



STATUTORY INSTRUMENTS.

S.I. No. 334 of 2011

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

(Prn. A11/1163)

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

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S.I. No. 334 of 2011

EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (ACCESS) 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 2002/19/EC of the European Parliament and of the Council of 7 March 2002¹ as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009², hereby make the following regulations:

Citation

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

Interpretation

2. (1) For the purpose of these Regulations the definitions set out in Regulation 2(1) of the Framework Regulations apply.

(2) In these Regulations—

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

“Act of 2009” means Broadcasting Act 2009 (No. 18 of 2009);

“access” means the making available of facilities or services to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services. Among other things, it covers—

- (a) access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop),
- (b) access to physical infrastructure including buildings, ducts and masts,
- (c) access to relevant software systems including operational support systems,
- (d) access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing,

¹OJ L 108, 24.4.2002, p. 7

²OJ L 337, 18.12.2009, p. 37

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

- (e) access to number translation or systems offering equivalent functionality,
- (f) access to fixed and mobile networks, in particular for roaming, and
- (g) access to conditional access systems for digital television services and access to virtual network services;

“Framework Regulations” means European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“interconnection” means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

“local loop” means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in the fixed public electronic communications network;

“Regulations of 2003” means European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003);

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

“wide-screen television service” means a television service that consists wholly or partially of programmes produced and edited to be displayed in a full height wide-screen format. The 16:9 format is the reference format for wide-screen television services.

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

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

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

Confidentiality of information

3. 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.

General framework for access and interconnection

4. (1) Subject to these Regulations, an undertaking, whether established in the State or in another Member State, may negotiate with any other such undertaking an agreement on technical and commercial arrangements for access or interconnection in the State in accordance with European Union law for the purpose of the provision of electronic communications services.

(2) An undertaking requesting access or interconnection in the State does not need to be authorised to operate in the State if it is not providing services and does not operate a network in the State.

(3) The Regulator shall not maintain or impose administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services or to impose obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions specified in the Schedule to the Authorisation Regulations.

Rights and obligations for access and interconnection

5. (1) An operator has the right to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services in order to ensure provision and interoperability of services throughout the European Union.

(2) An operator shall negotiate interconnection for the purpose of providing publicly available electronic communications services when requested to do so by another undertaking, authorised in accordance with Regulation 4 of the Authorisation Regulations, in order to ensure provision and interoperability of services throughout the European Union.

(3) An operator shall offer access and interconnection to other undertakings on terms and conditions consistent with any obligations imposed by the Regulator under Regulations 6, 7 and 8.

(4) An operator of a public electronic communications network established for the distribution of digital television services shall ensure that the network is capable of distributing wide-screen television services and programmes.

(5) If an operator to which paragraph (4) relates receives and redistributes wide-screen television services or programmes, the operator—

(a) shall not alter a signal that it receives in wide-screen format, and

(b) shall ensure that the signal is redistributed in the same format.

(6) Without prejudice to Regulation 18 of the Authorisation Regulations, an undertaking that acquires information from another undertaking before, during or after the process of negotiating access or interconnection arrangements shall not use that information for a purpose other than that for which it was supplied and shall respect at all times the confidentiality of information transmitted or stored.

(7) An undertaking shall not pass any information referred to in paragraph (6) on to any other party, in particular, other departments, subsidiaries or partners of the undertaking for whom such information could provide a competitive advantage.

(8) An operator that—

(a) fails to comply with the requirements of paragraph (2), (3), (4) or (5)(b), or

(b) contravenes the requirements of paragraph (5)(a),

commits an offence.

(9) An undertaking that contravenes the requirements of paragraph (6) or (7) commits an offence.

(10) In proceedings for an offence under paragraph (8)(a) 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.

Functions of the Regulator with regard to access and interconnection

6. (1) The Regulator shall, acting in pursuit of its objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and the interoperability of services in such a way as to—

(a) promote efficiency,

(b) promote sustainable competition,

(c) promote efficient investment and innovation, and

(d) give the maximum benefit to end-users.

(2) Without prejudice to any measures that may be taken in accordance with Regulation 8 in respect of undertakings with significant market power, the Regulator may—

- (a) to the extent that is necessary to ensure end-to-end connectivity, impose obligations on undertakings that control access to end-users including, in justified cases, the obligation to interconnect their networks where this is not already the case,
- (b) in justified cases and to the extent that is necessary, impose obligations on undertakings that control access to end-users to make their services interoperable, and
- (c) after consultation with the Broadcasting Authority of Ireland, impose obligations set out in Regulation 7, to the extent that it is necessary to ensure accessibility for end-users to such digital radio and television broadcasting services as may be specified by the Broadcasting Authority of Ireland, on operators to provide access to application program interfaces (APIs) and electronic programme guides (EPGs) on fair, reasonable and non-discriminatory terms.

(3) Any obligations imposed by the Regulator under paragraphs (1) and (2) shall be objective, transparent, proportionate and non-discriminatory and shall be applied in accordance with Regulations 12, 13 and 14 of the Framework Regulations.

(4) With regard to access and interconnection referred to in paragraphs (1) and (2) the Regulator may exercise its powers under the Specific Regulations on its own initiative where justified in order to secure the policy objectives and regulatory principles set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, in accordance with these Regulations and the procedures referred to in Regulations 12, 13, 31 and 32 of the Framework Regulations.

Conditional access systems and other facilities

7. (1) An operator of a system for conditional access to digital television and radio services broadcast to viewers and listeners in the European Union by any means of transmission shall ensure that the system has the necessary technical capability for cost-effective transcontrol at redistribution system head-ends allowing the possibility for full control by operators of redistribution systems at local or regional level of the services using any such conditional access system.

(2) An operator of conditional access services, irrespective of the means of transmission, who produces or markets access services to digital television and radio services and upon whose access services broadcasters depend to reach any group of potential viewers or listeners shall—

- (a) offer to all broadcasters on a fair, reasonable and non-discriminatory basis, compatible with European Union competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operator, and
- (b) keep separate financial accounts regarding his or her activity as a provider of such a service.

(3) A holder of industrial property rights to conditional access products and systems shall when granting a licence to a manufacturer of consumer equipment in respect of those products or systems ensure that this is done on fair, reasonable and non-discriminatory terms.

(4) Without prejudice to the generality of paragraph (3), taking into account technical and commercial factors, a holder of such rights as are referred to in paragraph (3) shall not subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of—

(a) a common interface allowing connection with several other conditional access systems, or

(b) means specific to another conditional access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he or she is concerned, the security of transactions of conditional access system operators.

(5) Each duty referred to in paragraphs (3) and (4) is a duty owed to any person who may be affected by a breach of it and without prejudice to any other cause of action which may arise from the duty—

(a) any breach of such duty which causes that person to sustain loss or damage is actionable in tort, and

(b) any condition included in a licence in contravention of the duty referred to in paragraph (4) is void.

(6) In paragraph (1), “redistribution” in relation to television or radio signals means the retransmission or relaying of those signals and “redistribute” shall be construed accordingly.

(7) The Regulator may, if it considers it appropriate to do so, review any conditions applied in accordance with paragraphs (1) to (4) by carrying out a market analysis, in accordance with Regulation 27 of the Framework Regulations, in cooperation, where appropriate, with the Competition Authority in accordance with an agreement under section 34 or 47G of the Competition Act 2002 and taking the utmost account of the guidelines referred to in Article 15(2) of the Framework Directive, to determine whether to maintain, amend or withdraw any such conditions.

(8) Where, as a result of any such market analysis, the Regulator determines that one or more operators do not have significant market power on the relevant market, the Regulator may amend or withdraw the conditions with respect to those operators in accordance with the procedures referred to in Regulations 12 and 13 of the Framework Regulations but only to the extent that—

(a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services, specified in accordance with the Act of 2009, would not be adversely affected by such amendment or withdrawal, and

(b) the prospects for effective competition in the markets for—

- (i) retail digital television and radio broadcasting services, and
- (ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

(9) The Regulator shall give such notice as it considers reasonable to any party affected by any such amendment or withdrawal of conditions.

(10) Nothing in this Regulation, Regulation 4(3) or Regulation 6 shall prejudice the application of section 74 of the Act of 2009.

(11) An operator of a system referred to in paragraph (1) that fails to comply with the requirements of that paragraph commits an offence.

(12) An operator of conditional access services that fails to comply with the requirements of paragraph (2) commits an offence.

(13) A holder of industrial property rights to conditional access products and systems who—

- (a) fails to comply with the requirements of paragraph (3), or
- (b) contravenes the requirements of paragraph (4),

commits an offence.

Imposition, amendment or withdrawal of obligations

8. (1) Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 9 to 13 as the Regulator considers appropriate.

(2) The Regulator may impose on an operator such of the obligations set out in Regulations 9 to 13 as the Regulator considers appropriate in order to ensure that the State can comply with any international agreement to which the State and the European Union are parties.

(3) Without prejudice to—

- (a) paragraphs (1) and (2) of Regulation 6,
- (b) Regulation 7,
- (c) Part 5 of the Act of 2002 and Regulations 21 and 22 of the Framework Regulations,

- (d) condition 7 in Part B of the Schedule to the Authorisation Regulations as applied by virtue of Regulation 10(1) of the Authorisation Regulations,
- (e) Regulations 21, 23 and 25 of the Universal Service Regulations,
- (f) the relevant provisions of the Privacy and Electronic Communications Regulations containing obligations on undertakings other than those designated as having significant market power, or
- (g) the need to comply with a commitment in any international agreement referred to in paragraph (2),

the Regulator shall not impose the obligations set out in Regulations 9 to 13 on operators that have not been designated in accordance with paragraph (1).

(4) In relation to paragraph (2), the Regulator shall notify any decision to impose, amend or withdraw obligations on operators to the European Commission in accordance with Regulation 13 of the Framework Regulations.

(5) Where, in exceptional circumstances, the Regulator intends to impose on operators with significant market power obligations for access or interconnection other than those set out in Regulations 9 to 13, the Regulator shall submit to the European Commission a request for permission to impose such other obligations. The Regulator shall not impose such other obligations pending the decision of the European Commission in accordance with Article 8(3) of the Access Directive to authorise or prevent the Regulator from taking such measures.

(6) Any obligations imposed in accordance with this Regulation shall—

- (a) be based on the nature of the problem identified,
- (b) be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and
- (c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.

Transparency

9. (1) The Regulator may in accordance with Regulation 8 impose on an operator obligations to ensure transparency in relation to access or interconnection requiring such operator to make public specified information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to or use of services and applications where such conditions are permitted by law.

(2) The Regulator may, in particular where obligations under Regulation 10 are imposed on an operator, require such operator to publish a reference offer

that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested and such offer shall include—

- (a) a description of the relevant offerings broken down into components according to market needs, and
- (b) a description of the associated terms and conditions including prices.

(3) The Regulator may issue directions requiring an operator to which this Regulation applies to make changes to a reference offer to give effect to obligations imposed under these Regulations and to publish the reference offer with such changes.

(4) The Regulator may specify in an obligation referred to in paragraph (1) or (2) or in a direction referred to in paragraph (3) the precise information to be made available, the level of detail required and the manner of publication.

(5) Notwithstanding paragraph (4) where an operator has obligations under Regulation 12 concerning wholesale network infrastructure access, the Regulator shall require such operator to publish a reference offer containing at least the elements set out in the Schedule to these Regulations.

(6) An operator that fails to comply with—

- (a) an obligation imposed under paragraph (1),
- (b) a requirement imposed under paragraph (2) or (5), or
- (c) a direction issued under paragraph (3),

commits an offence.

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

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

Non-discrimination

10. (1) The Regulator may in accordance with Regulation 8 impose on an operator obligations of non-discrimination in relation to access or inter-connection.

(2) Any obligations referred to in paragraph (1) shall ensure, in particular, that the operator—

- (a) applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and

(b) provides services and information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

(3) An operator that fails to comply with an obligation imposed under paragraph (1) commits an offence.

(4) In proceedings for an offence under paragraph (3) it is a defence to establish that—

(a) reasonable steps were taken to comply with the relevant obligation, or

(b) it was not possible to comply with the relevant obligation.

Accounting separation

11. (1) The Regulator may in accordance with Regulation 8 impose on an operator obligations for accounting separation in relation to specified activities related to access or interconnection.

(2) Without prejudice to the generality of paragraph (1), the Regulator may require an operator which is vertically integrated to make transparent its wholesale prices and its internal transfer prices, among other things, to ensure compliance with any obligation imposed under Regulation 10 or, where necessary, to prevent unfair cross-subsidy.

(3) For the purpose of paragraphs (1) and (2) the Regulator may specify the format and accounting methodology to be used.

(4) A requirement upon an undertaking under Regulation 10 of the Framework Regulations may, in order to facilitate the verification of compliance by an operator with any obligations of transparency under Regulation 9 and non-discrimination under Regulation 10, include a requirement that accounting records, including data on revenues received from third parties, are provided by any such operator to the Regulator on request.

(5) Subject to the protection of the confidentiality of any information which the Regulator considers confidential, the Regulator may publish any information obtained by it under paragraph (4) to the extent that the Regulator considers that such information would contribute to an open and competitive market.

(6) An operator that fails to comply with—

(a) an obligation imposed under paragraph (1), or

(b) a requirement imposed under paragraph (2),

commits an offence.

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

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

Obligations of access to, and use of, specific network facilities

12. (1) The Regulator may in accordance with Regulation 8 impose on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities in situations where the Regulator considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect—

- (a) would hinder the emergence of a sustainable competitive market at the retail level,
- (b) would not be in the interests of end-users, or
- (c) would otherwise hinder the achievement of the objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations.

(2) Without prejudice to the generality of paragraph (1), among other things the Regulator may require an operator—

- (a) to give third parties access to specified network elements or facilities, including access to network elements which are not active or unbundled access to the local loop, to allow carrier selection or pre-selection or subscriber line resale offers,
- (b) to negotiate in good faith with undertakings requesting access,
- (c) not to withdraw access to facilities already granted,
- (d) to provide specified services on a wholesale basis for resale by third parties,
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services,
- (f) to provide co-location or other forms of associated facilities sharing,
- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks,
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services,
- (i) to interconnect networks or network facilities, or

(j) to provide access to associated services such as identity, location and presence service.

(3) The Regulator may attach to obligations imposed under paragraphs (1) and (2) conditions covering fairness, reasonableness and timeliness.

(4) When considering the obligations referred to in paragraphs (1) and (2) and, in particular, when assessing how such obligations would be imposed proportionate to the objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, the Regulator shall take into account in particular the following factors—

- (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of access or interconnection involved, including the viability of other upstream access products such as access to ducts,
- (b) the feasibility of providing the access proposed in relation to the capacity available,
- (c) the initial investment by the facility owner taking account of any public investment made and the risks involved in making the investment,
- (d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure based competition,
- (e) where appropriate, any relevant intellectual property rights, and
- (f) the provision of pan-European services.

(5) When imposing obligations on an operator to provide access in accordance with this Regulation, the Regulator may lay down technical or operational conditions to be met by the provider or beneficiaries of such access where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall be in compliance with the standards and specifications as set down in Regulation 28 of the Framework Regulations.

(6) An operator that fails to comply with—

- (a) an obligation imposed under paragraph (1),
- (b) a requirement imposed under paragraph (2), or
- (c) a condition attached to an obligation under paragraph (3),

commits an offence.

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

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

Price control and cost accounting obligations

13. (1) The Regulator may in accordance with Regulation 8 impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users.

(2) To encourage investments by the operator, including in next generation networks, the Regulator shall, when considering the imposition of obligations under paragraph (1), take into account the investment made by the operator which the Regulator considers relevant and allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks involved specific to a particular new investment network project.

(3) The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.

(4) Where an operator has an obligation under this Regulation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, the Regulator may use cost accounting methods independent of those used by the operator. The Regulator may issue directions requiring an operator to provide full justification for its prices and may, where appropriate, require prices to be adjusted.

(5) The Regulator shall ensure that, where implementation of a cost accounting system is imposed under this Regulation in order to support price controls, a description of the cost accounting system is made publicly available showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall, at the choice of the Regulator, be verified by the Regulator or by a suitably qualified independent body.

(6) The Regulator shall cause to be published annually a statement concerning compliance with any cost accounting system imposed under this Regulation.

(7) An operator that fails to comply with—

- (a) an obligation imposed under paragraph (1), or

(b) a direction issued under paragraph (4),
commits an offence.

(8) In proceedings for an offence under paragraph (7) it is a defence to establish that—

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

Functional separation

14. (1) Where the Regulator concludes—

- (a) that the appropriate obligations imposed under Regulations 9 to 13 have failed to achieve effective competition, and
- (b) that there are important and persisting competition problems or market failures identified in relation to the wholesale provision of certain access product markets,

it may as an exceptional measure, in accordance with Regulation 8(5), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

(2) The independently operating business entity referred to in paragraph (1) shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

(3) Where the Regulator intends to impose an obligation for functional separation under this Regulation, it shall submit a proposal to the European Commission that includes—

- (a) evidence justifying the conclusions of the Regulator as referred to in paragraph (1),
- (b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable timeframe,
- (c) an analysis of the expected impact—
 - (i) on the Regulator,
 - (ii) on the undertaking concerned, in particular on the workforce of the separated undertaking,
 - (iii) on the electronic communications sector as a whole,

- (iv) on incentives to invest in a sector as a whole particularly with regard to the need to ensure social and territorial cohesion, and
- (v) on other stakeholders including, in particular, the expected impact on competition and any potential consequential effects on consumers,

and

- (d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems or market failures identified.

(4) The draft measure shall include the following elements—

- (a) the precise nature and level of separation specifying, in particular, the legal status of the separate business entity,
- (b) an identification of the assets of the separate business entity and the products or services to be supplied by that entity,
- (c) the governance arrangements to ensure the independence of the staff employed by the separate business entity and the corresponding incentive structure,
- (d) rules for ensuring compliance with the obligations,
- (e) rules for ensuring transparency of operational procedures, in particular, towards other stakeholders, and
- (f) a monitoring programme to ensure compliance, including the publication of an annual report.

(5) Following the European Commission's decision on the draft measure taken in accordance with Article 8(3) of the Access Directive, the Regulator shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Regulation 27 of the Framework Regulations. On the basis of its assessment, the Regulator shall impose, maintain, amend or withdraw obligations in accordance with Regulations 12 and 13 of the Framework Regulations.

(6) Where the Regulator has imposed an obligation under paragraph (1) on an undertaking, it may also impose on the undertaking any of the obligations identified in Regulations 9 to 13 in any specific market where the undertaking has been designated as having significant market power in accordance with Regulation 27 of the Framework Regulations, or any other obligations authorised by the European Commission under Article 8(3) of the Access Directive.

(7) An undertaking that fails to comply with an obligation imposed under paragraph (1) commits an offence.

(8) In proceedings for an offence under paragraph (7) it is a defence to establish that—

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

Voluntary separation by a vertically integrated undertaking

15. (1) Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Regulation 27 of the Framework Regulations shall notify the Regulator when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products. Undertakings shall also notify the Regulator of any change of that intent as well as the final outcome of the process of separation. A notification under this paragraph shall be given in advance and in a timely manner in order to allow the Regulator to assess the effect of the intended transaction.

(2) The Regulator shall assess the effect of the intended transaction on existing regulatory obligations under the Framework Regulations. For that purpose, the Regulator shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Regulation 27 of the Framework Regulations. On the basis of its assessment, the Regulator shall impose, maintain, amend or withdraw obligations in accordance with Regulations 12 and 13 of the Framework Regulations.

(3) The Regulator may impose on the legally or operationally separate business entity any of the obligations identified in Regulations 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Regulation 27 of the Framework Regulations, or any other obligations authorised by the European Commission under Article 8(3) of the Access Directive.

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

(5) In proceedings for an offence under paragraph (4) 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.

Publication of notice of obligations and access to information

16. (1) The Regulator shall cause to be published on its website notice of the imposition of the obligations imposed under these Regulations. Such notice shall include information on where copies of a statement of the obligations imposed can be obtained.

(2) Where the Regulator amends or revokes an obligation imposed under these Regulations, it shall publish a notice referred to in paragraph (1).

(3) The notice referred to in paragraph (1) shall identify the specific product, service and geographical markets in respect of which the obligations are imposed.

(4) The Regulator shall ensure that the information published under paragraph (1) is up to date and, provided that the information is not in the opinion of the Regulator confidential and in particular does not, in its opinion, comprise business secrets, is made publicly available in a manner that guarantees all interested parties easy access to that information.

(5) The Regulator shall send to the European Commission a copy of any information published in accordance with this Regulation.

Notification

17. (1) The Regulator shall notify the European Commission of the names of operators deemed to have significant market power for the purpose of these Regulations and the obligations imposed upon them under these Regulations.

(2) The Regulator shall notify the European Commission of any changes affecting the obligations imposed upon operators referred to in paragraph (1) by or under these Regulations and of any changes to such operators affected as soon as practicable after any such change.

Directions

18. 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 operator or undertaking to do or refrain from doing anything which the Regulator specifies in the direction.

Enforcement — compliance with obligations

19. (1) Where the Regulator finds that an operator or undertaking has not complied with an obligation, requirement, condition or direction under these Regulations, the Regulator shall notify the operator or undertaking of those findings and give the operator or 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 operator or undertaking

concerned has not complied with the obligation, requirement, condition 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, condition or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement, condition 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, condition or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement, condition 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, condition 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 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, condition 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, condition 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 operator or 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, condition or direction to which the proceedings or notice relates.

Service of directions and notifications

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

- (a) by delivering it to the operator or undertaking,
- (b) by leaving it at the address at which the operator or 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, 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 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 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.

Prosecution of offences

21. (1) If—

- (a) the Regulator has made an application under Regulation 19 to the High Court to secure an operator or undertaking's compliance with an obligation, requirement, condition 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, condition 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, condition 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

22. (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, secretary or other similar officer of the body, 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

23. (1) An operator or undertaking that commits an offence under these Regulations (other than under Regulation 9(6), 10(3), 11(6), 12(6), 13(7) or 14(7)) is liable on summary conviction to a class A fine.

(2) An operator or undertaking that commits an offence under Regulation 9(6), 10(3), 11(6), 12(6), 13(7) or 14(7) 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.

Transitional arrangements

24. (1) A measure that was in force under the Regulations of 2003 immediately before the coming into operation 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 18(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 18(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

25. The following Regulations are revoked:

(a) the Regulations of 2003; and

- (b) the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007).

SCHEDULE

Regulation 9

MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR WHOLESALE NETWORK INFRASTRUCTURE ACCESS, INCLUDING SHARED OR FULLY UNBUNDLED ACCESS TO THE LOCAL LOOP AT A FIXED LOCATION TO BE PUBLISHED BY NOTIFIED OPERATORS WITH SIGNIFICANT MARKET POWER

Definitions

In this Schedule—

“local sub-loop” means a partial local loop connecting the network termination point to a concentration point or a specified intermediate access point in the fixed public electronic communications network;

“unbundled access to the local loop” means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;

“full unbundled access to the local loop” means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of the full capacity of the network infrastructure;

“shared access to the local loop” means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator, allowing the use of a specified part of the capacity of the network infrastructure such as a part of the frequency or an equivalent;

“SMP” means significant market power.

A. Conditions for unbundled access to the local loop

1. Network elements to which access is offered covering in particular the following elements together with appropriate associated facilities—

- (a) unbundled access to local loops (full and shared),
- (b) unbundled access to local sub-loops (full and shared) including, when relevant, access to network elements which are not active for the purpose of roll-out of backhaul networks,
- (c) where relevant, duct access enabling the roll out of access networks.

2. Information concerning the locations of physical access sites, the availability of which may be restricted to interested parties only in circumstances where there may be public security concerns, including cabinets and distribution frames, availability of local loops, sub-loops and backhaul in specific parts of

the access network and, when relevant, information concerning the locations of ducts and the availability within ducts.

3. Technical conditions related to access and use of local loops and sub-loops, including the technical characteristics of the twisted pair or optical fibre or equivalent, cable distributors, and associated facilities and, when relevant, technical conditions related to access to ducts.

4. Ordering and provisioning procedures, usage restrictions.

B. Co-location services

1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof. The availability of this information may be restricted to interested parties only in circumstances where there may be public security concerns.

2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).

3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.

4. Security issues: measures put in place by notified operators to ensure the security of their locations.

5. Access conditions for staff of competitive operators.

6. Safety standards.

7. Rules for the allocation of space where co-location space is limited.

8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

C. Information systems

Conditions for access to notified operator's operational support systems, information systems or databases for ordering and billing, maintenance and repair requests, pre-ordering and provisioning.

D. Supply conditions

1. Lead time for responding to requests for supply of services and facilities; service level agreements, fault resolution, procedures to return to a normal level of service and quality of service parameters.

2. Standard contract terms, including, where appropriate, compensation provided for failure to meet lead times.

3. Prices or pricing formulae for each feature, function and facility listed above.



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 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities (Access 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 Access Directive, namely, the “European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003)” and the “European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007 (S.I. No. 373 of 2007)”, which have been revoked by these Regulations.

These Regulations establish a regulatory framework for the relationships among suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

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