



Decision - Designation of SMP

**Market Analysis – Wholesale Access and Call  
Origination on Public Mobile Telephony  
Networks**

<b>Decision No:</b>	<b>D04/05</b>
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## 1 Introduction

- 1.1 The EU communications regulatory framework requires that ComReg defines relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.<sup>1</sup> In addition, ComReg is required to conduct an analysis of relevant markets to determine whether or not they are effectively competitive.
- 1.2 The Framework Regulations further require that the market analysis procedure under Regulation 27 is to be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ('the Recommendation'<sup>2</sup>) by the EU Commission.<sup>3</sup> In conducting its market definition and market analysis, ComReg must take the utmost account of the Recommendation and the EU Commission Guidelines on Market Analysis and Significant Market Power ('the SMP Guidelines'<sup>4</sup>).
- 1.3 The EU Commission identified, in the Recommendation, those product and service markets in which ex ante regulation may be warranted. One such market identified in the Recommendation at a wholesale level, is the market for wholesale access and call origination on public mobile telephone networks.
- 1.4 Having identified the relevant market, ComReg conducted an analysis of the relevant market and the closely related retail market to decide whether or not the relevant market is effectively competitive. ComReg assessed a wide range of criteria including market share data, the structure and availability of indirect access in the relevant market, potential competition, countervailing buyer power, pricing, profitability and also conducted a prospective analysis of competition in the relevant market.
- 1.5 Having regard to the above, ComReg has concluded in accordance with the Framework Regulations, that Vodafone and O<sub>2</sub>, have each with the other, significant market power ('SMP') (i.e. they are jointly dominant) on the market for wholesale access and call origination on public mobile telephony networks.
- 1.6 ComReg held a national consultation and took into account all representations made to it in arriving at its preliminary conclusions on market definition, market analysis and consequential SMP remedies.

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<sup>1</sup> S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>2</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>3</sup> Regulations 26 and 27.

<sup>4</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3.

## 2 Summary of Findings

### Market Analysis

- 2.1 The EU Commission identified, in the Recommendation, those product and service markets in which ex ante regulation may be warranted. One such market identified in the Recommendation at a wholesale level, is the market for wholesale access and call origination on public mobile telephone networks. The relevant product market is defined as the market for wholesale access and call origination on public mobile telephony networks as identified in ComReg Document Nos. 04/118 and 04/118a and having taken the utmost account of the Recommendation and the SMP Guidelines. ComReg has defined that the relevant geographic market for wholesale access and call origination on public mobile telephone networks is national in scope, which is the territory of Ireland.
- 2.2 ComReg's view, as set out in its document, *Market Analysis: Wholesale Mobile Access and Call Origination* ('Document No. 04/118 and 04/118a') is that the essential conditions warranting a finding of joint (or collective) dominance, as set out in the judgments of the European Courts in relation to Article 82 of the Treaty establishing the European Communities, as interpreted by the EU Commission in its Access Notice<sup>5</sup> and in the SMP Guidelines, and also in light of the criteria discussed by the Court of First Instance in *Airtours*<sup>6</sup>, are satisfied in relation to the market for wholesale mobile access and call origination on public mobile telephony networks.
- 2.3 Applying the traditional approach in accordance with the jurisprudence relating to Article 82 of Treaty establishing the European Communities, ComReg is of the view that the existence of a number of structural links between Vodafone and O<sub>2</sub>, given the nature of the mobile communications sector in Ireland, increases the likelihood that Vodafone and O<sub>2</sub> are aware of their common interests in ways which are conducive to the creation and maintenance of a position of collective dominance on the market for wholesale mobile access and call origination in Ireland, without the need for the parties to enter into an agreement or to resort to a concerted practice in order to cause prices to align or to deny access. This approach can be supplemented by a consideration of the more salient factors considered in *Airtours*.
- 2.4 Adopting the approach of the Court of First Instance in *Airtours*, the structure of the Irish market has many of the characteristics that would give rise to coordinated effects. The combination of these factors makes the Irish market particularly susceptible to collective dominance and this is likely to continue in the absence of appropriate regulatory action by ComReg, and competition law alone is not sufficient to address the problems identified. The recognition by O<sub>2</sub> and Vodafone that a departure from the current market position intended to boost profitability would precipitate a new equilibrium featuring normal conditions of

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<sup>5</sup> Notice on the application of the competition rules to access agreements in the telecommunications sector: Framework, relevant markets and principles (98/c 265/02).

<sup>6</sup> Case T342-99, *Airtours* judgement of the Court of First Instance (Fifth Chamber, Extended Composition), 6 June 2002.

competition at the retail level, provides the type of credible retaliatory mechanism which can sustain the prevailing market conditions.

2.5 The market power of Vodafone and O<sub>2</sub> is reinforced by:

- their size relative to each other, and relative to other market actors in the relevant market;
- their control of essential infrastructure which is unlikely to be economically duplicated over the life of this review;
- the absence of countervailing buyer power in the closely related downstream retail product market, or at a wholesale level;
- their sustained high levels of profitability;
- the economies of scale and scope resulting from membership of large European groups, including easier or privileged access to capital markets/financial resources; and
- highly developed distribution and sales networks.

2.6 More importantly, however, there are strong indications that the aligned or consciously parallel behaviour identified by ComReg at the retail level, in addition to the behaviour identified at the wholesale level, is reflected in the unsatisfactory level of competition at the retail level. For example, there appears to be little effective price competition between Vodafone and O<sub>2</sub> in the provision of their respective retail services and neither operator has yet to conclude any indirect access, wholesale minutes/capacity or Mobile Virtual Network Operators ('MVNOs') agreements with independent service providers. Furthermore, alternative sources of market entry also appear unlikely to be able to exert sufficient competitive pressure on Vodafone and O<sub>2</sub>.

2.7 ComReg concludes that, on the basis of its analysis of the market characteristics, there is evidence of the existence of a jointly held position of market dominance between Vodafone and O<sub>2</sub> in the Irish retail mobile market, and that this position of joint dominance is reinforced and sustained by the refusal, constructive or otherwise, on the part of the coordinating undertakings O<sub>2</sub> and Vodafone to grant wholesale access to wholesale airtime or to a more sophisticated form of access, such as a MVNO. Both Vodafone and O<sub>2</sub> have a strong incentive to converge to a coordinated market outcome and refrain from reliance on competitive conduct. This is the case because these parties are aware that the long-term benefits of their tacit coordination outweigh any short-term gains resulting from deviation.

2.8 ComReg concludes that O<sub>2</sub> and Vodafone each hold a position of dominance jointly with the other in the market for wholesale access and call origination on public mobile telephony networks.

## **SMP Obligations**

2.9 ComReg is obliged to impose one or more of SMP obligations, as provided for by Regulations 11, 12, 13 and 14 of the Access Regulations<sup>7</sup>. These SMP obligations will be imposed in a separate Decision.

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<sup>7</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

### **3 Notification to EU Commission and other NRAs**

- 3.1 The findings in this Decision were notified to the EU Commission in accordance with Regulation 20 of the Framework Regulations and the Article 7 Recommendation,<sup>8</sup> and were registered by the EU Commission on 10<sup>th</sup> December, 2004. The notified measures were accepted by the EU Commission subject to a number of comments, which it made pursuant to Article 7 (3) of the Framework Directive<sup>9</sup>, in correspondence to the Chairperson of ComReg dated 20<sup>th</sup> January, 2005.
- 3.2 The EU Commission commented on the use by ComReg of transactions occurring at the retail market. The EU Commission noted that a company's performance on the retail market does not automatically mirror its position and conduct on the upstream wholesale market, even if there are currently no market transactions taking place on the latter. The EU Commission also commented that in order to find joint SMP in the wholesale market, it is not indispensable to find joint SMP at the retail level. Although retail market conditions may inform an NRA of the structure of the wholesale market, they may and need not in themselves be conclusive, as regards the finding of SMP at the wholesale level.
- 3.3 The EU Commission commented on ComReg's analysis of fringe competitors. The EU Commission noted that, especially in the fourth quarter of 2004, Meteor has been able to benefit from its national roaming agreement with O<sub>2</sub> and could be in a position in the near future to constrain the ability of Vodafone and O<sub>2</sub> to act independently of their competitors. The EU Commission requested ComReg to monitor the developments of Meteor and '3'. The EU Commission also requested that ComReg closely monitor the behaviour of fringe competitors on the wholesale market for mobile access and call origination.
- 3.4 ComReg has taken utmost account of the comments of the EU Commission in this Decision and agrees with the EU Commission's comment that a company's performance on the retail market does not automatically mirror its position and conduct on the upstream wholesale market. According to the Recommendation, a determination as to whether ex ante regulatory intervention at the wholesale level might not be warranted will take account 'the level of competition generally observed in this market at the retail level'.<sup>10</sup>
- 3.5 It is ComReg's view that a relevant product market for wholesale mobile access and call origination can be identified, and for the purpose of analysing the relevant market for wholesale access and call origination on public mobile telephony networks, ComReg has identified the key elements of the market at the retail level which is linked to the wholesale market, with a view to determining whether the level of competition generally observed at the retail level suggested any market failure

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<sup>8</sup> Commission Recommendation of 23 July 2003 on notifications, time limits and consultation provided in Article 7 of Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services.

<sup>9</sup> Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>10</sup> Commission Recommendation and Explanatory Memorandum on Relevant Product or Service Markets within the Electronic Communications sector susceptible to ex ante regulation in accordance with directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory framework for electronic communication network and services, page 30.

identified at the wholesale level and is reflected in the level of competition witnessed in the closely related retail market.

- 3.6 ComReg is also of the view that the bargaining power of service providers at the wholesale level, recognised as a significant factor in the EU Commission's comments to the Finnish regulator<sup>11</sup>, also impacts the dynamics between wholesale and retail markets. ComReg also agrees with the EU Commission's comments to the Hungarian regulator in relation to the ability of NRAs to examine a relevant market in the absence of merchant transactions<sup>12</sup>.
- 3.7 ComReg notes the comments of the EU commission in relation to fringe competition. ComReg will monitor closely the competitive behaviour of the fringe competitors (Meteor and '3') during the period of the review and in particular will monitor the effect of the roaming agreement between Meteor and O<sub>2</sub>.
- 3.8 Having determined that the market for wholesale access and call origination on public mobile telephony networks reviewed is not effectively competitive; ComReg is now designating the undertakings with SMP, in accordance with Regulation 27 (4) of the Framework Regulations

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<sup>11</sup> Article 7 EU Commission comments case FI/2004/0082.

<sup>12</sup> Article 7 EU Commission comments to Hungarian Regulator, HU/2004/0096.

## 4 Decision

### Statutory Powers Giving Rise to Decision

4.1 In this Decision:

‘SMP’ means significant market power, as referred to in Regulation 25 of the Framework Regulations.

4.2 In making this Decision and imposing the obligations set out herein, ComReg has assessed the proportionality of the obligations imposed relative to the objectives of ComReg set out in section 12 of the Act of 2002,<sup>13</sup> has taken the utmost account of the Recommendation and the SMP Guidelines and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.<sup>14</sup> This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for wholesale access and call origination on public mobile telephony networks related to the Consultation Paper entitled *Market Analysis: Wholesale Mobile Access and Call Origination* (‘Document No. 04/05’) and response to consultation *Market Analysis: Wholesale Mobile Access and Call Origination* (‘Document No. 04/118 and 04/118a’).

4.3 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations and having regard to sections 10 and 12 of the Act of 2002.

### Market Definition

4.4 The relevant product market is defined as the market for wholesale access and call origination on public mobile telephone networks as identified in ComReg Document Nos. 04/118 and 04/118a and having taken the utmost account of the Recommendation and the SMP Guidelines.

4.5 ComReg has defined that the relevant geographic market for wholesale access and call origination on public mobile telephone networks is national in scope, which is the territory of Ireland.

### Designation

4.6 Vodafone and O<sub>2</sub> are each designated as having, jointly with the other, SMP on the market for wholesale mobile access and call origination on public mobile telephony networks.

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<sup>13</sup> The Communications Regulation Act 2002.

<sup>14</sup> Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

**Effective Date**

4.7 This Decision shall be effective from the 22<sup>nd</sup> day of February, 2005.

**Isolde Goggin**

**Chairperson**

**The Commission for Communications Regulation**

**The 22<sup>nd</sup> day of February, 2005**