



Office of the Director of
**Telecommunications
Regulation**



JOINT RESPONSE TO CONSULTATION

Joint Response to Consultation

on the

European Commission's Draft Recommendation on Relevant Product and Service Markets within the Electronic Communications sector

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1 INTRODUCTION

The Office of the Director of Telecommunications Regulations (ODTR) and the Competition Authority welcome the ‘*European Commissions Draft Recommendation on Relevant Product and Service Markets within the electronic communications sector*’¹. We commend the Recommendation and welcome the opportunity to contribute to the enhancement of the document. This response is a joint response from both the ODTR and the Competition Authority where the views expressed in the document are from both agencies unless stated otherwise in the document. We take this opportunity to present our submission following the Consultation document from the Commission. This document invites comments on:

- the relevant criteria on the basis of which markets may be added to the recommendation or be removed or added to future consultation, namely,
 - existence of barriers to entry and the development of competition
 - dynamic aspect
 - relative efficiency of competition law and complementary *ex ante* regulation, and,
- the proposed market segmentation

An overriding apprehension for Ireland is that the Recommendation does not take into account the various stages of market development in Member States. For example, the later liberalisation of the Irish telecommunications market means that effective competition has not been fully attained in certain sectors. Recent financial deterioration of the global telecommunications sector has impeded the growth of competition, which has also had repercussions for the Irish market. We envisage certain Member States, including Ireland, with concerns about markets not identified in the Recommendations, having an excessive reliance on Article 7 of the Framework Directive. This is a lengthy and complex process that may create uncertainty for operators at a time of difficult market conditions.

To assist the smooth implementation of the Framework and to mitigate any ambiguity, it would be of great assistance if the data collection powers granted under the Directives, for procedures under Article 7, are clarified in the Recommendations.

¹Hereinafter: “the Recommendations”

The Commission's approach to regulation at a wholesale level should, in theory, suffice to ensure effective competition at a retail level. This will not apply, however, where a double marginalisation problem exists, i.e. where there is market power at both levels. We feel that there is evidence of this problem in some sectors of the Irish market. Additionally, the lack of effective retail broadcasting markets in the Recommendation is regarded as a serious issue by the ODTR and the Competition Authority.

The new Framework raises the threshold of dominance, which allows for appropriate regulation of inefficient markets. Relevant markets will only be regulated where there is evidence of ineffective competition. With this in mind, we highlight that the inclusion of additional markets will not undermine the Framework, but should promote the level of competition in electronic communication sector.

The ODTR has participated with other IRG members in preparing the IRG Response² to the Commission in respect of the draft Recommendation. As is clear from that reply, the concerns of the ODTR and the Competition Authority of Ireland are shared by other regulators. This paper however, concentrates on the Irish position and circumstances in the Irish market. The ODTR and the Competition Authority favour light handed regulation where possible, and have no desire to impose regulation for regulation's sake. Rather, it is important that all measures taken reflect the realities of the market place which is currently subject to considerable challenges and needs *ex ante* regulatory support.

With regards to this issue raised in this document, we would appreciate if the Commission could clarify its position in its final Recommendation.

This consultative document is not a legal document and does not constitute legal, commercial or technical advice. The ODTR and the Competition Authority are not bound by it. The consultation is without prejudice to the legal position of the two agencies or to the rights and duties to regulate the market generally.

² IRG Input Document on Public consultation on a Draft Recommendation on Relevant product and service markets within the electronic communications sector.

2 ISSUES WITH METHODOLOGY AND APPROACH

The ODTR and the Competition Authority welcome the opportunity afforded to contribute to the enhancement of the Recommendation. On examination of the document a number of issues have arisen in relation to the methodology and approach adopted, and are discussed below.

2.1 General Remarks on the Draft Recommendations

We note that under the current framework it is possible for the NRA to regulate markets which differ from those identified in the Recommendation under two conditions which both must be satisfied:

- where it is justified by national circumstances;
- where the Commission does not raise any objections in accordance with the procedures referred to in article 7 (3) and 15 (4) of the Framework Directive.

We believe that more markets should be included in the initial list of markets which allow *ex ante* regulation. In fact, currently we feel that in Ireland's case a number of markets presented below would be potential candidates to be examined under the article 7 (4) procedure unless stated otherwise both agencies have the same views. As echoed in the IRG Response, a number of these are not specific to Ireland. Ultimately, we believe that these markets should be included for four reasons:

1 - The procedure outlined in Article 7 of the Directive appears to be complex and we feel that the procedure may be anything up to a year for each market. However, if mistaken we would appreciate further clarity from the Commission.

In addition, we take the view that the regulatory framework should provide certainty for the market players and should be easy to implement. Currently, we would have some reservations over the effectiveness of the proposed framework as a significant number of markets might need to be studied under Article 7. Uncertainty would arise in those markets

which are currently subject to *ex ante* regulation but would be freed from such regulation when the new framework comes into effect, but could be subject to re-regulation via Article 7 procedure. We consider that, where a number of NRAs have doubt, over whether a market should or should not be subject to *ex ante* regulation, it would be more efficient to include such a market in the Recommendation and to allow individual NRAs to decide, on the basis of an effective competition review, on whether or not it needs to be regulated rather than to require individual NRAs to go through the Article 7 procedure.

2 - The number of markets included in the Recommendation is of particular importance for jurisdictions where effective competition has not fully developed. It is important to note that it is often the case in small jurisdictions that the number of market players is limited by the market size and potential economies of scale. These countries should not be put at a disadvantage when compared with larger Member States benefiting from economies of scale, and where competition has the potential to be more effective.

3 - We believe that the Commission's willingness to support further liberalisation in the electronic communication sector is supported by efficient regulatory mechanisms that maximise the benefits of enhanced competition in the market. A liberalised market on telecoms, where reliance is placed on the courts and general competition policy to resolve competitive issues, may not be the ideal solution. Progressing from a state monopoly to a fully liberalised market requires an appropriate balance of *ex ante* and *ex post* remedies. The development of the Information Society in the EU depends on the future development of a competitive sector which requires a balance between a light handed regulation and the promotion of competition.

4 - There is a concern in relation to data gathering powers of NRAs. Powers to collect data are dependent on transposition of the Directives; nevertheless these powers are paramount to the implementation of the Framework. It appears that powers to collect data are unambiguous for markets included in the Recommendation, whereas it is unclear whether NRAs have data gathering powers in order to examine the effectiveness of competition in markets which may be considered for Article 7. This has implications for timeliness and completion as it will be more onerous to acquire data for the purpose of Article 7. We endeavour to highlight the critical nature of timely and adequate data collection powers in the

application of the Recommendation and through the Article 7 procedure. From the point of view of efficiency, inclusion of a greater number of markets circumvents the problems of data collection under Article 7.

2.2 General Remarks on Electronic Communications

We welcome the key objective of the new package that is to enable the regulatory framework to move closer to the conditions that would apply in a fully competitive market. It reflects inbuilt flexibility and does not assume that the conditions of full competition have already been met. It should however, be noted that market conditions for new entrants are less positive since 1999/2000 when the package was first devised

2.2.1 Background on the Development of the Irish Market

We consider that the framework does not take into account the differences in the level of market development achieved in the electronic communication sector in Member States. Ireland was one of the later Member States to liberalise the communications market like other countries is experiencing a weakening of competition so that it is not appropriate that the range of relevant markets be reduced. We support the view in the Recommendation that *ex ante* regulation should aim to deal with issues such as supporting new entrants' access to communications networks and supporting interconnection with other networks, however we are of the view that there will be slower change in market development in Ireland for some time to come. This is confirmed by recent operator responses to the price cap consultation on competition in the Irish market³.

2.2.2 Impact Assessment of Recommendation

The ODTR would like to query whether the Commission has carried out an assessment of the impact of the new framework on market conditions, as recommended by the Mandelkern Group⁴ and taken up in the Action Plan adopted at Seville. While the new framework gives

³ Review of the Price Cap on Certain Telecommunications Services – Consultation II (www.odtr.ie Doc 02/57)

⁴ The Mandelkern Group on Better Regulation – Final Report, 13 November 2001

flexibility to respond to this situation in defining appropriate markets in a Commission Recommendation, the draft however, may be perceived to work in the opposite direction.

2.3 Comments on Issues raised in Section 4 of the Recommendation

The new regulatory framework aims at ensuring that harmonisation occurs across the single market and guaranteeing legal certainty. The Recommendation identifies the markets where an NRA can directly carry out an analysis prior to imposing *ex ante* regulation if it considers that competition is ineffective. These markets include:

- Retail level
 - Access to the public telephone services at fixed locations:
 - Publicly available telephone services provided at a fixed location
 - Minimum set of leased lines
- Wholesale Level
 - Call origination on public telephone network provided at a fixed location
 - Call termination on individual public telephone networks provided at a fixed location
 - Wholesale local access for the purpose of providing broadband Internet services,
 - Local dedicated capacity (wholesale local or terminating segments of leased lines
 - Call termination on individual mobile networks
 - The wholesale national market for international roaming on public mobile networks
 - Broadcasting transmission services and distribution networks, to deliver broadcast content to end users
 - Transit services in the fixed public telephone network
 - Access and call origination on public telephone networks

Furthermore, in the first paragraph on page thirteen, the Recommendation asserts that:

“Regulatory controls on retail services can only be imposed where relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition”.

As mentioned previously, we understand that *ex ante* regulation on retail services can only be imposed where relevant wholesale or related measures would fail to achieve effective competition. However, we would like to highlight that in certain cases it is not clear that regulatory controls on wholesale services can achieve the same result as controls on retail services with the same degree of speed and directness, when the industry exhibits a high degree of vertical integration. Therefore, we believe that there are benefits to including retail markets in the Recommendation as this does not pre-empt the finding of ineffective competition. This would provide NRAs with the flexibility of using the provisions of the new regulatory framework to conduct market analysis.

2.4 Importance on Article 7 of the Framework Directive

Article 7 of the Framework Directive is intended to account for divergent market structures across the EU. We endorse and strongly support the explicit possibility to define relevant markets. It is however, a complex process which imposes particularly severe burdens on smaller NRAs. Given the circumstances of the Irish market, we are concerned that should the Recommendation remain in its current form, it would necessitate extensive use of this procedure. Moreover, to be consistent with requirements, NRAs using Article 7 would be obliged to provide a comprehensive analysis and would be subject to a lengthy and extensive procedure, if deviating from the Recommendation. This appears to raise the threshold at which market analysis can be envisaged and leads to the potential for significant delays in addressing bottlenecks and anti-competitive behaviour. In Ireland, experience indicates that such a procedure may be open to legal challenge and our overriding apprehension would be that this would create market uncertainty and may deter market entry or innovation. It is for this reason we argue that the Commission should take on board requests for additional markets to be included in the Recommendation.

2.5 Criteria for identifying markets

According to the Recommendation, the following cumulative criteria have to be met to justify the identification of relevant markets for *ex ante* regulation:

- markets have to be subject to high and non-transitory entry barriers;
- the dynamic aspects of the markets are such that the market doesn't tend towards effective competition.
- competition law would be insufficient to reduce or remove effective competition.

The three criteria are principally relevant for deciding whether or not a market needs regulating. For some markets it will be difficult to judge whether this is the case without undertaking a full market analysis. However, in order to have the powers to be able to collect the data to do this, the market needs to be in the Recommendation. This makes it difficult to accurately assess the true number of markets required for inclusion in the Recommendation. We would ask the Commission to clarify what powers the NRAs have in relation to data collection to address the above eventuality.

Equally, in innovation-driven markets the timeframe over which the markets can be assessed is short. This implies that the analysis must be carried over relatively short time intervals. We would therefore welcome the Commission's view on the appropriate timeframe over which the markets have to be analysed

2.6 Protection of new and emerging markets

We recognise the need to give new and emerging markets the freedom required to innovate and grow. There are few new products which constitute natural monopolies and viable business plans can be built by incumbents on the basis of some share being taken by other players. If other players cannot provide innovative services, they can rapidly become disadvantaged. The European experience with bitstream is instructive in this regard. However, it could be argued that innovation in the electronic communication sector comes as

much from small, start-up operators as from established market players. We feel that innovation of this kind needs to be protected from possible abuse of market power, through *ex ante* regulation. Furthermore, in the absence of appropriate regulation, potential new entrants to markets where competition is not robust will either be deterred from entry altogether or, on entry will fail to get a foothold in the market. This may be a risky approach if sustained support is needed to get markets underway. We would welcome any wording that recognises the potential threat to competition in innovative markets.

3 FUTURE REVISION OF THE RECOMMENDATION

We welcome the inclusion of a wholesale market for mobile call termination on individual networks. However, we would like clarification as to why the inclusion of this market is to be reviewed in March 2003, as we agree with the view held by the Competition Commission in the UK that there is a separate market for termination of calls on the network of each mobile operator⁵. In addition, from a practical point of view, we wonder if it is wise to consider changes to a pre-defined market when the Recommendation's effectiveness has not been tested. Referring to draft Commission Decision on ERG, which says:

“The Group should serve as a body for reflection, debate and advice for the Commission in the electronic communications field, including on matters related to the implementation and revision of Recommendation on Relevant Product and Service Markets and in drawing up the Decision on trans national markets.”

We feel that perhaps the Commission should not make any commitment now as to when they are going to review mobile termination (or remove the following two markets) without consultation with ERG.

We would like to query why ***Wholesale Mobile Call Origination*** and ***Fixed Wholesale Transit Services*** are likely not to be required in future recommendations.

3.1 Wholesale Mobile Call Origination

We would welcome the continued inclusion of a market for Wholesale Mobile Call Origination in the Recommendation. EU legislation has concentrated on encouraging competition in the mobile market through network competition, by requiring member states to issue licences to additional operators. This policy has generally been successful in promoting the widespread adoption and use of mobile telecommunications services. However, it is arguable whether the policy has, as yet, met other policy objectives:

⁵ The Competition Commission of the UK – Mobile Phones Enquiry – Remedies Statement – 2 April 2002

- Ensuring cost based prices for end users
- Encouraging innovative service offerings
- Ensuring tariff transparency

Service competition, through indirect access (IA) or MVNOs, can be effective in reducing end-user tariffs, particularly for high-margin services like international calls and offer to the consumer the availability of a greater choice of tariff packages. Access to mobile networks for IA operators or MVNOs, therefore, on reasonable terms is attractive in terms of promoting competition and consumer choice.

Currently mobile operators are free to charge fixed operators of free phone numbers a mobile call origination charge, and no cost is paid by the subscriber. There are a limited number of competitors in the mobile sector and fixed free phone operators have no choice but to pay these rates in order to provide their service. In this way, there are no retail pressures on mobile call origination charges. Competition through IA may result in a significant drop in international call traffic routed directly from the mobile networks which in turn could be offset by reductions in the networks' international tariffs. Network operators may seek to recoup any loss of revenue from international calls by some rebalancing with a greater proportion of costs being allocated to national calls and possibly higher call origination charges for IA operators. Furthermore, competition in the origination market may not be, as yet, sufficiently strong to deliver competitive origination prices. The competitive impact is that increased mobile origination charges ultimately feed through to service providers thereby potentially dampening greater competition in the mobile market.

3.2 Wholesale Fixed Transit Market

We would welcome the continued inclusion of a market for Wholesale Transit Services for the following reasons:

Barriers to entry and the development of competition

A transit service is a conveyance service provided by a network between two points of interconnection. It is, therefore, a service that links two networks that are not in themselves

interconnected. The vast majority of transit minutes in the Irish market are over the *eircom* Fixed Network. The cable network in Ireland is relatively undeveloped in comparison to many other Member States and does not represent a feasible alternative source of supply thus limiting the level of competition in the market. Demand for transit services is high as it is important for operators to have the capability to provide customers with a reliable basic service. Operators have no choice but to reach agreements with *eircom* regarding transit tariffs. Thus, the state of technology in the Irish market, its associated cost structure and the level of demand create asymmetric conditions between incumbents and new entrants which may impede and prevent additional market entry.

Dynamic Aspects

The perception is that it makes more sense financially for new entrants to continue to pay transit tariffs to the incumbent rather than incur the cost of rolling out their own complete access network. This market is not characterised by large changes in market shares over time. Thus there is no indication that this market will tend towards effective competition in the near future and *ex ante* regulation is required to ensure fair access to *eircom*'s network for all competitors.

Competition Law versus ex ante regulation

Regulation of the wholesale fixed transit market is of critical importance in ensuring OLO access to *eircom*'s network and thus the development of competitive alternative to *eircom*. In the past the ODTR has been involved in discussions between *eircom* and certain OLOs to overcome disagreements regarding fair outcomes for transit tariff arrangements. For example, in late 2000 and early 2001 the ODTR acted as intermediary between *eircom*, OLOs and Mobile Network Operators to reach an agreement regarding the introduction of a transit charge for free phone traffic from mobile networks to OLO networks. The ODTR envisage that interventions of this kind will continue to be required in the future.

4 MARKET SEGMENTATION

We welcome the flexibility of market segmentation afforded in the Recommendation. We would welcome the following segmentation of markets:

- The segmentation of retail access to the public telephone network at a fixed location into business and residential.
- The segmentation of retail publicly available telephone services provided at a fixed location into business and residential markets for local, national and international calls.

5 POTENTIAL CANDIDATE MARKETS FOR INCLUSION IN THE RECOMMENDATION

We feel that more markets should be included in the initial list of markets which allow *ex ante* regulation. In fact, currently, both the ODTR and Competition Authority feel that, in the case of Ireland, the Retail Market for Mobile Call Origination and the Retail Market for Broadcasting Distribution Services would warrant examination. In addition to these, the ODTR feels that other potential candidates are the Retail Leased Lines Market and the Wholesale SMS Market.

5.1 Call Origination Services in the Mobile Retail Market

The ODTR and the Competition Authority are in agreement that this market should be included in the Recommendation. We would suggest that mobile retail prices in a number of countries, including Ireland, are subject to limited competitive pressure. This is of particular importance as the Average Revenue per User (ARPU) in the Irish Mobile Market is the highest in the EU⁶. While larger volumes of traffic contribute to this, these higher traffic patterns per handset are not matched by relatively lower tariffs. To resolve this issue necessitates further powers of investigation than would be afforded by the inclusion of this market in the Recommendation. In addition, market shares in the Irish mobile market have remained steady over time with both Vodafone and O₂ retaining significant market shares despite the entry of a new operator, Meteor.

Barriers to Entry

Where barriers to entry are high the likelihood of anticompetitive behaviour is greatly increased. Furthermore, as the mobile market nears saturation point operators discriminating between on net and off net calls may tip the market in favour of their networks. Barriers to

⁶ Irish Communications Market Quarterly Review, June 2002 (www.odtr.ie, Doc 02/50)

entry in the Irish mobile market are high. It would appear, therefore, that the intensity of competition at the network level has been limited as a result.

Dynamic Aspects

The Irish market is now characterised by a high 2G mobile penetration rate. In addition, there is a relatively low churn rate in this market. According to a recent survey of SMEs in Ireland only 18% of respondents had switched supplier in the last 12 months⁷ while in a recent survey of residential customers as little as 10% of respondents had switched supplier within the last 12 months⁸. This contrasts with figures for BT Cellnet/O₂, where for the 12 months to June 2001 the overall churn rate was 25.2%⁹. A high churn rate alongside a high penetration rate may indicate healthy competition amongst mobile operators. Ireland has a high 2G penetration rate and is experiencing a relatively low churn rate. Furthermore, in the aforementioned residential survey, respondents were more inclined to give fixed telephony and internet usage a higher value for money rating than mobile telephony. Alongside this, potential customers will consider a telecommunications network with more subscribers more favourably¹⁰. Thus the Irish retail mobile market requires market analysis.

Competition Law versus ex ante regulation

Given spectrum issues, *ex ante* regulation is required for the entry of new competitors into the market. However, subscribers have been slow to move from the first two operators who apparently have been able to benefit from first mover advantage. Competition law alone may be insufficient to ensure the movement of this market towards a competitive outcome.

5.2 Broadcasting Distribution - The Scope of the Directives

Both the ODTR and the Competition Authority are in agreement that this market should be included in the Recommendation. We welcome the inclusion of the wholesale market for “broadcasting transmission services and distribution networks in so far as they provide the means to deliver broadcast content to end users” in the draft Recommendation. However, the

⁷ Irish Communications Market Quarterly Review, December 2001 (www.odtr.ie, Doc 01/93)

⁸ Irish Communications Market Quarterly Review, March 2002 (www.odtr.ie, Doc 02/26)

⁹ The Yankee Group

¹⁰ Indicators for the Assessment of Telecommunications Competition, 24/04/2002, DSTI/ICCP/TISP(2001)6/REV1 - OECD

lack of a retail broadcasting distribution market in the Recommendation is regarded as a serious omission.

The Recommendation states that the provision of broadcasting services lies outside the scope of the regulatory framework, while the networks and associated facilities used for the delivery of broadcast services are within its scope. While we agree that content regulation and services that provide or exercise editorial control over content clearly lie outside the scope of the framework, we would argue that the service of providing access to content distributed over networks to end users is within the scope of the framework. The exclusion of the provision of content services from the Framework Directive is not, of itself, justification for omitting the related, and necessary, provision of access to communications infrastructure. The two elements, content provision and access, are complements and this is reflected in tariff structures. For example, subscribers to pay TV services are required to pay, implicitly or explicitly, a contribution towards the cost of installing and operating the delivery network and related termination equipment. Therefore, access should be within the scope of the Framework Directive. This is analogous to the internet where content is excluded but the access to and provision of internet services are considered to be within the scope of the directives and are recognised as such in the Recommendation.

The argument within the Recommendation to exclude any retail market for broadcasting is based solely on the fact that content is excluded from the scope of the regulatory framework. However, as we have argued, access to the delivery platform does fall within its scope. Subscription or Pay TV unlike free-to-air services involves a trade relationship between the distribution or transmission network and the consumer and has been defined as a separate market in a number of Commission cases (for example see OJ L312, 6.12.1999). The inclusion of a retail market for broadcasting would reflect the position adopted by the Commission in March 2002. If this does not occur, the level of protection for consumers of broadcasting distribution services in Ireland in terms of choice, quality and price will be negatively impacted and this cannot have been the intention of the Commission.

We believe that the inclusion in the Recommendation of a retail market for the provision of access to broadcasting distribution services can be justified according to the criteria defined by the Commission itself, namely:

Barriers to entry

Cable, satellite and terrestrial network operators have incurred substantial sunk costs and many also benefit from economies of scale and scope in their respective markets thus making it unattractive to new entrants. With regard to networks that require spectrum, there is a limit to the number of operators that may exist in a particular Member State. Moreover, switching costs in Ireland can be considerable, at around €350, the digital systems are not interoperable and digital subscribers are locked into 12 month contracts¹¹.

Dynamic aspects

Ireland is a small market (1.27 million homes) with a high take up of pay-TV (two-thirds of all TV homes subscribe). Some Member States do not have multiple platforms offering television services. In Ireland, the supply of subscription / pay-TV is dominated by two cable/MMDS operators who have enjoyed local monopolies (according to AC Nielsen, ntl had 93% of the pay TV subscribers in Dublin in 2001) and one vertically integrated satellite supplier that can leverage its position in the related content market into the broadcasting market at both the wholesale and retail levels. Cable companies were awarded exclusive franchises in urban areas. Little expansion of cable services is expected in the medium term in the current economic climate. Satellite may be the only platform available to access subscription television services, while the provision of digital terrestrial television services has been disappointing in the UK and Spain. Digital terrestrial television has yet to be launched in a number of Member States including Ireland. Broadcasting over DSL is also unavailable in Ireland and its viability as a platform for the distribution of television services remains unproven.

Overall, we consider it unlikely that the supply of broadcasting distribution is characterised by effective competition. Furthermore, we consider that the prospects for further competition from new entrants is limited due to the size of the market, rural/urban divide, existing market shares, barriers to entry and the non-availability to date of DTT. We do recognise that the relative market shares held by the former monopoly cable/MMDS operators and the satellite provider of pay/subscription broadcasting is changing.

¹¹This feature is to be taken into consideration as the Commission itself stated in the Recommendation : “*if switching costs for a substantial proportion of users between alternative platforms were sufficiently high it might be argued that the relevant market could be for ancillary technical broadcasting services on a given delivery platform.*”

Competition Law versus ex ante regulation

In the event of recurrent market failures, for example quality of service issues, we believe that competition law would not be sufficient to effectively resolve such issues. In addition, with regard to the broadcasting markets, we maintain that wholesale measures alone are not sufficient because the state of the networks in some Member States is such that open access to these networks is not viable in the near to medium term. We acknowledge that this may change over time and the Recommendations provision for future reviews will take account of this.

We submit that a relevant retail market for broadcasting distribution does exist which is in keeping with the new framework. The above arguments are not unique to the Irish market and therefore it is appropriate to include a retail market for broadcasting in the list of relevant markets included in the Recommendation. It is submitted that; “The overall retail market or markets supplied to end users consists of access to the delivery of radio and television broadcasting and includes free-to-air broadcasting as well as subscription and pay broadcasting and also the delivery or transmission of interactive services.¹²” be included within the Recommendation as was indicated in the Commission’s presentation in March, with access to subscription TV as a segment of that Market.

5.3 Retail Leased Lines Market

Views of the ODTR

We welcome the inclusion of a market for Retail Leased Lines in the minimum set. However, we assume that this market as defined, only applies to leased lines under 2mbps. Our concern is that we have a number of major users in the IT and pharmaceuticals sectors that would require large leased lines but we may only have a small number of suppliers for this market who would have some degree of market power. Thus, we share the view in the IRG Response that a market above the minimum set of leased lines (all markets for leased lines) should also

¹² Paragraph 4.4 of the Recommendation

be included, as this would reflect the services provided to large multinationals in Member States.

The Irish retail leased lines market over 2mbps is characterized by a small number of operators providing services to a small number of customers. We believe that there is to some extent a chain of substitution between the different retail leased line capacities. A 5-10 per cent price increase in the price of one of the bandwidths is likely to lead to retail customers upgrading to the next available bandwidth. Competitive conditions are also relatively homogenous between the different types of leased lines. Most new entrants have built high bandwidth backbone networks which can be used to provide all types of digital leased line. However, competition from new entrants is limited as local access forms a bottleneck to all types of digital leased lines. As the competitive assessment would not change even if different markets were defined for different bandwidths, we believe it makes sense to treat them as one market.

Barriers to entry and the development of competition

There are substantial barriers to entry into the retail leased lines market. In order to provide retail leased lines, a company has either to buy wholesale leased lines for resale or build its own connection to the customer.

Although there has been significant roll-out of leased lines by OLOs in the past, with the slowing of growth in the communications sector, capital rationing has reduced the diversity of supplier in the market place. In addition, provision of leased lines over 2mbps requires a high level of expertise and resources. Large capacity users seeking a service provider for such a large undertaking will value a competitive choice between multinational operators or incumbents such as *eircom*. Due to the relatively low level of demand in a country as small as Ireland, potential entrants will have to invest substantial resources in infrastructure, expertise and manpower. Thus, the state of technology in the Irish market, its associated cost structure and the level of demand create asymmetric conditions between incumbents and potential new entrants.

Dynamic Aspects

The high barriers to entry in the Irish market are such that a lower level of competition is likely to persist over time. The small peripheral nature of the Irish market will ensure that this

characteristic persists. Thus the Irish market will not tend towards effective competition in the long term without careful nurturing of the market through *ex ante* regulation.

Competition Law versus ex ante regulation

The ODTR has, in recent years, been heavily involved in arranging Service Level Agreements and eliminating the substantial backlog in leased line provision by *eircom* to OLOs. Without such *ex ante* regulatory powers in the >2mbps market, competition may be harmed and reduced even further. This could have adverse affects on the business users' ability to take advantage of innovation in the electronic communications sector and could consequently have an impact on GDP and employment in Ireland.

Views of the Competition Authority

The Competition Authority is not yet in a position to give its views on whether or not the market for leased lines above the minimum set is appropriate for an effective competition review.

5.4 The Wholesale SMS Market

Views of the ODTR

As indicated in the ODTR's Quarterly Review of the Irish communications market published in June 2002, the number of SMS messages sent continues to grow strongly with over half a billion sent during the quarter. On average, mobile users send 62 SMS messages per month, representing an increase of approximately 20% on the previous quarter and a 70% increase on the previous year. The importance of SMS to Irish operators and to customers is clearly growing at a fast rate and there are no indications of this rate of increase subsiding. SMS is not defined as either a Retail or Wholesale market in the Recommendation, thus it is apparent that no safeguards through regulation can be imposed. We would like to see this market included in the Recommendation to allow for regulatory powers that would ensure that the SMS market is open and transparent to competition like other interconnect products. The same competitive conditions exist on wholesale SMS call termination as prevail for wholesale mobile call termination, and thus we believe that this market is relevant.

Evidence of consumer behaviour

While the ODTR has not carried out any explicit reviews of the market for SMS, on 26th September 2001 Oftel published an Effective Competition Review of the UK Mobile Market. Evidence of consumer behaviour regarding SMS on the demand side, and supply side constraints leads Oftel to suggest that SMS and voice services may not be in the same market. Oftel considers that there is an asymmetry regarding supply side substitutability; a supplier of SMS would not be able to switch into the provision of voice services, following price rises in voice services, due to spectrum constraints but a supplier of voice would be able to switch into SMS. Regarding the demand side, Oftel's latest qualitative research suggests that text messaging is mainly used by younger respondents who admit that, while sending text messages may have started as an economical alternative to voice calls, it has now become a unique phenomenon in its own right. The medium has its own language and symbolism, and is an imperfect alternative to voice, since text messages do not take place in 'real time' and have a slightly different role. In addition, it is not obvious that sending a text message is a low cost alternative to a voice call (constant exchanges of SMS to hold a 'conversation' would cost a significant amount). There is no reason to believe that the consumer behaviour for these products in the UK market is any different to that of Irish consumers.

Barriers to entry

Virtually all SMS users are subscribers of the Mobile Network Operators (MNO). The MNO is an essential provider of services to these end users. Without open, transparent and non-discriminatory rules for parties requiring access to these subscribers there is no guarantee that SMS competition will flourish. Operators wishing to offer (premium) SMS services must realistically first gain access to an existing mobile operator's network and then agree terms of use.

Dynamic Aspects

With two large players in the mobile market, the wholesale SMS Market is not expected to tend towards effective competition over time without sufficient *ex ante* regulation to ensure acceptable outcomes for agreements on mobile network usage.

Competition Law versus ex ante regulation

The ODTR has been notified by fixed operators seeking to enter the Irish SMS market that they are finding it difficult to negotiate terms with mobile operators. One operator has stated that an MNO is refusing to sign an SMS interconnect agreement with them. *Ex ante* regulation is required to ensure potential entrants can gain access to these networks and thus stimulate competition.

Views of the Competition Authority

The Competition Authority is not yet in a position to give its views on whether or not the Wholesale SMS Market is appropriate for an effective competition review.

CONCLUSION

The Office of the Director of Telecommunications Regulations (ODTR) and the Competition Authority welcome the ‘*European Commissions Draft Recommendation on Relevant Product and Service Markets within the electronic communications sector*’. We commend the Recommendation and once again welcome the opportunity to contribute to the enhancement of the document.

On examination of the Recommendation, various concerns have arisen and have been discussed further in the document. It is our view that it would assist the European Commission, Member States and operators that, as recommended by the Mandelkern Group and taken up in the Action Plan adopted at Seville, that some form of impact assessment of the provisions in the Recommendation be undertaken. We feel that the diversity across the EU needs to be recognised through flexibility in the regulatory framework so that all Member States move towards conformity in regulation.

We acknowledge the Commission’s approach to regulation at a wholesale level should, in theory, suffice to ensure effective competition at a retail level. However, we would like the Commission to recognise that where a double marginalisation problem exists, i.e. where there is market power at both levels, retail regulation is justified. For this reason we have asked for the inclusion of a number of additional markets in the Recommendation. In fact, we feel that the market would either be unable to move towards effective competition in the absence of *ex ante* regulation or that by their nature cannot achieve effective competition. Further, the lack of effective broadcasting markets in the Recommendation is regarded as a serious issue by the ODTR and the Competition Authority.

We look forward to the publication of the new Commission Recommendation.