



STATUTORY INSTRUMENTS.

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EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES) (FRAMEWORK) REGULATIONS 2011

(Prn. A11/1162)

EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES) (FRAMEWORK) REGULATIONS 2011

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EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (FRAMEWORK) REGULATIONS 2011

I, PAT RABBITTE, Minister for Communications, Energy and Natural Resources, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002¹ as amended by Regulation (EC) No. 717/2007 of the European Parliament and of the Council of 27 June 2007², Regulation (EC) No. 544/2009 of the European Parliament and of the Council of 18 June 2009³ and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009⁴, hereby make the following regulations:

PART 1

PRELIMINARY

Citation

1. These Regulations may be cited as the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.

Interpretation

2. (1) In these Regulations—

“Access Directive” means Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002⁵ as amended by Directive 2009/140/EC of the European Parliament and of the Council of the 25 November 2009⁴;

“Access Regulations” means European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“Act of 1926” means Wireless Telegraphy Act 1926 (No. 45 of 1926);

“Act of 2000” means Planning and Development Act 2000 (No. 30 of 2000);

“Act of 2002” means Communications Regulation Act 2002 (No. 20 of 2002);

“appeal” means an appeal lodged under Part 2;

¹OJ No. L 108, 24.04.2002, p. 33

²OJ No. L 171, 29.06.2007, p. 32

³OJ No. L 167, 29.06.2009, p. 12

⁴OJ No. L 337, 18.12.2009, p. 37

⁵OJ No. L 108, 24.04.2002, p. 7

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 5th July, 2011.

“application program interface (API)” means the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services;

“associated facilities” means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network or an electronic communications service which enable or support the provision of services via that network or service or have the potential to do so and include, among other things, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes and cabinets;

“associated services” means those services associated with an electronic communications network or an electronic communications service which enable or support the provision of services via that network or service or have the potential to do so and include, among other things, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence services;

“Authorisation Directive” means Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002⁶ as amended by Directive 2009/140/EC of the European Parliament and of the Council of the 25 November 2009⁴

“Authorisation Regulations” means European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

“BEREC” means the Body of European Regulators for Electronic Communications as established by Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009⁷;

“call” means a connection established by means of a publicly available electronic communications service allowing two-way voice communication;

“CEPT” means the European Conference of Postal and Telecommunications Administrations;

“conditional access system” means any technical measure or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;

“consumer” means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession;

⁶OJ No. L 108, 24.04.2002, p. 21

⁴OJ No. L 337, 18.12.2009, p. 37

⁷OJ No. L 337, 18.12.2009, p. 1

“decision” includes designation, determination, specification, requirement, direction, notification and notice, and any other act of an equivalent nature;

“Directive on privacy and electronic communications” means Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002⁸ as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006⁹ and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009¹⁰;

“electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

“electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes—

- (a) services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, and
- (b) information society services, as defined in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998¹¹, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

“electronic programme guide” means any electronic means of providing information to members of the public in relation to the schedule of programme material the subject of any broadcasting service and which electronic means is an integral part of the distribution and reception system by which the broadcasting service is provided;

“end-user” means a user not providing public communications networks or publicly available electronic communications services;

“enhanced digital television equipment” means set-top boxes intended for connection to television sets or integrated digital television sets, able to receive digital interactive television services;

“ENISA” means the European Network and Information Security Agency;

⁸OJ No. L 201, 31.07.2002, p. 37

⁹OJ No. L 105, 13.04.2006, p. 54

¹⁰OJ No. L 337, 18.12.2009, p. 11

¹¹OJ No. L 204, 21.07.1998, p. 37

“European Commission” means the Commission of the European Union;

“European Standards Organisations” means the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI);

“Framework Directive” means Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002¹ as amended by Regulation (EC) No. 717/2007 of the European Parliament and of the Council of 27 June 2007², Regulation (EC) No. 544/2009 of the European Parliament and of the Council of 18 June 2009³ and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009⁴;

“harmful interference” means interference which endangers the functioning of a radio navigation service or other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with a requirement under the International Telecommunication Union Radio Regulations, a Regulation of the European Union or legislation giving effect to an act, or a provision of an act, adopted by an institution of the European Union relating to the provision of an electronic communications service, electronic communications network or an associated facility or the radio frequency spectrum or regulations made under the Act of 1926;

“International Telecommunication Union Radio Regulations” means the decisions of the World Radiocommunication Conferences, including all appendices, resolutions, recommendations and International Telecommunication Union Radiocommunication Sector recommendations incorporated by reference;

“Minister” means Minister for Communications, Energy and Natural Resources;

“MMS” means a Multimedia Messaging Service which sends messages that include multimedia content between mobile or fixed numbers assigned in accordance with national numbering plans;

“national numbering scheme” means the scheme administered by the Regulator which sets out the sequence of numbers or other characters which must be used to route communications to specific locations, terminals, persons or functions on public electronic communications networks;

“national regulatory authority” in relation to another Member State, means the body or bodies charged by another Member State with any of the regulatory tasks assigned in the Framework Directive or the Specific Directives;

¹OJ No. L 171, 29.06.2007, p. 32

²OJ No. L 171, 29.06.2007, p. 32

³OJ No. L 167, 29.06.2009, p. 12

⁴OJ No. L 337, 18.012.2009, p. 37

“network termination point (NTP)” means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;

“number” includes a character and a combination of numbers or characters or both;

“operator” means an undertaking providing or authorised to provide a public communications network or associated facility;

“Privacy and Electronic Communications Regulations” means European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011);

“public communications network” means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;

“Radio Spectrum Decision” means Decision No. 2002/676/EC of the European Parliament and of the Council of 7 March 2002¹²;

“Regulations of 2003” means European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003);

“Regulator” means Commission for Communications Regulation;

“relevant market” means a product or service market defined by the Regulator in accordance with Regulation 26 or referred to in Regulation 13(4)(a) and adopted in accordance with Regulation 13(6);

“SMS” means a Short Message Service text message, composed principally of alphabetical or numerical characters, capable of being sent between mobile or fixed numbers assigned in accordance with national numbering plans;

“Specific Directives” means Authorisation Directive, Access Directive, Universal Service Directive and Directive on privacy and electronic communications;

“specific obligations” means obligations that may be imposed by the Regulator on an undertaking under Regulations 6(1) and (2), 7 and 8 of the Access Regulations and Regulation 13 of the Universal Service Regulations, and on those undertakings designated under Regulation 7 of the Universal Service Regulations to carry out the obligations referred to in that Regulation;

“Specific Regulations” means these Regulations, Authorisation Regulations, Access Regulations, Universal Service Regulations and Privacy and Electronic Communications Regulations;

¹²OJ No. L 108, 24.04.2002, p. 1

“spectrum allocation” means the designation of a given frequency band for use by one or more types of radiocommunications services, where appropriate, under specified conditions;

“subscriber” means any natural person or legal entity who or which is party to a contract with a provider of publicly available electronic communications services for the supply of such services;

“transnational markets” means markets identified in accordance with Article 15(4) of the Framework Directive covering the European Union or a substantial part thereof located in more than one Member State;

“undertaking” means a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities;

“universal service” means the minimum set of services, defined in the Universal Service Directive, of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;

“Universal Service Directive” means Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002¹³ as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009¹⁰

“Universal Service Regulations” means European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011);

“user” means a legal entity or natural person using or requesting a publicly available electronic communications service.

(2) A word or expression that is used in these Regulations and that is also used in the Framework Directive has, unless the context otherwise requires, the same meaning in these Regulations that it has in that Directive.

(3) In these Regulations a reference to an enactment or Regulations is to be construed as reference to the enactment or Regulations as amended by any subsequent enactment or Regulations, including these Regulations.

(4) A reference in any enactment or Regulations to the Regulations of 2003 is to be construed as a reference to these Regulations.

PART 2

APPEALS

Application for appeal against decision of Regulator

¹³OJ No. L 108, 24.04.2002, p. 51

¹⁰OJ No. L 337, 18.12.2009, p. 11

3. (1) Except as provided by paragraphs (2) and (3), this Part applies to a decision made or given by the Regulator under—

- (a) these Regulations,
- (b) the Authorisation Regulations,
- (c) the Access Regulations,
- (d) the Universal Service Regulations, or
- (e) the Privacy and Electronic Communications Regulations.

(2) This Part does not apply to a notification or notice given under any of the following provisions—

- (a) Regulation 37(1),
- (b) Regulation 19(1) of the Access Regulations,
- (c) Regulation 16(3) of the Authorisation Regulations,
- (d) Regulation 31(2) of the Universal Service Regulations,
- (e) Regulation 31(1) of the Privacy and Electronic Communications Regulations, or
- (f) section 44 of the Act of 2002.

(3) This Part does not apply to an opinion under any of the following provisions—

- (a) Regulation 37(4),
- (b) Regulation 19(4) of the Access Regulations,
- (c) Regulation 16(6) of the Authorisation Regulations,
- (d) Regulation 31(5) of the Universal Service Regulations, or
- (e) Regulation 31(4) of the Privacy and Electronic Communications Regulations.

Right of appeal against decision of Regulator

4. (1) A user who, or undertaking that, is affected by a decision of the Regulator may appeal to the High Court against the decision.

(2) Any appeal, referred to in paragraph (1), must be lodged within 28 days after the user or undertaking has been notified of the decision.

Regulator to be respondent to appeal

5. (1) The High Court may hear the appeal referred to in Regulation 4(1) only if it is satisfied that a copy of the appeal has been served on the Regulator.

(2) On being served with a copy of the appeal, the Regulator becomes the respondent to the appeal.

Powers of High Court with respect to appeals

6. (1) The High Court shall hear and determine the appeal referred to in Regulation 4(1) and may make such orders as it considers appropriate.

(2) Without limiting paragraph (1), the orders that may be made by the High Court on the determination of the appeal include—

- (a) an order affirming or setting aside the whole or any part of the decision of the Regulator, and
- (b) an order remitting the case to the Regulator to be reconsidered, either with or without the hearing of further evidence, in accordance with the directions of the High Court.

Effect of appeal on operation of Regulator's decision

7. (1) Subject to this Regulation, lodging an appeal with the High Court from a decision of the Regulator does not of itself affect the operation of the decision or prevent action from being taken to implement the decision.

(2) If an appeal is lodged with the High Court from a decision of the Regulator, the High Court or a Judge of the High Court may make such order staying or otherwise affecting the operation or implementation of the decision of the Regulator, or a part of that decision, as the High Court or Judge of the High Court considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the appeal.

(3) If an order is in force under paragraph (2) (including an order that has previously been varied on one or more occasions under this paragraph), the High Court, or a Judge of the High Court, may make a further order varying or revoking the order.

(4) An order in force under paragraph (2) (including an order that has previously been varied on one or more occasions under paragraph (3))—

- (a) is subject to such conditions as are specified in the order, and
- (b) has effect until—
 - (i) if a period for the operation of the order is specified in the order, the expiry of that period or, if the appeal is determined before the end of that period, the making of the determination, or
 - (ii) if no period is so specified, the giving of a decision on the appeal by the High Court.

Certain documents to be sent to High Court

8. When an appeal is made under Regulation 4—

- (a) the Regulator shall send to the High Court all documents that were before it in connection with the proceedings to which the appeal relates, and
- (b) at the conclusion of the proceedings before the High Court in relation to the appeal, the High Court shall arrange for the documents to be returned to the Regulator.

Collection of information relating to appeals

9. The Regulator shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. The information collected shall be provided to the Minister annually or as requested by him or her.

PART 3

INFORMATION

Provision of information

10. (1) Notwithstanding section 39 of the Act of 2002, the Regulator may, in writing, require any undertaking to provide, within such timescales and in conformity with the level of detail specified by the Regulator, any information, including financial information, that the Regulator considers necessary for the purposes of ensuring conformity with the provisions of, or decisions or determinations of the Regulator made in accordance with, the Specific Regulations, the Framework Directive or the Specific Directives. In particular such information may include information concerning future network or service developments that could have an impact on the wholesale services that the undertaking makes available to competitors.

(2) Where an undertaking has significant market power on wholesale markets, the Regulator may, in accordance with paragraph (1), require the undertaking to provide accounting data on the retail markets that are associated with those wholesale markets.

(3) Any information sought by the Regulator under paragraphs (1) and (2) shall be proportionate to the performance by the Regulator of the task of monitoring compliance and the Regulator shall give reasons justifying its requirement for the information including a statement as to which of the Regulator's statutory duties gives rise to the request.

(4) An undertaking upon which a requirement is served under paragraph (1) or (2) shall comply with the requirement.

(5) An undertaking that fails to comply with a requirement under paragraph (1) or (2) commits an offence.

(6) In proceedings for an offence under paragraph (5), it is a defence to establish that—

- (a) reasonable steps were taken to comply with the relevant requirement, or
- (b) it was not possible to comply with the relevant requirement.

(7) Upon receipt of a reasoned request from the European Commission, the Regulator shall, subject to this Regulation, provide the European Commission with such information as is necessary for the European Commission to carry out its tasks under the Treaties governing the European Union.

(8) Where any information requested by the European Commission under paragraph (7) has been obtained by the Regulator under paragraph (1) or under section 39 of the Act of 2002, the Regulator shall notify, in writing, the undertaking which provided that information that the Regulator has been requested to provide the information to the European Commission and that the European Commission is entitled to pass such information on to national regulatory authorities in other Member States unless the Regulator makes an explicit and reasoned request to the contrary. In the case of information expressed to be confidential by the undertaking which provided it, the Regulator shall delay provision of the information to the European Commission to enable the undertaking which provided the information concerned to make written representations to the Regulator within 7 days of the notification from the Regulator referred to in this paragraph.

(9) The Regulator may, taking into account any representations expressed to it under paragraph (8) but at its sole discretion, make an explicit and reasoned request to the European Commission not to make any information provided under paragraph (7) available to a national regulatory authority in another Member State.

(10) The Regulator may make information submitted to it under paragraph (1) available to a national regulatory authority in another Member State, after a substantiated request, where the Regulator is satisfied that provision of such information is necessary to allow either national regulatory authority to fulfil its responsibilities under European Union law.

(11) Where the Regulator considers information to be made available under paragraph (10) is confidential, the Regulator shall identify such information accordingly.

(12) Where the Regulator receives information classified as confidential from the European Commission or from a national regulatory authority of another Member State under Article 5 of the Framework Directive and the Regulator is satisfied that such information is so classified in accordance with rules of business confidentiality of the European Union or of the Member State from which the information originated, as the case may be, it shall protect the confidentiality of such information. The Freedom of Information Acts 1997 and 2003 do not apply to such information.

(13) The Regulator shall, subject to the protection of the confidentiality of any information which it considers to be confidential, publish from time to time

such information as would, in the opinion of the Regulator, contribute to an open and competitive market.

Co-operation with the National Consumer Agency

11. (1) The Regulator shall, where appropriate, consult and co-operate with the National Consumer Agency on matters of common interest in connection with the application of the Specific Regulations.

(2) The Regulator and the National Consumer Agency shall, subject to the Freedom of Information Acts 1997 and 2003, accept as confidential any information provided under paragraph (1) by an undertaking providing electronic communications networks or services expressed by it to be confidential, except where the Regulator and the National Consumer Agency have good reason to consider otherwise.

Consultation and transparency mechanism

12. (1) In this Regulation and Regulation 13, “measure” means a decision, designation, determination, requirement, specification or other act of an equivalent effect made by the Regulator under the Specific Regulations, other than a determination under Regulation 31 or 32, a notification under Regulation 37 or a notification or requirement under Regulation 16 of the Authorisation Regulations, Regulation 19 of the Access Regulations, Regulation 31 of the Universal Service Regulations and Regulation 31 of the Privacy and Electronic Communications Regulations.

(2) Except in cases falling within Regulation 13(8), where the Regulator intends to take a measure in accordance with the Specific Regulations or intends to provide for restrictions in accordance with Regulation 17(3) and (5), which have a significant impact on a relevant market, the Regulator shall observe the procedures referred to in paragraphs (3) and (4).

(3) Before taking a measure under paragraph (2) the Regulator shall publish the text of the proposed measure, give the reasons for it, including information as to which of the Regulator’s statutory powers gives rise to the measure, and specify the period within which submissions relating to the proposal may be made by interested parties.

(4) The Regulator, having considered any representations received under paragraph (3), may take the measure with or without amendment.

(5) The Regulator shall publish its consultation procedures and shall establish a single information point through which all current consultations can be accessed.

(6) The Regulator shall, subject to the protection of the confidentiality of any information which it considers to be confidential, make the results of any consultation under this Regulation publicly available.

Consolidating the internal market for electronic communications

13. (1) The Regulator shall, taking the utmost account of its objectives under section 12 of the Act of 2002 and Regulation 16 and its functions under the

Specific Regulations, contribute to the development of the internal market by working with national regulatory authorities in other Member States, BEREC and the European Commission in a transparent manner to ensure the consistent application of the Framework Directive and the Specific Directives.

(2) For the purpose of paragraph (1), the Regulator shall, in particular, work with the European Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

(3) Except where otherwise provided in recommendations or guidelines adopted by the European Commission under Article 7b of the Framework Directive, upon completion of the consultation referred to in Regulation 12, where the Regulator intends to take a measure which—

(a) falls within the scope of—

(i) Regulation 26 or 27, or

(ii) Regulation 6 or 8 of the Access Regulations,

and

(b) would affect trade between Member States,

the Regulator shall make the draft measure accessible to the European Commission, BEREC and the national regulatory authorities in other Member States at the same time, together with the reasoning on which the measure is based, and inform the European Commission, BEREC and the national regulatory authorities in other Member States of it.

(4) Where a draft measure referred to in paragraph (3) consists of—

(a) a proposed definition of a relevant market which differs from any defined in a Recommendation adopted in accordance with Article 15(1) of the Framework Directive, or

(b) a proposed decision whether or not to designate an undertaking as having, either individually or jointly with others, significant market power under Regulation 27(3), (4) or (5),

and would affect trade between Member States, and the European Commission has indicated to the Regulator that it considers the draft measure would create a barrier to the single market or that it has serious doubts as to its compatibility with European Union law and, in particular, the objectives referred to in Article 8 of the Framework Directive, the draft measure shall not be adopted for a further 2 months. This two month period may not be extended.

(5) (a) Where the European Commission has adopted a decision in accordance with Article 7(5) of the Framework Directive requiring the Regulator to withdraw a draft measure, the Regulator shall, within 6

months of the date of the decision of the European Commission, amend the draft measure, having regard to the specific proposals for amending the draft measure set out by the European Commission in its decision, or withdraw the draft measure.

- (b) Where the Regulator amends the draft measure, the Regulator shall undertake a public consultation in accordance with the procedures referred to in Regulation 12 and shall re-notify the amended draft measure to the European Commission in accordance with the procedure set out in paragraph (3).

(6) The Regulator shall take the utmost account of any comments of the European Commission, BEREC and a national regulatory authority in another Member State received in accordance with Article 7(3) of the Framework Directive and may, except in cases covered by Article 7(5)(a) of the Framework Directive and paragraph (4), adopt the resulting draft measure and, where it does so adopt the draft measure, shall communicate it to the European Commission.

(7) The Regulator shall communicate to the European Commission and BEREC all adopted final measures which fall within the scope of paragraph (3).

(8) Where the Regulator considers that there are exceptional circumstances justifying an urgent need to act in order to safeguard competition and protect the interests of users it may, by way of derogation from the procedures set out in paragraphs (3) and (4), immediately adopt proportionate measures on a provisional basis.

(9) Where the Regulator acts in accordance with paragraph (8), it shall without delay notify the measures concerned, with full reasons for their adoption, to the European Commission, BEREC and the national regulatory authorities in other Member States.

(10) A decision by the Regulator to render a measure referred to in paragraph (8) permanent or extend the time for which it is applicable is subject to paragraphs (3) and (4).

Procedure for the consistent application of remedies

14. (1) Where—

- (a) a draft measure referred to in Regulation 13(3) aims to impose, amend or withdraw an obligation on an undertaking or operator in application of Regulation 27 in conjunction with Regulation 10, Regulations 9 to 13 of the Access Regulations and Regulation 13 of the Universal Service Regulations, and
- (b) the European Commission has, within the period of one month specified in Article 7(3) of the Framework Directive, notified the Regulator that it considers that the draft measure would create a barrier to the single market or that it has serious doubts as to its compatibility with European Union law,

then the draft measure shall not be adopted for a further 3 months following the notification in subparagraph (b) from the European Commission.

(2) In the absence of a notification from the European Commission under Article 7a(1) of the Framework Directive, the Regulator may adopt the draft measure taking the utmost account of any comments made by the European Commission, BEREC or a national regulatory authority in another Member State.

(3) Within the three month period referred to in paragraph (1), the Regulator shall co-operate closely with the European Commission and BEREC to identify the most appropriate and effective measure, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

(4) Before the end of the three month period referred to in paragraph (1), the Regulator may—

(a) amend or withdraw its draft measure taking the utmost account of the notification from the European Commission referred to in paragraph (1) and the opinion and advice of BEREC issued in accordance with Articles 7a(3) and 7a(4) of the Framework Directive, or

(b) maintain its draft measure.

(5) Within one month of the European Commission issuing a recommendation in accordance with Article 7a(5)(a) of the Framework Directive or lifting its reservations in accordance with Article 7a(5)(b) of the Framework Directive, the Regulator shall communicate to the European Commission and BEREC the adopted final measure. This period may be extended where the Regulator wishes to undertake a public consultation in accordance with Regulation 12.

(6) Where the Regulator decides not to amend or withdraw the draft measure on the basis of the recommendation of the European Commission issued in accordance with Article 7a(5)(a) of the Framework Directive, the Regulator shall provide a reasoned justification.

(7) The Regulator may withdraw the proposed draft measure at any stage of the procedure set out in this Regulation.

Confidentiality of information

15. For the purpose of these Regulations the Regulator shall, subject to the Freedom of Information Acts 1997 and 2003, accept as confidential any information provided to the Regulator which is expressed to be confidential, except where the Regulator has good reason to consider otherwise.

PART 4

TASKS AND OBJECTIVES OF REGULATOR AND OBLIGATIONS ON UNDERTAKINGS

Objectives of the Regulator

16. (1) In addition to, but without prejudice to, its objectives under section 12 of the Act of 2002, the Regulator shall—

- (a) unless otherwise provided for in Regulation 17, take the utmost account of the desirability of technological neutrality in complying with the requirements of the Specific Regulations having particular regard to those designed to ensure effective competition,
- (b) in so far as the promotion of competition is concerned—
 - (i) ensure that elderly users and users with special social needs derive maximum benefit in terms of choice, price and quality, and
 - (ii) ensure that, in the transmission of content, there is no distortion or restriction of competition in the electronic communications sector,
- (c) in so far as contributing to the development of the internal market is concerned, co-operate with BEREC in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of European Union law in the field of electronic communications, and
- (d) in so far as promotion of the interests of users within the European Union is concerned—
 - (i) address the needs of specific social groups, in particular, elderly users and users with special social needs, and
 - (ii) promote the ability of end-users to access and distribute information or use applications and services of their choice.

(2) In pursuit of its objectives under paragraph (1) and under section 12 of the Act of 2002, the Regulator shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by, among other things—

- (a) promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods,
- (b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services,
- (c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure based competition,

- (d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, while ensuring that competition in the market and the principle of non-discrimination are preserved,
 - (e) taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State, and
 - (f) imposing *ex-ante* regulatory obligations only where there is no effective and sustainable competition and relaxing or lifting such obligations as soon as that condition is fulfilled.
- (3) (a) The Regulator shall, having regard to its objectives under section 12 of the Act of 2002 and its functions under the Specific Regulations, actively support the goals of BEREC of promoting greater regulatory co-ordination and coherence.
- (b) The Regulator shall take the utmost account of opinions and common positions adopted by BEREC when adopting decisions for the national market.

Management of radio frequencies for electronic communications services

17. (1) The Regulator shall, subject to any directions issued by the Minister under section 13 of the Act of 2002 and having regard to its objectives under section 12 of the Act of 2002, Regulation 16 and Article 8a of the Framework Directive, ensure—

- (a) the effective management of radio frequencies for electronic communications services,
- (b) that spectrum allocations used for electronic communications services and issuing of general authorisations or individual rights of use for such radio frequencies are based on objective, transparent, non-discriminatory and proportionate criteria, and
- (c) that harmonisation of the use of radio frequency spectrum across the European Union is promoted, consistent with the need to ensure its effective and efficient use and in pursuit of benefits for the consumer such as economies of scale and interoperability of services, having regard to all decisions and measures adopted by the European Commission in accordance with the Radio Spectrum Decision.

(2) Unless otherwise provided in paragraph (3), the Regulator shall ensure that all types of technology used for electronic communications services may be used in the radio frequency bands that are declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the Act of 2002 in accordance with European Union law.

(3) Notwithstanding paragraph (2), the Regulator may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to—

- (a) avoid harmful interference,
- (b) protect public health against electromagnetic fields,
- (c) ensure technical quality of service,
- (d) ensure maximisation of radio frequency sharing,
- (e) safeguard the efficient use of spectrum, or
- (f) ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in accordance with paragraph (6).

(4) Unless otherwise provided in paragraph (5), the Regulator shall ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in the Radio Frequency Plan published under section 35 of the Act of 2002 in accordance with European Union law.

(5) Notwithstanding paragraph (4), the Regulator may provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including where necessary, to fulfil a requirement under the International Telecommunication Union Radio Regulations.

(6) Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as defined by or on behalf of the Government or a Minister of the Government in conformity with European Union law such as, but not limited to—

- (a) safety of life,
- (b) the promotion of social, regional or territorial cohesion,
- (c) the avoidance of inefficient use of radio frequencies, or
- (d) the promotion of cultural and linguistic diversity and media pluralism, for example, by the provision of radio and television broadcasting services.

(7) The Regulator may only prohibit the provision of any other electronic communications service in a specific radio spectrum frequency band where such a prohibition is justified by the need to protect safety of life services. The Regulator may, on an exceptional basis, extend such a measure in order to fulfil other

general interest objectives as defined by or on behalf of the Government or a Minister of the Government.

(8) The Regulator shall in accordance with Regulation 18 regularly review the necessity of the restrictions referred to in paragraphs (3) and (5) and shall make the results of such reviews publicly available.

(9) Paragraphs (2) to (7) apply to spectrum allocated to be used for electronic communications services, general authorisations issued and individual rights of use for radio frequencies granted after the commencement of these Regulations. Spectrum allocations, general authorisations and individual rights of use which existed on the commencement of these Regulations shall be subject to Regulation 18.

(10) The Regulator may, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16 and its functions under the Specific Regulations, lay down rules in order to prevent spectrum hoarding, in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of rights and by withdrawing the rights of use in cases of non-compliance with the deadlines. Any rules laid down under this paragraph shall be applied in a proportionate, non-discriminatory and transparent manner.

(11) In the fulfilment of its obligations under this Regulation, the Regulator shall respect relevant international agreements including the International Telecommunication Union Radio Regulations and any public policy considerations brought to its attention by the Minister.

Review of restrictions on existing rights

18. (1) For a period of 5 years following the commencement date of these Regulations, holders of rights to use radio frequencies which were granted before that date and which will remain valid for a period of not less than 5 years after that date may submit an application to the Regulator for a reassessment of the restrictions on their rights in accordance with Regulation 17(2) to (7).

(2) Before adopting its decision in relation to an application under paragraph (1), the Regulator shall notify the applicant of its reassessment of the restrictions, indicating the extent of the right after reassessment and shall allow the applicant a reasonable time limit to withdraw the application. Where an applicant withdraws the application the right shall remain unchanged until its expiry or until the end of the five year period referred to in paragraph (1), whichever is the earlier date.

(3) On the expiration of the five year period referred to in paragraph (1), the Regulator shall take all appropriate measures to ensure that Regulation 17(2) to (7) applies to all remaining general authorisations or individual rights of use and spectrum allocations used for electronic communications services which existed on the commencement of these Regulations.

(4) In applying this Regulation, the Regulator shall take measures to promote fair competition.

(5) Measures adopted in applying this Regulation do not constitute the granting of new rights of use and therefore are not subject to the relevant provisions of Regulation 9(3) of the Authorisation Regulations.

Transfer or lease of individual rights to use radio frequencies

19. (1) Having regard to its objectives under section 12 of the Act of 2002 and Regulation 16, and its functions under these Regulations, the Regulator—

- (a) shall ensure that undertakings may transfer or lease to other undertakings, in accordance with conditions attached to the rights of use for radio frequencies and any procedures specified by the Regulator, individual rights to use radio frequencies in the bands for which this is provided for in accordance with implementing measures adopted by the European Commission under Article 9b(3) of the Framework Directive, and
- (b) may, in the case of bands which are not identified by the European Commission under Article 9b(3) of the Framework Directive, provide for undertakings to transfer or lease individual rights to use radio frequencies to other undertakings in accordance with any procedures specified by the Regulator.

(2) The Regulator shall ensure that the conditions attached to individual rights to use radio frequencies shall continue to apply after the transfer or lease, unless the Regulator specifies otherwise.

(3) Where an individual right to use radio frequencies was initially obtained by an undertaking free of charge, a determination by the Regulator that paragraph (1) shall or shall not apply will only be made with the consent of the Minister.

(4) An undertaking intending to transfer rights to use radio frequencies shall notify the Regulator of its intention to do so and of the effective transfer of the rights. The notification shall be in accordance with procedures specified by the Regulator. The Regulator shall ensure that such notifications are made public.

(5) Where radio frequency use has been harmonised through the application of the Radio Spectrum Decision or other European Union measures, a transfer of rights to use radio frequencies shall comply with such harmonised use.

Numbering, naming and addressing

20. (1) The Regulator shall, subject to ensuring the proper management of the national numbering scheme in accordance with its objectives under section 12 of the Act of 2002 and Regulation 16, grant rights of use for all national numbering resources for all publicly available electronic communications services.

(2) The Regulator shall establish objective, transparent and non-discriminatory procedures for granting rights of use for national numbering resources.

(3) The Regulator shall ensure that adequate numbers and numbering ranges are provided for all publicly available electronic communications services.

(4) An undertaking commits an offence if the undertaking assigns to locations, terminals, persons or functions on public communications networks numbers from the national numbering scheme that the Regulator has not specifically allocated to the undertaking in connection with the provision of publicly available electronic communications services.

(5) The Regulator shall, subject to ensuring the proper management of the national numbering scheme, grant rights of use for numbers and number ranges for all publicly available electronic communications services in a manner that gives fair and equitable treatment to all undertakings providing publicly available electronic communications services.

(6) The Regulator may, without prejudice to the generality of Regulation 14(1) of the Authorisation Regulations, attach conditions to rights of use for numbers—

- (a) to ensure efficient and effective management of all numbering resources, and
- (b) to ensure that an undertaking to which the right of use for a range of numbers has been granted does not discriminate against other undertakings as regards the number sequences used to give access to its services.

(7) The Regulator shall, subject only to limitations which may be specified by the Minister on the grounds of national security, from time to time publish the details of the national numbering scheme and significant subsequent additions or amendments to it.

(8) The Regulator shall, in so far as is practicable, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16 and to its functions under the Specific Regulations, support the harmonisation of specific numbers or numbering ranges within the European Union where it promotes both the functioning of the internal market and the development of pan-European services.

Co-location and sharing of network elements and associated facilities for providers of electronic communications networks

21. (1) The Regulator may require the holders of rights (including, without limitation, rights under section 254 (1) of the Act of 2000 or section 53 of the Act of 2002) to install facilities on, over or under public or private property to enter into negotiations with other physical infrastructure providers for sharing of physical infrastructure where the Regulator considers that it is necessary to do so in order to—

- (a) protect the environment,
- (b) protect public health,

(c) protect public security, or

(d) meet town and country planning objectives.

(2) Where the Regulator considers that it is justifiable on the grounds that duplication of infrastructure would be economically inefficient or physically impracticable, the Regulator may require the holders of rights mentioned in paragraph (1) to install facilities on, over or under public or private property to enter into negotiations with other physical infrastructure providers in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside the building.

(3) For the purpose of negotiations to be entered into in accordance with paragraphs (1) and (2), the Regulator may specify a reasonable period by which such negotiations shall be concluded.

(4) The negotiations referred to in paragraphs (1) and (2) shall be subject to an appropriate period of public consultation as may be specified by the Regulator during which all interested parties shall be given an opportunity to express their views.

(5) In the event that agreement cannot be reached within the time period specified by the Regulator on the negotiations referred to in paragraphs (1) and (2), the Regulator shall make a decision on the sharing of the physical infrastructure concerned in accordance with the procedures set out in section 57 the Act of 2002.

(6) Any measure or decision taken by the Regulator in accordance with this Regulation or section 57 of the Act of 2002 shall be objective, transparent, non-discriminatory and take full account of the principle of proportionality.

(7) For the purpose of this Regulation, “physical infrastructure” has the meaning assigned to it by section 52 of the Act of 2002.

Accounting separation and financial reports

22. (1) An undertaking providing a public communications network or a publicly available electronic communications service that is also engaged in an activity other than the provision of such network or service on the basis of special or exclusive rights for the provision of that activity, whether in the State or in another Member State, shall—

(a) keep separate accounts audited in accordance with generally accepted auditing practices for the activities associated with the provision of that network or service, to the extent that would be required if those activities were carried out by one or more legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, related to its activities associated with the provision of electronic communications networks or services including an itemised breakdown of fixed asset and structural costs, or

- (b) have structural separation for the activities associated with the provision of electronic communications networks or services.

(2) Where an undertaking providing a public communications network or a publicly available electronic communications service is not subject to the Companies Acts and does not satisfy the small and medium sized enterprise criteria of European Union law accounting rules, it shall ensure that—

- (a) annual accounts are drawn up, submitted to independent audit and published, and
- (b) such audit is carried out in accordance with generally accepted auditing practices.

(3) An undertaking that fails to comply with the requirements of paragraph (1) or (2) commits an offence.

Security and integrity

23. (1) Undertakings providing public communications networks or publicly available electronic communications services shall take appropriate technical and organisational measures to appropriately manage the risks posed to security of networks and services. In particular, measures shall be taken to prevent and minimise the impact of security incidents on users and interconnected networks.

(2) The technical and organisational measures referred to in paragraph (1) shall, having regard to the state of the art, ensure a level of security appropriate to the risk presented.

(3) Undertakings providing public communications networks shall take all appropriate steps to guarantee the integrity of their networks, thereby ensuring the continuity of supply of services provided over those networks.

(4) (a) An undertaking providing public communications networks or publicly available electronic communications services shall notify the Regulator in the event of a breach of security or loss of integrity that has a significant impact on the operation of networks or services.

(b) Where the Regulator receives a notification under subparagraph (a), it shall inform the Minister of the said notification and, with the agreement of the Minister, it shall also, where appropriate, inform the national regulatory authorities in other Member States and ENISA.

(c) Where it is considered that it is in the public interest to do so the Regulator, with the agreement of the Minister, may inform the public in relation to the breach notified under subparagraph (a) or require the undertaking to inform the public accordingly.

(5) The Regulator shall annually submit a summary report to the Minister, the European Commission and EINSAs on the notifications received and the actions taken in accordance with paragraph (4).

(6) An undertaking that fails to comply with the requirements of paragraph (4)(a) or (c) commits an offence.

Implementation and enforcement

24. (1) For the purpose of ensuring compliance with Regulation 23 (1), (2) and (3), the Regulator may issue directions to an undertaking providing public communications networks or publicly available electronic communications services, including directions in relation to time limits for implementation.

(2) The Regulator may require an undertaking providing public communications networks or publicly available electronic communications services to—

(a) provide information needed to assess the security or integrity of their services and networks, including documented security policies, and

(b) submit to a security audit to be carried out by a qualified independent body nominated by the Regulator and make the results of the audit available to the Regulator and the Minister. The cost of the audit is to be borne by the undertaking.

(3) An undertaking in receipt of a direction under paragraph (1) shall comply with the direction.

(4) An undertaking that fails to comply with a direction under paragraph (1) or a requirement under paragraph (2) commits an offence.

Undertakings with significant market power

25. (1) A reference in the Specific Regulations to an undertaking with significant market power is a reference to an undertaking designated as such by the Regulator under Regulation 27(4) where the Regulator is satisfied that, in relation to any relevant market, such undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers and, ultimately, consumers.

(2) The Regulator shall, when assessing whether an undertaking has significant market power or whether two or more undertakings are in a joint dominant position in a relevant market, act in accordance with European Union law and take the utmost account of guidelines on market analysis and the assessment of significant market power published by the European Commission pursuant to Article 15(2) of the Framework Directive and, in addition, in the case of an assessment of whether two or more undertakings are in a joint dominant position, the criteria set out in the Schedule to these Regulations.

(3) (a) Where an undertaking has significant market power on a relevant market (the first market) it may also be designated as having significant market power on a closely related market (the second market) where the links between those two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking.

- (b) Remedies aimed at preventing the leverage referred to in subparagraph (a) may be applied in the second market under Regulations 9, 10, 11 and 13 of the Access Regulations and where such remedies prove to be insufficient, remedies under Regulation 13 of the Universal Service Regulations may be imposed.

Procedure for the identification and definition of markets

26. (1) The Regulator shall, taking the utmost account of the Recommendation and guidelines referred to Article 15(1) and (2) of the Framework Directive, for the purposes of the Specific Regulations define relevant markets appropriate to national circumstances, in particular the relevant geographic markets within the State, in accordance with the principles of competition law.

(2) The Regulator shall follow the procedures referred to in Regulations 12 and 13 before defining markets that differ from those identified in the Recommendation referred to in Article 15(1) of the Framework Directive.

Market analysis procedure

27. (1) The Regulator shall carry out an analysis of the relevant markets in accordance, where appropriate, with an agreement with the Competition Authority under section 34 or 47G (inserted by section 31 of the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007)) of the Competition Act 2002 (No. 14 of 2002) and taking account of the markets identified in the Recommendation referred to in Article 15(1) of the Framework Directive and taking the utmost account of the guidelines referred to in Article 15(2) of that Directive.

(2) Where the Regulator is required under paragraph (3) or (4), Regulation 13 of the Universal Service Regulations or Regulation 8 of the Access Regulations to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph (1) whether a relevant market is effectively competitive.

(3) Where the Regulator concludes that a relevant market is effectively competitive, it shall not impose or maintain any of the obligations referred to in paragraph (2). In cases where an undertaking had previously been designated as having significant market power in such market and such obligations already exist, the Regulator shall, after giving reasonable notice to any parties which it considers to be affected by such withdrawal, withdraw such obligation from the undertaking concerned.

(4) Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings which individually or jointly have a significant market power on that market and it shall impose on such undertakings appropriate specific regulatory obligations referred to in paragraph (2) or maintain or amend such obligations where they already exist.

(5) In the case of transnational markets identified in a Decision referred to in Article 15(4) of the Framework Directive, the Regulator and any other relevant national regulatory authority concerned shall jointly conduct the market analysis

taking the utmost account of the guidelines referred to in Article 15(2) of the Framework Directive and, in a concerted fashion, decide on any imposition, maintenance, amendment or withdrawal of obligations referred to in paragraph (2).

(6) Measures taken in accordance with paragraphs (3) and (4) shall be subject to the procedures referred to in Regulations 12 and 13. The Regulator shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Regulation 13—

- (a) within 3 years from the adoption of a previous measure relating to that market. This period may exceptionally be extended for up to three additional years where the Regulator has notified a reasoned proposed extension to the European Commission and the European Commission has not objected within one month of the notified extension, or
- (b) within 2 years from the adoption of a revised Recommendation in accordance with Article 15(1) of the Framework Directive on relevant markets, for markets not previously notified to the European Commission.

(7) Where the Regulator has not completed its analysis of a relevant market identified in the Recommendation referred to in Article 15(1) of the Framework Directive within the time limit laid down in paragraph (6), it may request the assistance of BEREC in completing the analysis of the specific market and the specific obligations to be imposed. With this assistance, the Regulator shall within 6 months notify the draft measure to the European Commission in accordance with Regulation 13.

Standardisation

28. (1) The Regulator shall, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16 and its functions under the Specific Regulations, encourage the use of the standards or specifications drawn up and published by the European Commission in accordance with Article 17(1) of the Framework Directive for the provision of any or all of the following—

- (a) services,
- (b) technical interfaces, or
- (c) network functions,

to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users.

(2) As long as standards or specifications have not been published by the European Commission in accordance with Article 17(1) of the Framework Directive, the Regulator shall encourage the implementation of standards or specifications adopted by the European Standards Organisations.

(3) In the absence of such standards or specifications, the Regulator shall encourage the implementation of international standards or recommendations adopted by the ITU, CEPT, the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC).

(4) This Regulation does not apply in respect of any of the essential requirements, interface specifications or harmonised standards to which Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999¹⁴ applies.

Interoperability of digital interactive television services

29. (1) The Regulator shall, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16 and its functions under the Specific Regulations, encourage—

- (a) providers of digital interactive television services for distribution to the public in the European Union on digital interactive television platforms, regardless of the transmission mode, to use an open application program interface,
- (b) providers of all enhanced digital television equipment deployed for the reception of digital interactive television services on interactive digital television platforms to comply with an open application program interface in accordance with the minimum requirements of the relevant standards or specifications, and
- (c) providers of digital television services and equipment to co-operate in the provision of interoperable television services for disabled end-users.

(2) Without prejudice to Regulation 6(2)(c) of the Access Regulations, the Regulator shall, having regard to its objectives under section 12 of the Act of 2002 and Regulation 16 and its functions under the Specific Regulations, encourage proprietors of application program interfaces to make available on fair, reasonable and non-discriminatory terms, and against appropriate remuneration, all such information as is necessary to enable providers of digital interactive television services to provide all services supported by the application program interface in a fully functional form.

Harmonisation procedures

30. (1) The Regulator shall, in carrying out its tasks under the Specific Regulations, the Framework Directive and the Specific Directives, take the utmost account of any recommendations to which Article 19 of the Framework Directive refers.

(2) Where the Regulator chooses not to follow any such recommendation, it shall so inform the Minister and the European Commission giving the reasons for its position.

¹⁴OJ No. L 91, 07.04.1999, p. 10

Dispute resolution between undertakings

31. (1) This Regulation applies to disputes—
- (a) arising between undertakings providing electronic communications networks or services in the State, in connection with existing obligations under the Framework Directive, the Specific Directives or the Specific Regulations, or
 - (b) between such undertakings and other undertakings benefiting from obligations of access or interconnection arising under the Framework Directive, the Specific Directives or the Specific Regulations.
- (2) In the event of a dispute referred to in paragraph (1), the Regulator shall, subject to paragraph (4), at the request of either party, initiate an investigation of the dispute and as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination aimed at ensuring compliance with the obligations of the Framework Directive, the Specific Directives and the Specific Regulations to resolve the dispute.
- (3) The Regulator shall publish its dispute resolution procedures and shall ensure that all investigations and determinations are handled in accordance with those procedures.
- (4) The Regulator may decide not to initiate an investigation referred to in paragraph (2) where it is satisfied that other means of resolving the dispute in a timely manner are available to the parties or if legal proceedings in relation to the dispute have been initiated by either party.
- (5) Where the Regulator decides, under paragraph (4), not to initiate an investigation it shall inform the parties of such decision as soon as possible thereafter and the notification shall include the reasons for its decision.
- (6) If after the expiry of 4 months from the date of a decision referred to in paragraph (4) the dispute is not resolved and legal proceedings by either party in relation to the dispute are not in progress, the Regulator shall at the request of either party initiate an investigation and make a determination in accordance with paragraph (2).
- (7) In making a determination under this Regulation the Regulator shall have regard to its objectives under section 12 of the Act of 2002 and Regulation 16.
- (8) An undertaking to which a determination under this Regulation applies shall comply with the determination applicable to it.
- (9) An undertaking that—
- (a) fails to co-operate with an investigation under this Regulation, or
 - (b) fails to comply with a determination made under this Regulation,

commits an offence.

(10) In proceedings for an offence under paragraph (9) it is a defence to establish that—

- (a) reasonable steps were taken to co-operate with the relevant investigation or to comply with the determination, or
- (b) it was not possible to co-operate with the relevant investigation or to comply with that determination.

(11) Any obligations imposed on an undertaking by the Regulator in resolving a dispute shall respect the Framework Directive, the Specific Directives, the Specific Regulations and the relevant provisions of the Act of 2002.

(12) The Regulator shall publish a notice of a determination under this Regulation and the notice shall indicate where copies of, or information regarding, the determination may be obtained.

(13) The procedure referred to in this Regulation does not preclude either party from bringing an action before the courts and is without prejudice to the right to bring an appeal under Regulation 4.

Resolution of cross-border disputes

32. (1) In the event of a dispute arising under the Specific Regulations, the Framework Directive or the Specific Directives between parties in different Member States and where the dispute lies within the competence of the Regulator and a national regulatory authority from another Member State, paragraphs (2) to (8) apply.

(2) Any party may refer such a dispute to the Regulator or to the other national regulatory authority concerned. The Regulator shall co-ordinate its efforts with the other national regulatory authority concerned and may consult BEREC in order to bring about a consistent resolution of the dispute in accordance with the objectives set out in Article 8 of the Framework Directive.

(3) Any obligations imposed by the Regulator and by the other national regulatory authority concerned on undertakings as part of the resolution of a dispute shall comply with the provisions of the Framework Directive and the provisions of the Specific Directives. Where the Regulator makes a determination for the purpose of resolving a dispute under this Regulation, paragraphs (7) to (12) of Regulation 31 apply.

(4) The Regulator may request BEREC to adopt an opinion as to the action to be taken in accordance with the Framework Directive or the Specific Directives to resolve the dispute.

(5) Where a request is made to BEREC under paragraph (4), the Regulator shall await the opinion of BEREC before taking action to resolve the dispute. This shall not preclude the Regulator from taking urgent measures where necessary.

(6) Any obligations imposed on an undertaking by the Regulator in resolving a dispute shall respect the Specific Regulations, the Framework Directive or the Specific Directives and take the utmost account of the opinion adopted by BEREC.

(7) The Regulator may enter into arrangements with the other national regulatory authority concerned whereby they may jointly decline to resolve a dispute where other mechanisms, including mediation, exist and would better contribute to the resolution of the dispute in a timely matter in accordance with Article 8 of the Framework Directive.

(8) The arrangements referred to in paragraph (7) shall include provision for the Regulator and the other national regulatory authority concerned to inform the parties without delay where it has been agreed to jointly decline to resolve the dispute. If, after the expiry of 4 months from the parties being so informed—

- (a) the dispute has not been resolved,
- (b) the dispute has not been brought before the courts by the party seeking redress, and
- (c) if either party requests it,

the Regulator shall co-ordinate its efforts with the other national regulatory authority concerned in order to resolve the dispute, in accordance with Article 8 of the Framework Directive and taking the utmost account of the opinion adopted by BEREC.

(9) The procedure referred to in paragraph (2) does not preclude either party from bringing an action before the courts.

Prosecution of offences

33. (1) If—

- (a) the Regulator has made an application under Regulation 37 to the High Court to secure an undertaking's compliance with an obligation, requirement, determination or direction imposed by or under these Regulations, and
- (b) a provision of these Regulations makes it an offence to fail to comply with the obligation, requirement, determination or direction,

the Regulator may not bring proceedings against the undertaking for such an offence or give notice under section 44 of the Act of 2002 for failure to comply with the obligation, requirement, determination or direction.

(2) An offence under these Regulations is an offence to which section 44 of the Act of 2002 applies.

Offences by bodies corporate

34. (1) If—

- (a) an offence under these Regulations is committed by a body corporate, and
- (b) the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a person who is a director, manager or secretary or other similar officer of the body corporate, or is a person who was purporting to act in any such capacity,

that person as well as the body corporate commits an offence and is liable to be proceeded against and punished as if that person had committed the first-mentioned offence.

(2) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and omissions of a member of the body in connection with the member's functions of management as if the member were a director or manager of it.

(3) A person may be proceeded against for an offence under paragraph (1) whether or not the body corporate has been proceeded against or been convicted of the offence committed by the body.

Penalties

35. (1) An undertaking that commits an offence under these Regulations (other than under Regulation 10(5), 20(4), 22(3), 23(6) or 24(4)) is liable on summary conviction to a class A fine.

(2) An undertaking that commits an offence under Regulation 10(5), 20(4), 22(3), 23(6) or 24(4) is liable, on summary conviction to a class A fine or, on conviction on indictment—

- (a) in the case of a body corporate, to a fine not exceeding €500,000, or
- (b) in the case of a natural person, to a fine not exceeding €50,000.

Directions

36. The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an undertaking to do or refrain from doing anything which the Regulator specifies in the direction.

Enforcement and compliance requirements

37. (1) Where the Regulator finds that an undertaking has not complied with an obligation, requirement, determination or direction under these Regulations, the Regulator shall notify the undertaking of those findings and give the undertaking an opportunity to state its views or, if the non-compliance can be remedied, to remedy the non-compliance within a reasonable time limit as specified by the Regulator.

(2) The Regulator may publish, in such manner as it thinks fit, any notification given by it under this Regulation subject to the protection of the confidentiality of any information which the Regulator considers confidential.

(3) The Regulator may amend or revoke any notification under this Regulation.

(4) Where, at the end of the period specified by the Regulator under paragraph (1), the Regulator is of the opinion that the undertaking concerned has not complied with the obligation, requirement, determination or direction, the Regulator may, whether or not the non-compliance is continuing, subject to paragraph (9), apply to the High Court for such order as the Regulator considers appropriate including—

- (a) a declaration of non-compliance,
- (b) an order directing compliance with the obligation, requirement, determination or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement, determination or direction, or
- (d) an order as provided for in paragraph (8).

(5) The High Court may, on the hearing of the application referred to in paragraph (4), make such order as it thinks fit which may include—

- (a) a declaration of non-compliance,
- (b) an order directing compliance with the obligation, requirement, determination or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement, determination or direction, or
- (d) an order as provided for in paragraph (8),

or refuse the application.

An order of the High Court compelling compliance may stipulate that the obligation, requirement, determination or direction must be complied with immediately or may specify a reasonable time limit for compliance and may also stipulate appropriate and proportionate measures aimed at ensuring compliance.

(6) The High Court when dealing with an application under paragraph (4) may make such interim or interlocutory order as it considers appropriate.

(7) The High Court shall not deny any interim or interlocutory relief, referred to in paragraph (6), solely on the basis that the Regulator may not suffer any damage if such relief were not granted pending conclusion of the action.

- (8) (a) An application for an order under paragraph (4) may be for, or include an application for, an order to pay to the Regulator such amount, by way of financial penalty, which may include penalties having effect for periods of non-compliance with the obligation, requirement, determination or direction, as the Regulator may propose as appropriate in the light of the non-compliance or any continuing non-compliance. Such an application for an order in respect of a financial penalty for a period of non-compliance may be made even if there since has been compliance with the obligation, requirement, determination or direction.
- (b) In deciding on such an application, the High Court shall decide the amount, if any, of the financial penalty which should be payable and shall not be bound by the amount proposed by the Regulator.
- (c) Any financial penalty ordered by the High Court to be paid by an undertaking under this paragraph shall be paid to and retained by the Regulator as income.
- (d) In deciding what amount, if any, should be payable, the High Court shall consider the circumstances of the non-compliance, including—
- (i) its duration,
 - (ii) the effect on consumers, users and other operators,
 - (iii) the submissions of the Regulator on the appropriate amount, and
 - (iv) any excuse or explanation for the non-compliance.
- (9) Where the Regulator has brought proceedings for an offence under these Regulations or given a notice under section 44 of the Act of 2002 in respect of an alleged offence under these Regulations, the Regulator shall not make an application for an order under this Regulation to the High Court to compel compliance by the undertaking with the obligation, requirement, determination or direction to which the proceedings or notice relates.

Service of determinations, directions and notifications

38. (1) Where the Regulator issues a determination, direction or notification under these Regulations, it shall be in writing, state the reasons on which it is based and be addressed to the undertaking concerned, and as soon as practicable, be sent or given in any of the following ways—

- (a) by delivering it to the undertaking,
- (b) by leaving it at the address at which the undertaking ordinarily carries on business,
- (c) by sending it by pre-paid registered post addressed to the undertaking at the address at which the undertaking ordinarily carries on business,

- (d) if an address for the service of determinations, directions or notifications has been furnished by the undertaking to the Regulator, by leaving it at, or sending it by pre-paid registered post to, that address, or
- (e) in any case where the Regulator considers that the immediate giving of the determination, direction or notification is required, by sending it, by means of a facsimile machine or by electronic mail, to a device or facility for the reception of facsimiles or electronic mail located at the address at which the undertaking ordinarily carries on business or, if an address for the service of notices has been furnished by the undertaking, that address, but only if—
 - (i) the sender's facsimile machine generates a message confirming successful delivery of the total number of pages of the determination, direction or notification, or
 - (ii) the recipient's facility for the reception of electronic mail generates a message confirming receipt of the electronic mail,

and it is also given in one of the other ways mentioned in subparagraphs (a) to (d).

(2) In paragraph (1), a company within the meaning of the Companies Acts is deemed to be ordinarily resident at its registered office and every other body corporate and every unincorporated body of persons shall be deemed to be ordinarily resident at its principal office or place of business.

PART 5

AMENDMENT TO THE ACT OF 2002, TRANSITIONAL ARRANGEMENTS AND REPEALS AND REVOCATIONS

Amendment of the Act of 2002

39. Section 52 of the Act of 2002 is amended by substituting for the definition of “physical infrastructure” the following:

“ ‘physical infrastructure’ means infrastructure which is capable of supporting electronic communications infrastructure including buildings, entries to buildings, wiring both inside and outside buildings, masts, antenna, poles, towers and other supporting constructions, ducts, conduits, manholes, cabinets and rights of way over land but does not include electronic communications infrastructure;”.

Transitional arrangements

40. (1) A measure that was in force under the Regulations of 2003 immediately before the commencement of these Regulations shall continue in force as if it was made under these Regulations.

(2) For the purpose of this Regulation, “measure” means a decision, designation, determination, direction, notice, notification (other than a notification under Regulation 35(1) of the Regulations of 2003), requirement, specification or other act of an equivalent effect made by the Regulator.

(3) Notwithstanding the revocation of the Regulations of 2003, notifications by the Regulator on a person under Regulation 35(1) of those Regulations—

(a) continue in force, and

(b) may continue to be issued, revoked or amended,

as if the Regulations of 2003 had not been revoked.

Revocations

41. (1) Subparagraph (iii) of paragraph (a) and subparagraph (iii) of paragraph (b) of section 12(2) of the Act of 2002 are repealed.

(2) The following Regulations are revoked:

(a) the Regulations of 2003;

(b) the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (Amendment) Regulations 2006 (S.I. No. 210 of 2006); and

(c) the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007).

SCHEDULE

CRITERIA TO BE USED BY REGULATOR IN MAKING AN
ASSESSMENT OF JOINT DOMINANCE IN ACCORDANCE WITH
REGULATION 25(2)

Regulation 25

Two or more undertakings can be found to be in a joint dominant position within the meaning of Regulation 25 if, even in the absence of structural or other links between them, they operate in a market which is characterised by a lack of effective competition and in which no single undertaking has significant market power. In accordance with the applicable European Union law and with the case law of the Court of Justice of the European Union on joint dominance, this is likely to be the case where the market is concentrated and exhibits a number of appropriate characteristics of which the following may be the most relevant in the context of electronic communications:

- low elasticity of demand;
- similar market shares;
- high legal or economic barriers to entry;
- vertical integration with collective refusal to supply;
- lack of countervailing buyer power;
- lack of potential competition.

The above is not an indicative list and is not exhaustive, nor are the criteria cumulative. Rather, the list is intended to illustrate only the type of evidence that could be used to support assertions concerning the existence of joint dominance.



GIVEN under my Official Seal,
1 July 2011.

PAT RABBITTE,
Minister for Communications, Energy and Natural Resources.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation)

The purpose of these Regulations is to give effect to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications and services (Framework Directive), and the amendments to that Directive as introduced by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

As well as transposing the amendments made by Directive 2009/140/EC, these Regulations consolidate the provisions of the existing Statutory Instruments transposing the Framework Directive, namely, the “European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003)”, the “European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (Amendment) Regulations 2006 (S.I. No. 210 of 2006)” and the “European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007)”, which have been revoked by these Regulations.

These Regulations establish a framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services.

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
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TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,
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AONAD 20 PÁIRC MIONDÍOLA COIS LOCHA, CLÁR CHLAINNE MHUIRIS,
CONTAE MHAIGH EO,
(Teil: 01 - 6476834 nó 1890 213434; Fax: 094 - 9378964 nó 01 - 6476843)
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