant end-user market and (where relevant) end-to-end interworking can be achieved without application of the rule;

   b) the interests of end-users can be achieved more effectively without application of the rule;

   c) application of the rule would not be proportionate, in all the circumstances of the case.

10. Notwithstanding paragraphs 7 and 8, the NRA will ensure that the terms under which the SMP operator is obliged to grant a right of access does not undermine the ability of the SMP operator to make a reasonable return on its investments.

11. The Commission may, from time to time, issue Recommendations covering the matters in paragraphs 7-10. The NRA will pay the utmost regard to those Recommendations.

12. The NRA will review its Determinations on rights of interconnection and access within [a reasonable period]. If, as a result of the evolution of competition in the relevant end-user market, the Determination needs to be modified or removed, the NRA will give due notice for such modification or removal, taking into account the need of market players for a high degree of regulatory certainty.

13. The NRA may, to the extent necessary to ensure end-to-end interworking of communications services, determine that the rules in paragraphs (a)-(c) and (g) to (j) of paragraph 7 shall apply to any operator. The NRA shall publish guidance on its use of this flexibility.

ANNEX E: IMPLEMENTATION OF UNIVERSAL SERVICE OBLIGATION

The Commission´s proposals

The European Commission states that competition is not sufficient to achieve the Community´s policy objectives and that, therefore, it is essential that the new regulatory framework continues to ensure all are provided with those services considered essential for participation in society and already available to the majority of citizens.

The European Commission states that the criteria set in Commission´s Communication of 1996 to determine the extension of the scope of universal service still hold true and valid. That is, that any extension should combine a market-based analysis of demand for and availability of the service with a political assessment of its social and economic desirability.

The Commission has not identified any services not currently covered by universal service that meet the criteria it has identified for extending its scope. According to these criteria, the Commission is not convinced that extending the scope of universal service to broadband services at this stage would be advisable. However, it recognises that the market develops rapidly. New services may become available to a substantial majority of the population, with the consequent risk of social exclusion for those who cannot afford them because of their economic or geographical situation.

The views of IRG

IRG:

- supports the views of the Commission that the new regulatory framework should continue to guarantee access for all citizens, independent of their geographical situation, to a number of “universal” services of a defined quality at an affordable price. It believes that the criteria set in the Commission´s Communication to assess the scope of universal service remain valid. In particular, the market-based analysis must include a rigorous analysis of costs and benefits.

- believes that the Directives must provide authority for timely evolution of the definition of the universal service obligation, in line with the needs of society and the evolution of the market.

- believes that the 5 regulatory principles identified by the Commission for the new regulatory framework should be equally applicable to the future of universal service.

- believes that the independent regulators should play an important role in determining the manner of implementing the universal service obligation that minimises its distorting effect on competition.

- considers that:

  - NRAs should ensure that the implementation of the universal service obligation is technologically neutral.

  - NRAs should ensure that USO is provided by the most efficient method.

  - NRAs should ensure that operators of infrastructure provided in pursuance of a Universal Service Obligation should grant access so as to permit the development of competition in the universal service.

  - the definition of the minimum scope of Universal Services should continue to be harmonised at European level. Member States may expand the scope of USO at national level so far as it does not distort competition.

  - the concepts of affordability and defined quality should remain a national matter. Both largely depend on national conditions, and thus the importance of the application of the subsidiarity principle. NRAs should ensure that the services of the defined quality are available in practice.

  - the obligation to provide access to identified services should be placed on SMP public network operators or on the winners of bidding procedures. Bidding procedures could be at national and/or regional level.

  - NRAs should ensure that universal service is provided in the most efficient manner.

  - where the harmonised European Universal Service Obligation is a burden on the operators providing it and is funded by a levy on market players, all relevant public network operators should contribute to the financing Any compensation paid to universal service providers should be based on a careful analysis of the costs net of any benefits. Concrete applicable cost analysis methodologies should be the object of a further analysis by IRG.

  - mechanisms of "pay or play" should remain within the future regulatory framework.

Comment

In the past the USO was imposed on fixed operators who had to provide a determined set of services at an affordable price. This had the disadvantage that it did not encourage competition in the provision of universal service, that it linked service provision to particular infrastructure and it was not technologically neutral.

In future therefore, the focus should be on the provision of infrastructure necessary to deliver USO. Once the necessary infrastructures are in place, the cost of providing new communications services is minimum and the market could usually provide them as a result of commercial offerings rather than as a result of obligations imposed on certain market players. Competition in the provision of services would result into lower prices, better commercial offers and maximum incentive to innovate.

ANNEX F – RETAIL MARKETS AND OTHER CONSUMER ISSUES

The problems with the current regime

1. The present regime has a number of specific provisions, apart from USO, for protecting consumers from abuses of market power or from instances when even a competitive market cannot be expected to provide consumer needs (special facilities for the disabled, for example). These form the basis of a balanced strategy for dealing with consumer issues and do not need wholesale reform.

2. Most of these provisions are contained in the Voice Telephony Directive (98/10) which is rather prescriptive of detail. The Directives therefore leave a gap in the legal basis for some interventions which it has been appropriate for NRAs to make; and in other cases, while they provide for intervention, it may not be the most appropriate form of intervention. Horizontal consumer legislation may not meet the identified needs either.

The Commission's proposals

3. The Commission's stance is that many of the issues faced in practice by consumers of communications services are not specific to the communications sector. It believes that horizontal consumer law is the appropriate vehicle for addressing such issues and that this should be complemented by sector-specific rules only where there is a sector-specific need. Moreover, it believes that it is important not to burden market players, particularly SMEs, with excessive regulation.

4. Against that background, it proposes to rationalise the existing provisions dealing with:

    - Personal data and privacy protection;
    - Complaint handling and dispute settlement;
    - Transparency of information; and
    - Service quality.

5. The Commission has also made proposals concerning caller location in connection with the European emergency call number (112); and expects to withdraw the Leased Lines Directive in due course.

The views of IRG

6. IRG broadly agrees with the Commission's philosophy in this area. However, IRG believes that the Commission has taken a good principle too far. There are consumer issues which will not be resolved by the Commission's approach. Consumers would therefore not receive "the

best deal in terms of low prices, high quality and maximum value for money", as required under the policy objectives proposed by the Commission.

Scope of legislation

7. The provisions of Directive 98/10 apply to voice telephony services, in some cases only to fixed services. In the latter cases, there is provision for NRAs to exercise discretion to extend provisions to mobile telephony services. While telephony services may have been the appropriate focus for the past, and to some extent the present, this is inappropriately prescriptive. The new Directive needs to be more flexible, both providing for the ability to update the scope by Commission Decision and continuing the existing practice of allowing a measure of NRA discretion. Concerns that NRAs will use discretion inappropriately to intervene more than justified can be allayed by issue of a Commission Recommendation.

Tariff transparency

8. IRG believes that tariff transparency is extremely important for the residential user and very small business market. It is not an important issue for larger businesses. Future legislation in this area should therefore apply to the former markets only.

9. The present rules, contained in Article 11 of Directive 98/10, need to be augmented. The key need is for NRAs to be empowered to obtain tariff information on a prescribed basis to allow for publication of "whole bill" comparisons either by or on behalf of the NRA, or indeed by commercial players making a business of informing their clients about the best deals. NRAs need to be able to recover reasonable costs of organising publication from the market players. As noted above, the scope ought to be *any* service provided to residential users. In practice, NRAs might decide that collection and dissemination of information about certain services was unnecessary or disproportionate in the national circumstances.

10. IRG believes that a requirement to provide call-by-call tariff information, as under consideration by the Commission, is an appropriate matter for national discretion.

Quality of service

11. IRG broadly agrees with the Commission's analysis of this issue. Publication obligations and the ability for NRAs to obtain information on a prescribed basis should be analogous to the situation for tariff transparency. The concept of quality should cover both technical aspects and customer-facing aspects. A reserve power for the specification of minimum service quality of SMP operators may need to be retained although, as the Commission suggests, use of such power ought to be unnecessary in a competitive market.

Contractual terms

12. Article 10 of Directive 98/10 provides NRAs with discretion to intervene if it believes certain contractual terms are against consumer interests. If this provision remains necessary in the light of harmonised European law on unfair contract terms, it should be made more flexible so as to cover offensive contractual terms of any description. The Commission should also consider the merits of publication of comparative information, along the lines discussed above for service quality and tariff transparency.

Regulation of retail services of operators with SMP in retail markets

13. The Commission states that in many cases, the best way of protecting consumers is to ensure that they have choice and the means to make informed choices between competing services. Moreover, many problems which consumers experience in practice also occur in other sectors of the economy and can be dealt with by means of horizontal consumer law. IRG agrees with both these propositions. Nevertheless, there are circumstances where this approach will not deliver "the best deal" for consumers, as required according to the Commission's proposed policy objectives. Intervention in retail markets may therefore be necessary in order to facilitate market entry and sustainable competition on the one hand, and on the other hand to protect consumers where market forces fail. NRAs need to be equipped with appropriate tools to deal with such problems, albeit that interventions should be relatively infrequent.

14. Competition will not develop at a uniform rate across all retail services and across all customer groups. Competitors will undoubtedly prioritise the most attractive service opportunities, or the most profitable customers, leaving a range of customers without effectively competitive supply of certain services, at least for the time being.

15. Competitors may legitimately pick and choose in this way. But it is the role of regulators to ensure that all retail customers reap a fair share of the benefits of competition. In practice, this is achieved by placing restrictions on SMP operators to ensure that they treat all their customers fairly and do not simply mimic their competitors' strategies.

16. In addition, NRAs need to be able to prevent operators with SMP in the relevant interconnection or access market from leveraging that power into retail markets, to the detriment of retail competition and the consumer.

17. IRG believes that NRAs should be reluctant to intervene in retail markets. Nevertheless, limited and well-focused intervention will remain necessary for the foreseeable future to ensure that <u>all</u> consumers (and not merely those who are the most sought after clients) get the "best deal".

18. The range of reserve powers which the NRA needs to be able to apply to SMP players comprise:

    - Powers to take steps to prevent unfair discrimination between classes of user
    - Powers to take steps to prevent unfair cross-subsidy between a retail service in a market in which the player has SMP and another service
    - Powers to impose an obligation to prepare separate accounts on a prescribed basis for specific retail services
    - Ability to set price caps on groups of services
    - Ability to determine that prices for certain services should be cost-oriented
    - Powers to require unbundling of retail tariffs
    - Powers to impose an obligation to satisfy reasonable demand

19. If any further detail is necessary concerning the practical application of these powers, it should be developed through harmonised guidance.

Complaint-handling and dispute settlement

20. IRG believes that the Commission's ideas in this area are basically sound. However, the suggestion that the High Level Communications Group should resolve cross-border disputes is not an appropriate one, for similar reasons to those discussed in Annex G. IRG is willing to develop model arrangements for bilateral resolution of such issues.

The disabled and other users with special needs

21. Existing Directives provide for NRAs to take steps to promote equal access to and affordability of fixed telephone services by those with special needs and for the Commission to provide for equipment to facilitate use by the disabled. These provisions remain appropriate although, as noted more generally above, the restriction of scope of the provisions related to services is inappropriate.

22. The Commission's view of standardisation of equipment is to leave it as far as possible to voluntary groups and bodies, intervening only where voluntary standardisation does not work. Communications equipment suitable for use by those with special needs appears to be one of the areas where voluntary standardisation may not work. The markets for such equipment are small in any case. Further fragmentation of those markets across Europe is not acceptable as one inevitable result will be an increase in retail price.

Over-arching reserve power

23. The consumer issues of the moment cannot be predicted very accurately 3 years in advance, let alone for the lifetime of this legislation. NRAs therefore need to have the flexibility to take any appropriate steps to meet

the regulatory objectives set out in Directives, other than in the areas covered by explicit provisions, provided that in doing so they do nothing to undermine fair and effective competition. A new Directive must do nothing to restrict that flexibility and should preferably provide a legal basis for it.

ANNEX G – INSTITUTIONAL ISSUES

The problems with the current regime

1. The regime has been criticised from time to time for the following reasons, amongst others:

- Insufficient independence of NRA from political intervention
- Insufficient co-operation between NRA and competition authorities
- Overlapping functions between different regulatory authorities within a Member State, leading to lack of clarity and delays in decision-making
- Lack of true harmonisation of approach across Europe

2. While there may be some truth in all of these, there is little point in a close analysis since it is clear that the Commission's proposals for revisions to the regime will require a completely fresh look at institutional arrangements.

The Commission's proposals

3. Most of the Commission's proposals in this area are expressed in rather general terms. The area in which they are most specific concerns the relationship between the Commission and the representatives of the Member States.

4. The Commission has proposed a regulatory committee (COCOM), subject to the comitology procedure. The Commission envisages that the Directives would provide for supplementary binding Decisions to be taken by this Committee and for Recommendations to be issued on the basis of the Committee's advice. It has not specified which matters would be covered by Decisions and which by Recommendations.

5. The Commission has also proposed an advisory group (High Level Communications Group – HLCG) of the Commission and all those national bodies with some relevant regulatory functions. The Ministries of most member states would therefore be entitled to attend the HLCG, alongside the members of IRG and a number of other regulatory agencies dealing with broadcasting matters, spectrum management and data protection, for example. In the case of COCOM, membership of the national delegation would be at the discretion of the Ministries. The function of HLCG would be to prepare advice for COCOM and to liaise with representative bodies of key interested parties.

The views of IRG

Overview

6. While IRG considers that the Commission's proposals are interesting, it believes it has some ideas for the basis of an even more effective solution. In short, IRG agrees that the replacement of the existing Brussels committees by COCOM will be a valuable step. However IRG doubts whether the HLCG would be an appropriate forum for making timely progress on detailed practical matters. In some Member States, the delegation could easily consist of representatives of 5 or 6 agencies (for example, telecoms regulatory agency, broadcasting regulatory agency or agencies, spectrum regulator, data protection regulator, national competition authority, government departments to the extent that they retain regulatory functions). It appears implausible that such a large and diffuse body will be able to hold regular focused discussions which are implicitly required by the Commission's proposals. Also it runs the risk of bringing national political intervention into operational issues, something which the Commission appears at pains to avoid within the national procedures.

7. Where the new regulatory framework envisages somewhat flexible powers for NRAs, this necessitates guidance and coordination. The independent telecom regulators, the Commission and COCOM all have roles to play to ensure that the new framework functions smoothly. IRG is willing to co-operate closely with the Commission to work out viable arrangements for the fulfilment of a large part of the roles envisaged by the Commission for HLCG.

Independence of NRAs

8. The current regulatory framework prescribes that the rules should be enforced by regulators who are independent of the market players. Under the envisaged framework, regulators would be equipped with new flexible powers in the field of relevant market definitions, competition tests, and the application (or non-application) of a series of legal instruments.

9. Therefore, there is a sharper focus on independence and accountability of NRAs. This is not so much any more because of state ownership. The issue is how to safeguard a professional , expert and consistent application of instruments . In the words of the Commission, there need to be legal safeguards to ensure that "the independent national regulator can undertake its role of supervision of the market free from political interference, without prejudice to the government's responsibility for national policy". Additional provisions should be considered on the following issues*:*

- NRAs should be in the position to select and appoint their professional staff;

- Resolution of individual enforcement cases should be the sole responsibility of NRAs;
- Where – because of political accountability – governments need steering influence, this should be carefully regulated in the national law. Any intervention by means of ministerial directives or guidelines should be made subject to transparency requirements;
- There should be a guarantee of adequate resources, with NRAs being accountable on efficient use of personnel and other resources, but with safeguards against use by government of budgetary control as a mechanism for influencing the NRAs' activities. ;
- NRAs should be sufficiently accountable, e.g. by direct reporting to national parliaments;
- NRAs should be equipped with adequate investigative and enforcement powers.

Competences of NRAs

10. IRG notes that the Commission intends to propose measures leading to greater standardisation of the responsibilities of NRAs and to reduction in wasteful overlap of responsibilities between different authorities in the same Member State. This could be very valuable provided that the obligations are not expressed in an over-prescriptive way.

11. A considerable degree of harmonisation of NRA competences seems indicated in order to safeguard a level playing field. For example, if responsibility for numbering plans are amongst the responsibilities of independent regulators, but scattered among different types of agencies, including ministries, harmonisation would be ill-served.

Relationship between NRA and national competition authority

12. A satisfactory relationship between NRA and national competition authority is vital. The regulatory regime for communications needs of course to be internally coherent. But it must also be coherent with the national competition regime. This is becoming a compelling issue, as communication markets are becoming more competitive. IRG considered various models – separation of powers, mutual consultation and co-operation, concurrent powers and assumption of regulatory powers by the Competition Authority.

13. Given that there will remain for the foreseeable future a substantial body of communications law alongside the horizontal competition and consumer law, IRG believes that the sectoral regulatory powers are best assumed by a specialist agency. A national competition authority would not in general have the experience of operating the sectoral legislation; and it would tend to underestimate the resources necessary to perform the task.

14. On the other hand, complete separation of powers between NRA and national competition authority is unlikely to lead to coherence between the communications regime and competition law.

15. IRG believes that it would be appropriate for the Framework Directive to place Member States under an explicit obligation to put in place adequate arrangements for co-operation between the NRA and the competition authority.

16. One adequate arrangement could in practice be achieved via *concurrent exercise* of horizontal competition powers in the communications sector by the NRA and the national competition authority. The NRA would thereby be provided with the whole 'toolbag' of instruments. It could choose the most proportionate means of dealing with a specific problem, using general competition instruments rather than sectoral instruments wherever possible. Further, this model has the advantage of a one-stop shop.

17. Another adequate arrangement could be a co-operation agreement for mutual consultation and co-operation on matters of common interest.

18. The principle of subsidiarity suggests that it would not be appropriate for the Directives to be too prescriptive in this area. On the other hand, the checks and balances for enforcement are essential to the functioning of the new legal framework. In any instance, a Commission Recommendation could be useful.

Relationship between national authorities and the Commission

19. IRG believes that effective arrangements need to be in place for 4 types of multilateral exchange:

- The development and ongoing review of various "soft law" instruments to complement the Directives;
- Strategic reviews of market developments and their regulatory implications;
- Interaction with bodies representing market players, consumers and business users on specific issues;
- Interaction with the European Parliament.

20. These categories will of course tend to overlap.

"Soft law"

21. The Commission's proposals do not fully address the practicalities of developing soft law. IRG supports the proposal to replace the existing Brussels committees by COCOM. Where the Directives are to be augmented by Decisions which are binding on market players, this must be properly considered by representatives of the national governments. Similarly, the national administrations will wish to have sight of proposals

concerning the approach to implementation of key aspects of the regulatory regime, for example, how the proposed basic rules in Directives on access and interconnection are to be interpreted in practice. There may well be Commission Recommendations on these key aspects and it is vital that national administrations have the opportunity to consider them in draft and express any concerns they may have. Again, COCOM is the appropriate vehicle for this.

22. Just as importantly, binding Decisions and harmonised European guidance constrain NRAs in the performance of their enforcement activities. Therefore, the involvement of independent regulators in the drafting of such instruments is essential. Preparation and review of initial drafts of Decisions and Recommendations is a task for relatively small and coherent groups of experts, basing their work on relevant enforcement experiences. It is not a task for a large group with a rather broad focus. Agencies with responsibility for broadcasting or data protection are unlikely to be able to offer insights into the practicalities of resolution of interconnection disputes; agencies under political direction are unlikely to be able to offer insights on the execution of competition tests or on relevant market definitions.

23. Within the areas of responsibility of its members, IRG itself has the expertise and commitment to work closely with the Commission on the task of preparing and reviewing drafts of the Decisions and Recommendations envisaged by the Directives and to subordinate to them. IRG proposes that, in the course of drafting the new framework, discussions should be held with Commission officials to work out practical arrangements.

24. It should not be assumed that all complementary “soft law” needs to be given the status of a Commission Decision or Recommendation. More technical issues (e.g. procedures for assessing LRIC) can continue to be dealt with informally amongst the members of IRG, without formal measures from the EC.

25. Certain Member States have no legal tradition of widespread application of “soft law”.Current EC law and principles do not prevent Member States from converting EC soft law, for example Commission Recommendations, into binding national rules. The future Directives must allow for the continuation of this practice.

Strategic reviews

26. The institutional framework needs to provide a mechanism for consideration of emerging issues which may require development of Commission Decisions or new or revised soft law. IRG members believe that IRG will continue to provide a useful forum for such discussions. However, while such discussions can be initiated by IRG members, as they mature they will need to involve the Commission, market players and interested parties. The High Level Communications Group (HLCG)

proposed by the Commission could be a mechanism for this; in addition, IRG could invite senior Commission officials to regular high-level discussions.

Interaction with representative bodies

27. It is important that interested parties should have an opportunity to consider drafts of soft law instruments before they are formally considered by COCOM. More generally, they also need the opportunity to express their views on the way in which the regulatory regime is developing; or concerns about aspects of the regime which they believe are working effectively. The Framework Directive should place an explicit requirement on Member States for adequate arrangements to be put in place in this area at national level.

28. However, there is also a need for such exchanges at European level. The Directives should mandate open consultation processes with market players and other interested parties. This can be very helpful in preventing regulation which is misdirected or excessive. It would also strengthen accountability if the European Parliament had direct access to the expertise and experience of the bodies that are faced with enforcing the EU legislation. Again, in both these cases, practical arrangements with regard to the drafting of the new framework, need to be worked out.

Cross-border issues

29. The Commission has suggested 2 areas where it thought HLCG would be able to assist with transnational issues. These were:

- Cross-border cases where more than one NRA had an interest;

- Problems of an inconsistent approach to licensing by NRAs.

30. For the reasons discussed above, HLCG would represent an unwieldy solution to any such problems. In the first case, IRG could develop a model scheme for NRAs to use in resolving such cases bilaterally. The second issue should not arise if Directives, complemented by harmonised guidance as necessary, are sufficiently clear. IRG could take on the role of monitoring any such guidance to ensure that it remains relevant and up-to-date. If the harmonised licensing rules are departed from in any Member State, the Commission of course has the power to enforce compliance.

31. NRAs will however need a power, absent from existing Directives, to allow the exchange of confidential information sufficient to enable either party to perform their duties under the Directives. In some cases, such exchange is forbidden by national law; the authority of European law is necessary to over-ride this.

ANNEX H: THE INDEPENDENT REGULATORS GROUP

The Independent Regulators Group (IRG) brings together the heads of the independent National Regulatory Authorities for telecommunications in the 15 EU countries following the “1998 Package” of harmonisation and liberalisation of the telecoms market, as well as their counterparts in Iceland, Liechtenstein, Norway and Switzerland.

IRG was set up in the autumn of 1997 and has met twice a year since its formation.

The aim of the group is to discuss developments of common interest and important issues for the regulation and development of the European telecommunications market issues, to learn from each others’ experiences and to work towards a harmonised approach to implementation of EU legislation. When appropriate and agreed upon by all members, IRG may decide to publish common position documents.

The group has also set up a number of working groups to address specific issues of interest, namely cross-border interconnection, confidentiality, local loop unbundling, UMTS, cost-allocation and Significant Market Power. IRG has also created a common website, IRGIS (IRG Information Sharing), a system which has been set up to share information available to the public in English on the websites of the 19 authorities.