

2003 No. 330

ELECTRONIC COMMUNICATIONS

**The Electronic Communications (Market Analysis)
Regulations 2003**

Made - - - - - 19th February 2003

Laid before Parliament 20th February 2003

Coming into force - - 24th February 2003

The Secretary of State, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in respect of matters relating to electronic communications, in exercise of the powers conferred on her by that section, hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Electronic Communications (Market Analysis) Regulations 2003 and shall come into force on 24th February 2003.

Interpretation

2. In these Regulations—

“the Access Directive” means Directive 2002/19/EC of the European Parliament and of the Council of 7th March 2002 on access to, and interconnection of, electronic communications networks and associated facilities(e);

“associated facilities” has the meaning given by Article 2(e) of the Framework Directive;

“the Director” means the Director General of Telecommunications appointed under section 1 of the Telecommunications Act 1984(d);

“electronic communications network” has the meaning given by Article 2(a) of the Framework Directive;

“electronic communications service” has the meaning given by Article 2(c) of the Framework Directive;

“the Framework Directive” means Directive 2002/21/EC of the European Parliament and of the Council of 7th March 2002 on a common regulatory framework for electronic communications networks and services(e);

“significant market power” has the meaning given by regulation 5(3) to (7); and

“the Universal Service Directive” means Directive 2002/22/EC of the European Parliament and of the Council of 7th March 2002 on universal service and users’ rights relating to electronic communications networks and services(f).

(a) S.I. 2001/3495.

(b) 1972 c. 68.

(c) OJ No. L 108, 24.4.02, p. 7.

(d) 1984 c. 12.

(e) OJ No. L 108, 24.4.02, p. 33.

(f) OJ No. L 108, 24.4.02, p. 51.

Amendment to the Electronic Communications (Universal Service) Regulations 2003

3. In regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003(a) (designation of universal service provider), for “Directorate” there shall be substituted “Directive”.

Policy objectives and regulatory principles

4.—(1) It shall be the duty of the Director in carrying out any of the functions set out in these Regulations to act in accordance with the policy objectives and regulatory principles in Article 8 of the Framework Directive.

(2) Where it appears to the Director that any of those policy objectives or regulatory principles conflict with each other, he must secure that the conflict is resolved in the manner he thinks best in the circumstances.

(3) Where it appears to the Director that any of his duties in section 3 of the Telecommunications Act 1984 conflict with one or more of those policy objectives or regulatory principles, priority must be given to those objectives and principles.

Market identification and analysis

5.—(1) The Director shall—

- (a) make proposals for identification (by reference, in particular, to area and locality) of the markets for electronic communications networks, electronic communications services and associated facilities which in his opinion are the ones which in the circumstances of the United Kingdom are the markets in relation to which it is appropriate to consider whether to make a determination that a person has significant market power;
- (b) carry out an analysis of the identified markets; and
- (c) based on that market analysis, make proposals for determination as to whether any person in the identified markets has significant market power.

(2) In identifying and analysing those markets, and in considering whether to make any such proposals, the Director must take due account of all applicable guidelines and recommendations which—

- (a) have been issued or made by the European Commission in pursuance of a Community instrument; and
- (b) relate to market analysis or the determination of what constitutes significant market power.

(3) A person shall be taken to have significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market.

(4) References in this regulation to dominance of a market must be construed in accordance with any applicable provisions of Article 14 of the Framework Directive.

(5) A person is to be taken to enjoy a position of dominance of a market if he is one of a number of persons who enjoy such a position in combination with each other.

(6) A person or combination of persons may also be taken to enjoy a position of dominance of a market by reason wholly or partly of his or their position in a closely related market if the links between the two markets allow the market power held in the closely related market to be used in a way that influences the other market so as to strengthen the position in the other market of that person or combination of persons.

(7) The matters which must be taken into account in determining whether a combination of persons enjoys a position of dominance include, in particular, those matters set out in Annex II of the Framework Directive.

Notifications for market identification etc.

6.—(1) Proposals for identifying a market or making a market power determination shall be made by means of a notification published by the Director.

(a) S.I. 2003/33.

- (2) Notifications for the purposes of paragraph (1)—
- (a) may be given separately; or
 - (b) may be contained in a single notification relating to both the identification of a market and the making of a market power determination.
- (3) A notification for the purposes of paragraph (1) must—
- (a) state that the Director is proposing to identify the market which is the subject of the proposal or to make that market power determination;
 - (b) set out the effect of the proposal;
 - (c) give his reasons for making the proposal; and
 - (d) specify the period within which representations may be made to the Director about the proposals set out in his notification.
- (4) A notification which sets out proposals for the making of a market power determination may also set out the conditions that the Director is proposing to set by reference to that market power determination so as to bind the person whom the Director is proposing to determine as having significant market power in the identified market.
- (5) Where a notification published in accordance with paragraph (1) sets out the conditions that the Director is proposing to set, the notification must set out—
- (a) the effect of those conditions; and
 - (b) the reasons for setting those conditions.
- (6) The period specified for the purpose of paragraph (3)(d) must be one of not less than one month, beginning with the day after the day on which the notification is published.
- (7) The publication of a notification under this regulation must be in such manner as appears to the Director to be appropriate for bringing it to the attention of the persons who, in the Director's opinion, are likely to have an interest in, or be affected by, it.
- (8) Any proposed conditions which the Director sets out in a notification published under this regulation must comply with, and be necessary for satisfying requirements in, Article 16 of the Framework Directive, Articles 7 to 13 of the Access Directive and Articles 16 to 19 of the Universal Service Directive.

Notifications for conditions set by reference to market power determination

7.—(1) Following the publication of a notification under regulation 6 which sets out proposals about the making of a market power determination (“the market power notification”), the Director may publish further notifications setting out one or more of the following—

- (a) conditions or further conditions that he is proposing to set by reference to the market power determination proposed in the market power notification; and
 - (b) modifications which he is proposing to make to the proposals to set conditions set out in the market power notification.
- (2) A further notification must set out—
- (a) the market power determination proposed in the market power notification;
 - (b) where the market power notification included proposals for the setting of conditions in accordance with paragraph (4) of regulation 6—
 - (i) any modification (if any) of those proposals which the Director is proposing to make; and
 - (ii) any further conditions (if any) the Director is proposing to set by reference to the market power determination proposed in the market power notification;
 - (c) where the market power notification did not include proposals for the setting of conditions in accordance with paragraph (4) of regulation 6, any conditions which the Director is proposing to set by reference to the market power determination proposed in the market power notification;
 - (d) the effect of making those modifications and setting those conditions;
 - (e) the reasons for proposing to make those modifications and set those conditions; and

(f) the period within which representations about the proposals set out in the further notification in accordance with paragraphs (b) and (c) may be made to the Director.

(3) The period specified for the purpose of paragraph (2)(f) must be one of not less than one month, beginning with the day after the day on which the notification is published.

(4) The Director may give effect, with or without modifications, to a proposal to make a modification to proposals to set conditions in the market power notification, only if he has considered every representation about the proposal that is made to him within the period specified in the notification; and the way in which the Director gives effect to such a proposal is by the publication of a notification.

(5) The publication of a notification under this regulation must be in such manner as appears to the Director to be appropriate for bringing it to the attention of the persons who, in the Director's opinion, are likely to have an interest in, or be affected by, it.

(6) Any proposed conditions or modification to conditions which the Director sets out in a notification published under this regulation must comply with, and be necessary for satisfying requirements in, Article 16 of the Framework Directive, Articles 7 to 13 of the Access Directive and Articles 16 to 19 of the Universal Service Directive.

Confirmation of proposals

8.—(1) This regulation applies to—

- (a) any proposals set out in a notification published under regulation 6 to the extent that they have not been modified by a notification published under regulation 7(4);
- (b) any proposals to set conditions which have been modified by a notification published under regulation 7(4); and
- (c) any proposals to set conditions set out in a notification published under regulation 7(1)(a).

(2) Subject to regulation 9, and if he has considered every representation about the proposals, set out in a notification, to which this regulation applies that is made to him within the period specified in the notification, the Director may, by publication of a further notification, set out the proposals, with or without modification, as he intends that effect would be given to them upon the coming into force of any enactment (including an enactment contained in subordinate legislation) which implements the provision of the Framework Directive, the Access Directive or the Universal Service Directive to which the proposal relates; and reference in this regulation to confirmation of proposals is a reference to publication of such a further notification.

(3) Where the Director has confirmed any proposals under paragraph (2), he may, by publication of a further notification, withdraw part or all of those proposals.

(4) Any proposed conditions which the Director sets out in a notification published under this regulation must comply with, and be necessary for satisfying requirements in, Article 16 of the Framework Directive, Articles 7 to 13 of the Access Directive and Articles 16 to 19 of the Universal Service Directive.

European Commission's control of market identification and analysis

9.—(1) The Director shall send a copy of each notification published under regulations 6 and 7 to—

- (a) the Secretary of State; and
- (b) where the proposal in the notification would, in the opinion of the Director, affect trade between member States, to the European Commission and to the national regulatory authorities (as defined in Article 2(g) of the Framework Directive) of every other member State.

(2) If, within the representations period, the Director is notified by the European Commission for the purposes of Article 7(4) of the Framework Directive (market identifications that do not conform to Commission recommendations and determinations that affect trade between member States)—

- (a) that the Commission considers that giving effect to the proposal would create a barrier in relation to the single European market, or

(b) that the Commission has serious doubts as to whether giving effect to the proposal would be compatible with the requirements of any Community obligations, the Director is not to confirm the proposal, in accordance with regulation 8, before the end of a further two months beginning with the end of the representations period.

(3) Where, before the end of that two month period, the European Commission makes a decision in accordance with Article 7(4) of the Framework Directive that the proposal should be withdrawn, the Director—

(a) must withdraw it; and

(b) shall not be entitled to confirm it in accordance with regulation 8.

(4) In this regulation “the representations period”, in relation to a notification under regulations 6 and 7, means the period specified in that notification for the making of representations about the proposals contained in it.

Information requirements for carrying out market analysis

10. For the purposes of regulations 5, 6, 7, 8 and 9, section 53 of the Telecommunications Act 1984 shall apply as if the exercise by the Director of the functions under those regulations was a relevant purpose under subsection (6) of that section.

Appeals

11. Section 46B of the Telecommunications Act 1984(a) shall apply to decisions made by the Director under these Regulations as it applies to the decisions set out in subsection (1) of that section.

19th February 2003

Stephen Timms,
Minister of State for E-Commerce and Competitiveness
Department of Trade and Industry

(a) Section 46B of the Telecommunications Act 1984 was inserted by regulation 3 of the Telecommunications (Appeals) Regulations 1999 S.I. 1999/3180.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations enable the Director General of Telecommunications (“the Director”) to carry out certain preparatory tasks required by Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”), Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (“the Framework Directive”) and Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services (“the Universal Service Directive”).

Regulation 3 corrects a minor error in the Electronic Communications (Universal Service) Regulations 2003.

Regulation 4 implements Article 8 of the Framework Directive. It requires the Director, in carrying out his functions under these Regulations, to act in accordance with the policy objectives and regulatory principles in Article 8 of the Framework Directive.

Regulations 5 to 10 implement Article 16 of the Framework Directive, Article 7(3) of the Access Directive and Article 16(3) of the Universal Service Directive. They enable the Director to make proposals for identification of markets for electronic communications networks, electronic communications services and associated facilities which in his opinion are the ones which in the circumstances of the United Kingdom are the markets in relation to which it is appropriate to consider whether to make a determination that a person has significant market power, to carry out an analysis of those markets, to make proposals for determination as to whether any person in the identified markets has significant market power and where a person is determined as having significant market power, to make proposals for the setting of conditions regulating that person in respect of those markets.

Regulation 11 applies the appeals procedure set out in section 46B of the Telecommunications Act 1984 to decisions made under these Regulations in the same way as it applies to decisions under the Telecommunications Act 1984. Section 46B provides that parties may appeal to the court against certain decisions of the Secretary of State or the Director General of Telecommunications on grounds of error of fact, error of law, procedural error or other illegality.

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£2.00

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Printed and published in the UK by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of
Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.
E0162 2/2003 130162 19585

ISBN 0-11-044954-1



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