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# **Independent Regulation:**

## **Governance and Accountability**

### **Introduction**

May I thank the Institute of Public Administration for their invitation to address the National Conference on Governance and Accountability in the Public Sector. As Director of Telecommunications Regulation and, indeed, the first independent regulator in Ireland, I am very pleased to have the opportunity to discuss with your distinguished audience the key issues involved in developing the Regulator's role, and establishing its position in relation to the industry and Government agencies.

Public management structures in Ireland are currently undergoing major changes as part of the general renewal programme for delivering better government. The objective is to put in place suitable organisations and management processes to ensure that the public service is capable of meeting the challenges of the present and of the new millennium. The establishment of the ODTR is a clear example of this.

It is an example on 'fast forward', for the process of devolving responsibility and replacing ex-ante prescription and control with ex-post accountability for delivery in the light of performance has been pushed forward for the ODTR. It has now the opportunities and responsibilities of independent exercise of functions within a legislative framework. Its structure has been developed to deal with the particular regulatory challenge it faces. The industry it serves is also on 'fast forward' as Ireland seeks to catch up with telecommunications developments in other countries.

A sea change is starting in the public service, a sea change which will match the development of the Celtic tiger in its profound implications for Ireland and how we do business. The ODTR is in the vanguard of this change. This paper is devoted to reviewing the role of the ODTR and how it will deliver to its broad performance target. This target is to provide the operational framework within which an advanced,

competitive telecommunications sector can develop and provide consumers with the services they need at low prices.

The theme of today's conference indicates the progress made from the old supposed dichotomy between control and anarchy, between a perceived requirement for a very small s for submission before a very large A for Authority, lest anarchy prevail. It is a sign of our maturity that we can move organisations outside of the traditional constraints, putting trust in the professionalism and responsibility of those charged with setting them up and delivering services.

### **Establishment and functions of ODTR**

The ODTR was established on 30th June under an Act passed at the end of 1996. This Act transferred to the Director telecommunications regulatory functions of what was then known as the Minister for Transport, Energy and Communications. In this context, telecommunications means radio, broadcasting and telephony. The ODTR is also the National Regulatory Authority, or NRA, in respect of European Union provisions for the telecommunications sector.

The regulatory functions can be divided into two categories - licensing, including enforcement of licence terms, and regulation of the market. We have responsibility for managing the radio spectrum, licensing the use of frequencies for radio, telephony and broadcasting. We are also responsible for licensing and managing the liberalised market for telecommunications services. We have a large range of service clients, from Telecom Eireann, Stentor, Cable and Wireless, to RTE and the TV cable companies, radio taxis and other users of business radio. While some functions are exercised with the consent of the Minister for Public Enterprise, and an annual report is to be prepared for the Minister and the Oireachtas, the 1996 Act requires the Director to be independent in the exercise of her functions and includes some further specific provisions to ensure her independence.

### **Regulation - why independent?**

Perhaps I should start by answering the question - why do we have an independent regulator? One answer would be that it was required under EU law, and essential in order to build a strategic alliance for Telecom Eireann. However, it is useful to look beyond this, to see why the EU and strategic investors require independent regulation.

Firstly, for more than a decade, the telecommunications industry has been undergoing a revolution which is becoming ever more intense. Telecommunications, already embracing radio and cable, is linking up with the entertainment and information industries. The old structure in European Union countries of a State funded monopoly providing basic telephone services to all is no longer adequate to the task of mobilising funds or for delivering services.

Competing services are needed to improve quality and range of services and to bring prices down. Even State companies across Europe need private investment to maintain and develop their businesses.

The EU recognised this in the 1980's and in 1984 the first Council Recommendation was published. Over the years the framework for opening EU markets to competitors of the State monopolies has been developed. The first measures covered equipment harmonisation and providing initial ground rules to enable competitors get going. EU Directives now extend to a full framework for complete liberalisation of the telecommunications market.

It may be noted in the initial analyses of the case of liberalisation, there was significant cross-subsidisation of residential by business customers. Measures for liberalisation have been framed to introduce competition for business before residential and for bigger telephony users before smaller ones.

As competition starts, existing operators also improve delivery and reduce prices, and the battles for market share result in larger overall markets. A quick glance at the development of the mobile phone market in Ireland up to 1994 compared with the market since then shows this clearly. The competition for the second mobile licence was announced in 1994 and this, followed by the arrival of the second mobile

operator has had a major impact. It took nearly a decade for mobile phone usage to move up to 5%: since 1994 it has more than doubled, while prices for the phones themselves have fallen significantly.

While OFTEL in the UK has been in existence for 13 years, liberalisation of telecommunications and the setting up of independent regulators is new in the rest of EU. Most of the new regulators were set up this year. Regulation has of course existed since the beginnings of competition, but its combination in Government Ministries with the share holding in the incumbent operator has not been considered effective. The EU requires Member States' Communications Ministries either to divest themselves of the incumbent operator share holding or of the regulatory function.

Private investors and telecommunications companies are willing to calculate and undertake commercial risk, but are less comfortable with political risks - an unpredictable election, a change of Minister - which they cannot factor easily into their financial calculations for assessing investments. What these companies need is clarity and certainty with respect to licences and permissions. They require service delivery standards in respect of these, standards which match their own single minded concentration on developing their businesses. Hence the need to set up dedicated independent bodies dealing with their industry, delivering the necessary services unaffected by general Governmental constraints and other priorities. I may note that many incumbent operators also welcome the development of independent regulation, as they too seek to adapt their businesses to the new market conditions.

### **Independent regulation - why regulate?**

If there is to be regulation, it should be independent, but let us consider briefly if regulation is in fact needed. Could one just abolish all regulation and licensing and let market forces operate alone? If liberalisation and competition are the keys to ensuring better range of services and ever decreasing prices, why not just let this happen?

The problem is that the market in telecommunications has been a monopoly. The entry costs of starting completely from scratch without any access to the incumbents' network are impossibly high. New players could not establish themselves without special regulation of the market, in particular ensuring access at reasonable prices in the initial stages. It is not enough to let the new players enter their names in the league if in fact they cannot ever get onto the pitch to play a game.

This is an issue not merely just in the telecommunications market, but in the liberalisation of utilities generally. Decades of investment in infrastructure and monopoly coverage of customers gives the incumbents advantages which no other players would be able to overcome without special regulation. The playing pitch is extremely bumpy and the regulatory rules are designed to enable new players into the game and provide effective competition to the incumbents. Consumers reap the benefits of lower prices, and a wider range of better services.

Sporting similes are common in the regulatory business, and the image of referee of a football match is not a bad one, in that he leaves the players to get on with their match, intervening only when someone breaks the rules. However, the neat image of a match of 90 minutes with a fixed number of players per team all playing hurling or soccer or whatever, is far too static for the fast moving Telecommunications industry.

In the telecoms game, the playing pitch is very bumpy, and the referee has to work hard at demolishing the bumps while the governing body is developing new rules, and new players are arriving all the time. Indeed some new arrivals are swimmers, not football players at all. They argue that if some of the pitch were just lowered six feet and filled with water, a very interesting land and water football game could be developed for the benefit of spectators. Somebody else wants to the use of the whole pitch for just 5 minutes every two hours, so they can land Airbuses. The regulator has to be able to referee the various matches and potential plays between all these interests, representing the converging of technologies of telephone, cable and radio. These will provide an ever greater range of services from the plain old telephone to video on demand to interactive TV and internet.

Market access is the element of regulation which is best known: however, there are other very important regulatory activities, in particular managing the radio spectrum. There are very many long standing clients for radio spectrum, including business radio and broadcasting bodies, but there is also ever increasing demand for radio spectrum for new telecommunications services. The spectrum must be managed effectively as a scarce resource, with clear, fair, transparent rules.

### **Regulatory rules**

The rules governing the regulation of the telecommunications market are mainly set down in EU telecommunications and competition law. They are fairly complex, reflecting the nature of the industry as it liberalises. They impose a wide range of obligations on the incumbent operators, including requirements to deliver specific types of access to their networks, and transparency in pricing services to other operators.

In time, it should be possible to reduce this sector specific regulation to sector specific and more general competition rules. Experience in other countries does not suggest that there can be a rapid fading away of regulation. In fact the opposite happens. Opening competition involves more regulation for the reasons I have described. Even in the countries which are most advanced, regulatory measures are used along with sector specific competition rules combined with general ones, to ensure an open and fair market. What is important is that it adapts to changing market conditions and moves on to new issues as required. Ireland is only at the initial stages of competition and it is just developing its regulatory framework at present.

### **The Irish Telecommunications market**

Telecommunications in Ireland improved very significantly in the 1980's and over the last decade prices have declined substantially. The recent competition for the Information Town of Ireland attracted a very high level of interest, marking a growing awareness of what the future holds for this sector. At Government level

there is a clear recognition of the importance of preparing Ireland for the information society as evidenced by its recent adoption of the *Information Society Ireland-Strategy for Action Report*. The report outlines what is needed under five headings - awareness, infrastructure, learning, enterprise and Government. It recognises the critical role that private sector investment will play, and acknowledges the importance of this new type of Society, catering for all citizens in terms of equal and universal access.

However, Ireland's current position looks less glowing when set against that of other countries. Prices have come down but are still above the OECD average for both business and residential customers. Penetration of new information age technology is very limited, while even penetration of the basic telephone service, at 4/5ths of Irish households, is significantly below the top performers in OECD. Internationally, we are rated 23rd in terms of preparedness for the Information Society, in the third division with Spain and the Czech Republic, well behind Denmark (in 3rd position), New Zealand (9th) and behind Taiwan and Korea, at 21st and 22nd respectively.

In 1996, the Government sought some derogations from the EU timetables for liberalising the Irish telecommunications market on the grounds that Telecom Eireann would not be able to adjust quickly enough to them. The European Commission agreed to most of the requests made.

The market for value added services (that is all services apart from real time voice telephony,) has been liberalised since 1992. Many companies are now providing these services to businesses in Ireland, in competition to Telecom Eireann. Since 1 July this year, other companies may also build and use their own networks for delivery of liberalised telecommunications services, and the remainder of the derogations for Telecom Eireann run out by the year 2000. From that year any company can sell any telephony service to anyone in Ireland or abroad, and the full provisions of EU liberalised market law will apply.

Telecom Eireann and its competitors are preparing for that date, and so too is my Office. The Celtic tiger has taken the international computer industry in its stride and

it must do the same with telecommunications. It is estimated by Forfas that some 30-40,000 jobs should be created in the sector in the next decade. Particularly for business, but also on social grounds, our geographical location demands that we succeed in this sector, and have available to all the most advanced range of services and continuous innovation. This requires major investment and low prices. Telecommunications growth means jobs, not alone in the industry itself, but in all sectors. Cheap, advanced communications are essential to the competitiveness of the Irish economy generally.

### **Role of ODTR**

What is the role of the ODTR in all this? It may be useful to deal first with some misconceptions. We are not a grant giving body like Forfas or IDA, which seek to encourage companies to set up and expand in the sector. We are not a Government Department like Public Enterprise. We are not responsible for telecommunications law generally.

In the context of the legislative framework created for us, our task is to provide the regulatory structure within which a competitive telecoms sector can develop and provide consumers with cheap and advanced telecoms services.

What we must do is provide a clear, straightforward, fair licensing system: we must provide effective market regulation and enforcement of licences, carefully adapted to market needs. It is up to the operators and investors to deliver the keenly priced range of services consumers need with the support of agencies such as Forfas.

### **Independence of the Regulator**

Independence is a guiding principle set down in the 1996 Act establishing the ODTR. Under the Act a wide range of regulatory functions have passed to me as Director. It is a measure of how seriously independent regulation is viewed by the Government.

The primary guarantees of independence contained in the Act are as follows:-

- a statutory requirement to act in an independent manner, and special provisions on removal from office.
- provision for independent exercise of virtually all regulatory functions.
- provision of the right, on the part of the Director, to specify and receive resource requirements.
- provision of the entitlement to the Director to appoint staff to the Office.
- provision for independent funding of the Office by the telecommunications industry.

The relationship between these provisions is crucial to ensuring that the Director is functionally, legally and financially independent. For example, an arrangement which left the Office dependent on the Minister or Exchequer would not be possible if the Office is to develop and enjoy the full confidence of the market. The extra tax on the industry collected by my Office to cover its expenses, provides the opportunity and obligation to provide the regulatory service which the industry needs now. We are not competing with other Government priorities for attention.

### **Legal Discontinuity**

The statutory requirement to act independently establishes a legal discontinuity between my actions as Director and those of Ministers who were previously responsible for the functions I now have.

Although I have taken over the on-going business of the Department in relation to transferred functions, statutory independence implies legal discontinuity. It is up to me to consider afresh what policies should be pursued. I would not discharge my obligation to act independently by just following on the past without consideration. The establishment of the ODTR marked a new beginning and a break with the past.

In a number of areas, I have made changes - for example in relation to radio links application procedures for links above 1GHz. The old procedures were geared to dealing with a small number of organisations – in particular Telecom Eireann, the mobile phone operators and the Irish Aviation Authority – and are no longer appropriate with the liberalisation of network provision to new operators.

The old procedures for radio links reflected a way of implementing policy not appropriate to the new competitive telecommunications market. There was much informality in submitting applications and often informal rounds of negotiation with applicants. These were helpful of course to individual applicants on a first come, first serves basis, but could close off options for later ones and result in a very unclear picture as to what the policy actually was. There are large costs involved in applying under these conditions, and they can constitute an informal but quite effective deterrent to new entrants or to the introduction of new products or ideas even by existing players. In devising its new procedures, the ODTR is operating a different model, one where the terms are clearly set out and applied simply and directly, having regard to the needs of the industry.

### **Accountability under the 1996 Act**

Broadly speaking, there are three strands to accountability of the Director of Telecommunications Regulation. The first of these are the specific provisions on accountability in the 1996 Act: the second is judicial review and the third is the general legal and moral obligation to explain and notify my decisions.

The Act contains a number of requirements in respect of reporting on the activities and accounts of the Office, and for seeking the consent of the Minister for Public Enterprise on specific issues.

On an annual basis, I am required by the Act to make reports to the Minister and to the Houses of the Oireachtas on the performance of my Office and on its financial management by way of annual accounts. The accounts will be audited by the Comptroller and Auditor General. These formal annual reports will provide a

comprehensive statement on the activities undertaken and results achieved, and provide an opportunity for review and discussion of progress in the ODTR.

The Act also requires that I seek the consent of Ministers on certain matters, for example the Minister for Public Enterprise on regulations governing the issue of wireless telegraphy licences, and of the Minister for Finance on fees for mobile phone licences. It also enables the issue of Ministerial directions on the frequency management matters and public service requirements in relation to mobile phone licences. These provisions ensure that the operations of the ODTR in these key areas do not conflict with Government policy.

These provisions are the key elements of the statutory framework within which the Minister and I and the relevant Government Departments must work. The legal obligations on all parties are quite clear, and changes have been made to reflect them. Issues which fall within my responsibility are now routinely referred to my Office rather than being dealt with by Public Enterprise. My Office has set up separate books of account to deal with its expenditures and funding. We are tackling our agenda according to our newly established basic principles, and seeking to develop our organisation to ensure that it can meet the major challenges it faces.

I am just about to send the first set of draft regulations requiring Ministerial consent to the Minister for Public Enterprise. They concern licences for GSM and TACS mobile networks.

### **Administrative Law**

Decisions taken by the ODTR have wide ranging implications for players in the telecommunications industry. There is an obligation to ensure that decisions are taken in the context of a properly developed framework and with a full understanding of their legal and commercial impact.

All decisions made by my Office must be reasoned and justified, and notified in appropriate detail to all parties concerned. This openness is a powerful stimulus to

ensuring that ODTR decisions can stand up to the full rigors of in depth analysis and scrutiny. Of course, the decision making process must take into account the fact that genuine business secrets and certain other matters cannot be disclosed.

The telecommunications law of the EU dictates in large measure the specific powers of the regulators in Member States. That law establishes certain rights for telecommunications service providers, in addition to existing rights to seek review or redress through the national Courts.

EU telecommunications law requires Member States to provide an appeal system. The law in Ireland implementing that obligation provides that any decision by me to refuse to grant, or to suspend or revoke a licence may, subject to judicial review:

- in the case of mobile telephony licences, be appealed to the High Court,
- and
- in the case of licences to provide other liberalised services be appealed to the District Court.

### **Consultation**

An independent public body needs to listen, and explain what it is about. In my view the best way of doing this is by open consultation and transparent decision-making. I am establishing a general strategy of open consultation to be undertaken before adoption of major policies. This will involve the publication of both initial consultation papers and the comments received on them. Decisions will then be taken and policies published: implementation will follow.

Our current consultation policy is limited as we have just started and all the deadlines we must meet are very tight. I intend to develop it further in 1998. This does not mean that I intend to have a heavy structure. That would delay necessary policy making for very long periods, which would be entirely inappropriate for a fast moving industry. There will always be times when decisions are needed more rapidly

than a full consultation process would allow. In keeping with the principle of independence, the judgement call on these lies with me.

Consultation is one of the ways by which we will ensure that we are fully informed of the commercial and other considerations affecting the market. We are identifying a programme of licensing and operational issues in respect of which we need to investigate and develop policies so that our decisions are based on the best information and advice available. For example, a study on future uses of the UHF band and related issues in connection with broadcasting was commissioned in August. We have also initiated work on a range of cost accounting issues in relation to Telecom Eireann. This will form the basis for many of my decisions on cross-subsidisation, prices for competitor access to the Telecom Eireann network and prices between competitors' networks and assessing general anti-competitive behaviour.

### **ODTR-Progress to date**

The ODTR took over its functions on 30 June: on 1 July infrastructure liberalisation took effect. I am pleased to say that we succeeded in revising the likening processes for radio links and introducing one for infrastructure within six weeks of start up.

To give you the briefest summary on major issues to date, may I just note that wholesale rates for telecommunications service providers were introduced by Telecom Eireann for the first time in October this year. We are engaged on further discussions on the range of accounting issues essential to ensuring a proper basis for pricing of services and separation of monopoly and non-monopoly services. Following a detailed examination of the issues, we have published a clear and unequivocal paper on voice telephony which outlined how this issue is being managed. We are also developing the terms for the third mobile licence competition which we will run very shortly.

### **Shaping the organisation**

It is only very recently that we have been able to give some time as a group to developing out ethos and mission. We recognise the unique opportunity we have to put in place an organisation, systems and procedures that best suit the environment within which the Office operates. This environment which is increasingly dynamic and driven by commercial considerations, with some planning horizons under 5 years as compared with 15 to 20 years for example, in electricity and transport infrastructure development.

We are reviewing our approaches and priorities to see how we can achieve a fully efficient and effective organisation which is focused on serving all of its clients. Our performance delivery needs to cover rapid licensing, effective and consistent enforcement, and speedy handling of industry complaints. We have set up a series of industry groups at middle management level to ensure that longer term planning is carried forward, not as discrete exercise separate from implementation, but as an integral part of the work of all officers.

### **ODTR Approach**

Starting from the statutory position as set out already, we have developed some practical working principles to guide our work. Some are specific to our functions, but most of these principles will govern good public sector practice under the developing Strategic Management Initiative. In the ODTR we must be mindful of the fact that, in addition to normal taxes, the industry pays directly to fund our operations. This gives us freedom from many general Government constraints, freedom we must use to provide services to meet private and public sector delivery requirements while maintaining the uniquely public sector principle of equity in our ethos and in all major decisions.

These principles are:-

- **independence in decision making**
- **Promotion of competition**
- **Light-handed regulation**
- **Consumer care**

- **Openness and transparency**
- **Clarity**
- **Timeliness**

### **Independence in decision making**

I have spoken at length on this and will make only one operational point here which is nevertheless of critical importance. While we will provide as many opportunities as possible for all parties to make their views known, decisions will be taken independently on each case, without reference to any outside influences.

In the light of what I have already said the importance we attach to facilitating competition is very clear. Where choices have to be made about prioritising issues, the impact on competitiveness between market players will be a key criterion.

### **Light handed regulation**

What's not broke does not need to be fixed. If market players can sort issues out among themselves, so much the better, so long as the settlement is not at the expense of the consumer. However, at present there are many instances where players need regulatory support. As I have already shown, where action is needed, I will intervene. I will have a light handed approach, but not, let me assure you, a soft approach.

### **Consumer care**

For my Office, consumer care is not only a matter of how we deal with our licensees, it has wider implications also. Licences are provided to enable services to be supplied. These services must be of appropriate quality. Complaints about quality in the telecommunications sector are dealt with by a number of agencies at present. However, as is evident from other sectors, quality control works when and only when the senior management of companies take it seriously.

I am encouraging an approach under which transparent and performance related self regulation would be adopted as standard in the industry. Consumer complaints should be dealt with independently of management functions. If consumer complaints are handled effectively by the industry, the ODTR can deal with complaints about systemic problems, including those noted in public information on complaints supplied by the industry itself or raised by consumer bodies such as the Director of Consumer Affairs.

### **Openness and transparency**

I have dealt with the issues here already and will just re-emphasise the importance of an open style of management.

### **Clarity**

Clarity is essential and we must ensure that all decisions and actions of my Office are clearly designed and set out. This is quite a challenge given our legislative framework and the complexity of the industry at this time. Nevertheless, we have already started with new application systems and guidelines for some key licenses.

### **Timeliness**

Horizons are very short in the telecommunications industry. We have to be quick in responding and reaching decisions. We are determined to ensure that new players do not have long waiting periods for important decisions. We have begun to achieve results in relation to current issues, but we still have a fair amount of catching up to do, in particular on policy development, so that we can respond to market needs. An example of this is numbering in a liberalised environment.

### **Conclusion**

It is a great honour and also a great responsibility to be appointed to a statutory post, to have one's terms of reference in an Act of the Oireachtas. The challenge is enormous, in terms of establishing the ODTR, ensuring that it is independent and appropriately accountable, and also in terms of the work to be done.

I would like to finish by paying tribute to the staff of the ODTR and to those experts whom we have engaged to provide specialist services: they have responded with enthusiasm and flexibility to the tasks of developing new approaches to the key issues and also in maintaining and improving delivery of services for this most challenging and exciting Office.