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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors Alexander Brown and Peter Broadhurst of Simmons & Simmons LLP, for their continued assistance with this volume.

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Ireland

Helen Kelly and Simon Shinkwin
Matheson

COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Department of Communications, Climate Action and Environment (DCCAE) is the relevant governmental department responsible for the telecoms and media sector. The regulator is the Commission for Communications Regulation (ComReg).

Ireland has implemented the European regulatory framework governing the electronic communications sector by way of primary and secondary legislation. Primary legislation consists of the Communications Regulation Acts 2002-2016. In 2011, Ireland introduced a number of regulations to transpose the European reform package, namely:

- the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the Framework Regulations);
- the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (the Access Regulations);
- the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (the Authorisation Regulations);
- the European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2011 (the Universal Service Regulations); and
- the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the Privacy Regulations).

The European Commission launched a review of the regulatory framework for electronic communications and the directive establishing the European Electronic Communications Code (EECC) entered into force in December 2018. Ireland will have until 21 December 2020 to implement the directive into national law, which will lead to a change to the Irish regulatory framework. We understand that the DCCAE is currently working on revised Irish legislation to implement the EECC. It is worth noting that the DCCAE has a good track record of implementing such legislation on time.

No foreign ownership restrictions apply to communications service at this time, although there is an ongoing consultation in relation to FDI screening which may apply restrictions to the communications sector (pan EU framework).

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The provision of communications services is subject to the regime set out in the Authorisation Regulations, which confers a general right to provide an electronic communications network (ECN) or an electronic communications service (ECS) (or both) provided certain conditions are complied with. No distinction is made as to the type of network or service (eg, mobile, fixed (including public Wi-Fi) or satellite).

The notification procedure for obtaining a general authorisation can be completed on the ComReg online portal. Operators are free to commence operations once a properly and fully completed notification has been received by ComReg. A notifying party is, however, immediately subject to the Irish regulatory regime and the conditions set out in the general authorisation. Conditions that may be attached to a general authorisation are set out in the schedule to the Authorisation Regulations.

General authorisations are unlimited in duration. No fee is payable on notification; however, an annual levy (0.2 per cent of relevant turnover) is payable where an operator's relevant turnover (ie, relating to the service or network) in Ireland in the relevant financial year is €500,000 or more.

The European Framework as transposed also governs the granting of rights of use for numbers and radio spectrum. ComReg revised the numbering conditions of use and application process, amalgamating the Numbering Conventions and conditions of use to simplify the rules.

Fixed and mobile service providers may also need to obtain a licence under the Wireless Telegraphy Act 1926 (as amended) in connection with the use of wireless telegraphy apparatus. Non-compliance with the Wireless Telegraphy Act can be prosecuted by ComReg.

Licensing and spectrum regime

ComReg granted liberalised use licences to the then four mobile network operators operating in Ireland (Hutchison 3G Ireland Limited (Three), Vodafone Ireland Limited (Vodafone), Telefónica Ireland Limited (O2 Ireland), Meteor Mobile Communications Limited (Meteor) (owned by eircom Limited (eir)) for liberalised use spectrum in the 800MHz, 900MHz and 1,800MHz bands, following an auction process. There are now only three mobile network operators following the European Commission's approval of Three's acquisition of O2 Ireland.

ComReg does not issue licences of indefinite duration or include any implied or express right of renewal, extension or any other form of prolongation. It considers that periodic predetermined re-release of spectrum is the most appropriate mechanism for the release of new 3.6GHz spectrum rights to maximise the efficient use of spectrum. On 20 December 2018, ComReg published its Radio Spectrum Management Strategy 2019 to 2021, which outlines the priorities for ComReg's radio spectrum work plan, in particular ComReg aims to make available an additional 350MHz of spectrum for wireless broadband.

In consultation with ComReg and 2RN (formerly known as RTÉ Networks), the DCCAE is working on a range of issues aimed at delivering a managed migration of broadcasting services from this band within the time frame available. The aim in Ireland is to achieve the release of this spectrum in advance of the June 2020 date, in coordination with the UK.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The legal framework controls ComReg's management of the radio frequency spectrum in Ireland. ComReg issues licences on a technology and service-neutral basis (eg, the 'liberalised use' licences issued following a spectrum auction were issued 'to keep and have possession of apparatus for wireless telegraphy for terrestrial systems capable of providing ECSs'). ComReg considers that spectrum trading is a spectrum management tool that, along with other measures, can increase the efficient use of spectrum rights.

However, ComReg 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 ECS where this is necessary (eg, to avoid harmful interference, safeguard the efficient use of spectrum, etc).

In February 2014, ComReg published regulations (the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014) and guidelines for spectrum trading in the Radio Spectrum Policy Programme (RSPP) bands and is prioritising the setting out of a spectrum leasing framework for the RSPP bands a priority action as part of its Strategy Statement. ComReg has imposed an ex-ante regime for reviewing notified spectrum transfers to determine whether such transfers would distort competition in the market. Where the transfer forms part of a wider transaction that is subject to merger control scrutiny by the Irish Competition and Consumer Protection Commission (CCPC) or by the European Commission, the framework and guidelines will not apply and the appropriate competition body will be the sole decision-making body. ComReg must be informed of any such merger or acquisition at the same time it is notified to the relevant competition body. The framework and guidelines deal solely with spectrum trading; ComReg has indicated that it will deal with spectrum leasing and sharing or pooling on a case-by-case basis pending further consideration of the same.

ComReg has also published its Framework for Spectrum Leases in Ireland in relation to:

- transfer of spectrum regime under the EU Spectrum Transfer Framework and implementing Irish legislation;
- the scope of the proposed Spectrum Lease Framework (noting the difference between a spectrum lease or transfer);
- the procedural framework for spectrum leasing; and
- how ComReg intends to grant and issue a spectrum lease licence.

ComReg is currently in the middle of a consultation process in relation to a significant release of spectrum (known as a Multi-Band Spectrum Auction) in relation to the 700MHz, 1.4GHz, 2.3GHz and 3.6GHz bands, which will govern the licensing regime in relation to these ranges. We are currently waiting for the final decision from ComReg on how it will structure this auction process. Due to covid-19, ComReg temporarily released some of this spectrum (on a short-term basis) to a number of operators to deal with the crisis.

In June 2017, ComReg assigned new spectrum rights of use on a service and technology basis as part of the 3.6GHz band, which is generally utilised for the provision of fixed wireless access to rural customers in Ireland. The award resulted in the following five winning bidders: Airspan Spectrum Holdings Ltd, Imagine Communications Ireland Ltd, Meteor Mobile Communications Ltd, Three Ireland (Hutchison) Ltd and Vodafone Ireland Ltd. In June 2018, ComReg published the results of its 26GHz spectrum award. The award resulted in the following winning bidders: Three, Meteor and Vodafone.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The following communications markets are subject to ex-ante regulation.

Fixed communications

Retail access to the public telephone network at a fixed location

Eir has been designated with significant market power (SMP) in this market and the remedies imposed on eir include access and price control obligations, and an obligation not to unreasonably bundle this service with its other services.

Wholesale call origination on the public telephone network provided at a fixed location

Eir has been designated with SMP in this market and the remedies imposed on eir include access, non-discrimination, transparency, accounting separation, price control and cost accounting.

Wholesale call termination on individual public telephone networks provided at a fixed location

Seven fixed service providers (namely, eircom Limited, BT Communications Ireland Limited, Verizon Ireland Limited, Virgin Media Ireland Limited (formerly UPC Communications Ireland Limited), Colt Telecom Ireland Limited, Smart Telecom Holdings Limited and Magnet Networks Limited) have been designated as having SMP. All operators are subject to a price control and cost accounting obligations, with separate price control and accounting obligations applying to eir.

Wholesale local access (provided at a fixed location)

Eir has been designated with SMP in this market and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.

Wholesale central access:

Eir has been designated with SMP in the Regional WCA Market (but not the urban WCA in which ComReg considered there was enough competition in this market) and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.

Wholesale terminating segments of leased lines

Eir has been designated with SMP in this market and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.

Mobile communications

Wholesale voice call termination on individual mobile networks

Six mobile network operators were designated as having SMP in this market (namely, Vodafone, O2 Ireland (acquired by Three), Meteor, Three, Tesco Mobile Ireland Limited and Lycamobile Ireland Limited). Remedies imposed on these operators include access, non-discrimination, transparency and price control obligations.

ComReg took court action against eir seeking to impose significant penalties (circa €10 million) over alleged breaches of the Access Regulations by failing to allow access to its network to other telecom providers. In December 2018, eir agreed to pay ComReg €3 million to

settle these enforcement proceedings. As part of the settlement deal, eir also consented to allow independent observers to monitor its internal divisions between its wholesale and retail structures.

Non-compliance with requests for information to inform market analysis or to enable ComReg to carry out its statutory function can be prosecuted by ComReg.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Structural separation has not been provided for in the Irish communications regulatory framework. Structural separation can be imposed under the Competition Acts 2002-2017 as a remedy in cases entailing an abuse of dominance contrary to section 5 of the Competition Acts 2002–2017.

Functional separation powers do exist as an exceptional remedy in respect of vertically integrated operators with SMP under the regulatory framework, in circumstances where ComReg concludes that: transparency, non-discrimination, accounting separation, access and price control obligations have failed to achieve effective competition; and where it has identified important and persisting competition problems or market failures in relation to the wholesale provision of certain access markets. As outlined above, following a settlement agreement between eir and ComReg, eir is to impose a revised regulatory governance model to separate its retail and wholesale arms (with independent observers monitoring such a separation for a five-year period).

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Eir has been designated as universal service provider (USP) for telephony services since 2006.

Most recently in 2016, ComReg designated eir as the USP for AFL USO, for the period 29 July 2016 to 30 June 2021 (following an unsuccessful eir appeal). ComReg stated that the ECS market is likely to change significantly as a result of the National Broadband Plan (NBP). It does not anticipate that this will be fully implemented before the end of the AFL USO five-year designation period (which appears more unlikely given the lengthy procurement process for the NBP), and it anticipates that the full effect will not be realised for a minimum five years. ComReg stated it will monitor and review developments to evaluate what impact it may have on the provision of basic electronic communications services in Ireland. ComReg stated that it will begin a review three months after the DCCAE has concluded the NBP contract award process. On the basis of the review, it will decide if it needs to commence a new consultation process in relation to AFL USO in the state and it will publish an information notice regarding this.

ComReg decided not to use USO fixed internet access requirements as a mechanism to guarantee access to broadband connections. However, it foresees that USO requirements might play a role in ensuring universal availability of affordable higher-speed broadband outside the NBP intervention area in the future. High-speed broadband is not currently a mandatory component of the USO under national and EU law.

The following points should be noted in relation to the USO:

- eir must satisfy any reasonable request to provide, at a fixed location, connections to the public telephone network and access to a publicly available telephone service (PATS);
- the maintenance of the National Directory Database (NDD) is no longer a USP obligation;
- eir must ensure that public pay telephones are provided to meet the reasonable needs of end users (although ComReg decided in 2014 that where usage of such public payphones falls below a certain level, removal may be permitted). ComReg decided in February 2019 that there is a continued need for a public payphone USO, and that eir remained designated as the public payphone USO until 31 December 2020;
- an accessibility statement being published to ensure equivalence in access and choice for disabled end users is now an obligation of all undertakings and the provision of specialised terminal equipment for disabled end users is no longer an obligation of the USP or any undertaking as of 1 January 2016; and
- eir must adhere to the principle of maintaining affordability for universal services.

In December 2018, ComReg decided that PortingXS (a Dutch company) would be responsible for the management and maintenance of the NDD from 1 July 2019, after the expiry of the transition period to allow the transfer of functions from Eir. As such, PortingXS must ensure that there exists a comprehensive record of all subscribers of publicly available telephone services in the state, excluding those who have refused to have their details included in the NDD. In August 2015 ComReg specified certain requirements to be complied with by all undertakings to ensure equivalence in access and choice for disabled end users (previously only eir as the USP had obligations in respect of a Code of Practice concerning the provision of services for people with disabilities).

Eir is subject to legally binding performance targets relating to timescales for connection, fault rate occurrence and fault repair times, and was subject to a performance improvement programme for 2015, backed by a financial security mechanism of up to €10 million per year. ComReg issues quarterly reports detailing eir's performance data covering its legally binding and non-legally binding performance targets.

There is currently no USO fund in Ireland. Eir, as the USP, may apply to receive funding for the net cost (if any) of meeting the USO where ComReg determines there is a net cost and that it represents an unfair burden. There is currently litigation before the Irish courts following ComReg's rejection of eir's application for funding. On 7 April 2017, ComReg published the outcome of its assessment of eir's 2015 compliance with the annual performance targets set out in Performance Improvement Plan 3. Eir submitted a force majeure claim in June 2016 and sought relief in respect of fault repair time performance only. The submission set out the basis for eir's force majeure claim as being the 'exceptional weather events in January, November and December 2015'. In addition, eir submitted an expert report on the weather conditions associated with the force majeure claim. In response, ComReg formed the view that it could be considered that force majeure conditions applied in the month of December 2015 but that the January and November 2015 weather events did not constitute force majeure events within the meaning of the Performance Improvement Programme (PIP3). Eir paid ComReg a penalty of €3,094,000 in December 2016 for its failure to meet the PIP3 agreed USO quality of service performance targets for 2015. In light of the above, ComReg does not intend to take further enforcement action against eir for the 2015 period. In March 2017, eir initiated High Court proceedings against ComReg in relation to fault repair time obligations imposed on eir. In January 2017, ComReg imposed a 48-hour deadline on eir to repair faults in its telecoms lines (pursuant to complaints from eir's competitors).

In June 2017, ComReg applied to the High Court for declarations of non-compliance in relation to eir's transparency, non-discrimination and access obligations to provide access to its network to other operators, seeking a financial penalty of up to €10 million (which would be the largest in the state) in relation to these regulatory breaches. In December 2017, eir launched counter proceedings against the Minister

claiming the EU telecoms regulations have been wrongly applied in Ireland (Access Regulations) and that ComReg has overstepped its remit in trying to impose civil penalties 'of the kind it is proposing under existing law'. In December 2018, eir agreed to pay €3 million to ComReg to settle these enforcement proceedings. As part of the settlement deal, eir also consented to allow independent observers to monitor its internal divisions between its wholesale and retail structures. In February 2020, ComReg published an update on the progress of the commitments under its settlement agreement with eir. The set of commitments, when fully implemented, will result in the establishment and operation of an enhanced Regulatory Governance Model in eir. Completion of the commitments is underpinned by €9 million held in escrow that is partially released to eir on completion of commitments 'milestones'.

ComReg will continue to closely monitor eir's USO performance and publishes quarterly reports on its USO performance.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

All operators providing a PATS must provide number portability to subscribers at no direct charge. Operators must ensure that the porting of numbers is carried out within the shortest possible time; numbers must be activated within one working day and loss of service during the process may not exceed one working day. ComReg may specify the payment of compensation to subscribers for delays in porting. ComReg has set a maximum wholesale porting charge for fixed and mobile operators.

ComReg has confirmed as part of 2013 and 2017 decisions on machine-to-machine numbering, that number portability is in principle an entitlement of machine-to-machine number holders.

ComReg is tasked with the management of the National Numbering Scheme, including attaching conditions to Rights of Use for numbers and generally makes allocations and reservations of numbering capacity from the scheme to notified network operators, who each sub-allocate individual numbers to service providers and end users. ComReg's tasks include:

- assigning numbers for existing services;
- developing frameworks for new and innovative services;
- ensuring numbers are used in accordance with conditions of use set out in the Numbering Conditions of Use; and
- monitoring number utilisation and number changes when required.

Applications for allocation are made via an application form and numbers are granted on a 'first come, first served' basis except when starting allocation from newly allocated number ranges. Allocation is carried out in an open, transparent and non-discriminatory manner. Number allocation occurs in two stages: primary allocation (allocation of blocks of numbers by ComReg) and secondary allocation (subsequent allocation of individual numbers by primary assignees to own customers or users). ComReg currently does not charge fees to recipients for allocations of numbers.

In December 2018, ComReg introduced measures regulating the costs of using non-geographic numbers. As of 1 December 2019, the cost of a call to a non-geographic number cannot exceed the cost of calling a landline number. In addition, the number of non-geographic number ranges available in Ireland will be reduced from five to two by 1 January 2022.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Operators providing a publicly available ECN or ECS must provide certain standard contract conditions to consumers in a clear, comprehensive and easily accessible form (eg, details of price and tariffs, duration of contract, etc). Operators must notify customers one month in advance of any proposed changes to their terms and conditions and of their right to withdraw without penalty if they do not accept the changes. Failure to do so may be prosecuted as a criminal matter as failure to comply is an offence. It is a defence to establish that reasonable steps were taken to comply, or that it was not possible to comply, with the requirement. ComReg also has the choice of bringing a civil action for non-compliance to the High Court. ComReg has not specified a medium to be used for contract change notifications, but provides that notifications must be presented to customers clearly, unambiguously and transparently, and must include certain minimum information. ComReg has initiated enforcement actions regarding a number of alleged breaches of the rules and most recently issued notices of non-compliance against eir, Vodafone, Virgin Media and Sky in 2018 for failure to notify customers in the prescribed manner as required under the Universal Service Regulations.

ComReg has also issued a number of requirements in relation to bills and billing mediums. By way of example, consumers must have a choice about whether to receive paper bills or alternative billing mediums, and a paper bill must be provided free of charge where access to online billing is not possible.

ComReg's enforcement powers in relation to consumer contracts derive from both the telecommunications framework (the Universal Service Regulations) and the European Union (Consumer Information, Cancellation and Other Rights) Regulations (following the EU Consumer Rights Directive). Consumer contract compliance continues to be a core focus of ComReg, and it has engaged in a number of enforcement actions against operators in recent years including the following examples.

In 2016, ComReg imposed a €255,000 fixed penalty notice on Virgin Media for failure to provide 26,046 of its customers with a contract in a durable form in contravention of the Consumer Information Regulations 2013. ComReg investigated Virgin Media as a result of complaints from Virgin customers who claimed the lack of a contract in durable form made it difficult for the affected Virgin Media customers to recognise and see exactly what they were being charged for by the company. This was the first time that ComReg has imposed fixed penalty notices (FPNs). ComReg has the power to issue FPNs under the Consumer Protection Act 2007 for breaches of the Consumer Information Regulations 2013.

In 2017, ComReg initiated an investigation into the way in which Vodafone notified its customers of changes to their roaming terms and conditions (to include an automatic opt-in provision). ComReg determined Vodafone incorrectly notified its customers of this change and imposed a fine of €250,000 and forced Vodafone to remediate its customers to the tune of €2.5 million. Vodafone also made binding commitments not to use 'auto opt-ins' in future.

In 2018, Sky made a settlement and paid ComReg €117,000 in relation to an alleged failure to provide customers with a contract on a durable medium, and breaches of their right to a cooling-off period. As part of this settlement, Sky agreed to take remedial action to prevent any further breaches of these consumer obligations.

In 2018, ComReg brought proceedings against Yourtel in relation to billing customers for a service that it was alleged was never received. In February 2019, Yourtel consented to orders before the Commercial Court requiring it to cease its contraventions (and has since been served with restraining orders to prevent it from doing so). Eircom was fined €23,500 and received 10 separate criminal convictions in relation to 10 counts of incorrect charging of customers for electronic communications services

In 2019, the District Court heard a prosecution taken by ComReg against Pure Telecom Limited in relation to Pure Telecom failing to provide full pricing information in its customer contracts. Pure Telecom

pleaded guilty to the counts brought against it and in lieu of a conviction was required to make a charitable donation of €10,000. ComReg also found Vodafone Ireland was non-compliant because it did not provide customers of its 'Extra' Pay as You Go product with their contract on a durable medium, in contravention with the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. ComReg reached a settlement agreement with Vodafone that included an undertaking by Vodafone to refund 72,774 customers the sum of €416,972.

The High Court also implemented a restraining order on behalf of ComReg against Yourtel in relation to services charged to consumers, and the Dublin District Court found in favour of ComReg in its case against Pure Telecom for failing to provide pricing information to its customers.

ComReg has brought cases in the Dublin District Court against eir, Vodafone and Yourtel in recent years. In June 2018, eir plead guilty to 10 offences in relation to overcharging customers and paid a total of €23,500. Vodafone had the Probation Act applied to it on condition that it donate €7,500 to charity and Vodafone agreed to make a contribution to ComReg's costs in the amount of €15,000, and Yourtel pled guilty to failing to comply with statutory request for information and was required to make a payment towards ComReg's costs (the Yourtel case related to an overcharging complaint). Following a further investigation, ComReg, as of February 2019, applied for and received a restraining order in relation to Yourtel and overcharging of customers (as Yourtel had 89 prior convictions for such an offence). ComReg has recently issued a number of notifications of non-compliance; some examples are given below.

In November 2018, ComReg announced Formal Dispute Resolution Procedures for End-Users of Electronic Communication Services and Networks, introducing structures and timelines for disputes in relation to any regulations under which ComReg has the power to resolve disputes. These measures entered into force in September 2019. Formal Dispute Resolution Procedures apply to issues for end users of mobile phone, home phone and broadband whose complaints have been unresolved for 40 working days or more after lodging a complaint with your service provider. ComReg will adjudicate on the dispute once the end user has applied for the service. The application procedure is set out in greater detail in Annex 2 of ComReg document 18/104.

In relation to the premium rate services (PRS) sector, ComReg has initiated investigations against operators and published a finding in March 2015 of non-compliance against Dragonfly Mobile Ltd with the PRS Code of Conduct and breaches of its licence resulting in €390,000 being refunded to 12,000 end-user consumers. It has also issued a notice of non-compliance against Zamano Limited in May 2017.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The Telecom Single Market Regulation, effective from June 2017, laid down measures regarding open internet access and net neutrality. ComReg has stated that its approach to network neutrality will be informed by ongoing Body of European Regulators for Electronic Communications (BEREC) work.

BEREC published its Guidelines on Net Neutrality to National Regulatory Authorities (NRAs) on 6 September 2016 providing guidance for NRAs to take into account when implementing the rules and assessing specific cases.

ComReg has published its 2019 Report on the Implementation of EU Net Neutrality Regulations in Ireland (as obliged under the TSM Regulation) and outlines how ComReg will:

- safeguard open internet access;
- ensure transparency measures are in place for open internet access;
- supervise and enforce breaches of the TSM Regulation; and
- implement the penalties for such breaches.

ComReg previously was concerned that the lack of enforcement powers and the lack of Irish legislation on penalties for breaches hindered its progress in enforcing net neutrality under the TSM Regulation. However, in July 2019, SI 343/2019 – European Union (Open Internet Access) Regulations 2019 was introduced giving enforcement powers toComReg in relation to net neutrality. ComReg may give a direction to an undertaking requiring the undertaking to take a measure under article 5(1) of the EU Regulation. Where ComReg finds an undertaking has not complied with its direction or with the obligations under Regulation (EU) 2015/2120, and that undertaking has not corrected its behaviour following a notification from ComReg, ComReg can seek an order from the High Court, which can include an order for payment of a financial penalty to ComReg.

In December 2019, ComReg issued notifications of non-compliance for breaches of net neutrality regulations to seven telecommunications companies operating in Ireland. The notifications were issued to internet access service providers regarding transparency breaches in their consumer contracts. With the recent expansion of its powers, ComReg has taken formal enforcement action against providers who appeared to have not been providing the required information in their customer contracts in relation to net neutrality.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Other than Part 8 of the Broadcasting Act 2009, which provides for digital broadcasting and the associated migration from analogue television, no legislation or guidelines have been introduced in Ireland in relation to digital platforms to date and there have been no enforcement initiatives to date. To the extent that a digital platform provides an ECS or ECN (or both), it would be subject to the authorisation regime set out in the Authorisation Regulations, which confers a general right to provide ECN or ECS (or both) subject to certain conditions.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

In November 2018, ComReg issued a decision concluding that eir continued to hold SMP in the wholesale broadband access market and, as such, imposed a series of remedies on Eircom. Such remedies are designed to ensure telecoms operators have access to eir's wholesale services, including the imposition of price control obligations in relation to the Fibre to the Cabinet wholesale market through a cost orientation obligation. This decision was based on a market review carried out by ComReg examining the nature and structure of the wholesale broadband access markets.

Previously, the DCCAE conducted a national broadband mapping exercise to identify areas where government intervention remains necessary to ensure the roll-out of the NGA in line with an NBP and to assess where further state-funded broadband schemes were required. Following a stakeholder consultation, the government approved an allocation of €275 million for a new NBP that will provide the initial stimulus required to deliver high-speed broadband to every city, town, village and individual premises in Ireland. On 4 April 2017, the DCCAE announced the publication of an updated High Speed Broadband Map, which includes

over 500,000 premises that will have access to commercial high-speed broadband by the end of 2020. There were a number of delays in the design and procurement phases of the NBP owing to negotiations with another commercial provider (eir) seeking to provide high speed broadband to some of the areas originally designated under the NBP. Most recently, one bidder, National Broadband Ireland was selected as the preferred bidder to deliver the NBP project.

The NBP follows a number of previous state-funded broadband schemes in operation in Ireland:

- the Metropolitan Area Networks Scheme, which aims to create open-access fibre networks in over 120 Irish towns at a cost of €170 million with support from EU structural funds;
- the National Broadband Scheme, operated by Three provided mobile broadband to all premises in locations where no services were available or likely to be made available by the market (this contract expired in August 2014); and
- the Rural Broadband Scheme, which aims to provide broadband to parts of Ireland where it is not commercially available and was designed to meet the needs of the last 1 per cent of the population not covered by any service.

The Minister for Communications, Climate Action and Environment, with the Minister for Culture, Heritage and the Gaeltacht established a Mobile Phone and Broadband Taskforce to identify immediate solutions to broadband and mobile phone coverage deficits and to investigate how better services could be provided to consumers prior to full build and rollout of the network planned under the National Broadband Plan State Intervention. The taskforce has published its report in 2017 outlining the issues considered and setting out its recommendations and actions to alleviate barriers to mobile reception and broadband access and the DCCAE publishes quarterly updates on how the recommendations are being implemented. While ComReg does not have direct responsibility for implementation of the NBP, the Mobile Phone and Broadband Taskforce outlines a number of regulatory actions that can assist in the rollout of the NBP and ComReg has announced it will undertake such action areas that support the objectives of the Mobile Phone and Broadband Taskforce.

Separately to the NBP, in June 2018, ComReg decided to legalise some mobile phone repeaters in an attempt to boost coverage of mobile phone services in respect of indoor reception. This was a key recommendation of the government's Mobile Phone and Broadband Taskforce. ComReg decided to make certain mobile phone repeaters licence-exempt provided certain technical conditions as outlined in the ComReg decision are met.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The communications sector is subject to the general Irish data protection regime as set out in the Data Protection Act 2018.

The Communications (Retention of Data) Act 2011 sets out a specific regime for the retention of certain communications data for the purpose of, inter alia, the investigation, detection and prosecution of criminal offences. A regime is also in place for the interception of communications by the Irish police force and the defence forces. The Court of Justice of the European Union (CJEU) recently found that the Data Retention Directive (2006/24/EC) (Data Directive), the basis for the Communications (Retention of Data) Act 2011, was invalid. As a result of the CJEU decision, no specific legal act at the EU level obliges Ireland to maintain a data retention regime in place. In December 2018, the Irish High Court ruled that the 2011 Act is incompatible with EU and ECHR law, and the Supreme Court recently referred this issue to the ECJ. While the 2011 Act formally remains law in Ireland, the government has published the General Scheme of the Communications (Retention of Data) Bill 2017 designed to replace the 2011 Act.

The 2011 Privacy Regulations from the EU electronic communications reform package referred to above also apply pending the publication of the proposed ePrivacy Regulation.

On 25 May 2018, the General Data Protection Regulation (No. 2016/679) (GDPR) came into force across the EU, and is implemented in Ireland through the Data Protection Act 2018. This follows a two-year implementation period following which the GDPR will replace the existing Data Protection Directive No. 95/46/EC. The aim of the GDPR is to harmonise data protection across the EU and will affect the way in which the communications sector operates.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Criminal Justice (Offences Relating to Information Systems) Act 2017 is the first piece of national legislation specifically relating to cybercrime and is designed to modernise the Irish framework relating to such crimes (previous legislation referred to 'unlawful use of a computer' which did not adequately address problems facing a more modern society). This legislation introduced a number of new offences such as:

- accessing an information system without lawful authority;
- interfering with an information system without lawful authority so as to intentionally hinder or interrupt its functioning;
- interfering with data without lawful authority;
- intercepting the transmission of data without lawful authority; and
- use of a computer, password, code or data for the purpose of the commission of any of the above offences.

The DCCAE published an updated National Cybersecurity Strategy in December 2019. The new strategy is broader in scope and operation than its predecessor from 2015. Objectives of the strategy include:

- to continue to improve the ability of the state to respond to and manage cybersecurity incidents;
- to identify and protect critical national infrastructure by ensuring that essential services have appropriate cybersecurity incident response plans;
- to improve the resilience and security of public sector IT systems;
- to invest in educational initiatives to prepare the workforce for advanced IT and cybersecurity careers;
- to raise awareness of the responsibilities of businesses around securing their networks, devices and information; and
- to invest in research and development in cyber security in Ireland.

In common with similar bodies in other EU member states, the National Cyber Security Centre has also steadily moved towards a more proactive approach across a range of areas. The provisions of the EU Network and Information Security Directive have been used to develop a quasi-regulatory approach for critical infrastructureproviders, an approach that operates in tandem with the existing and ongoing work of the National Cyber Security Centre.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

No new data protection legislation has been introduced in Ireland to deal specifically with big data, so the debate has focused on the

application of general data protection rules to each new way in which personal data are collected, stored, used and analysed.

For instance, current data protection law requires that personal data is only used for specific purposes which, naturally, restricts the trend in big data to make use of data in previously unknown ways. This means that big data systems should ideally be set up with this purpose limitation in mind, with each new use of personal data generating its own risk profile. There have been discussions around the use of techniques to effectively anonymise or pseudonymise personal data as a solution to this, so that the data falls outside the scope of data protection rules, though achieving this can sometimes be difficult.

While this may somewhat limit the ability to commercially exploit big data, the enforcement of data protection law in Ireland is not static, and is adaptable to each new innovation. The Irish Data Protection Commissioner takes a pragmatic approach to the treatment of big data and considers meaningful consultation with organisations operating in this space, including the many leading multinational technology companies based in Ireland, as essential to this strategy.

The Edward Snowden allegations of large-scale access by US authorities of EU citizens' personal data have brought the treatment of 'big data' to the forefront of political discussion in Europe, including Ireland. Significant changes are likely to come about as a result of the GDPR, implemented in Ireland by the Data Protection Act 2018.

In relation to big data, the GDPR provides in section 22 that, 'the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. Section 57 of the Data Protection Act 2018 outlines the rights of the individual in relation to automated decision making, implementing article 22 of the GDPR. As such, automated processing is only permitted with the express consent of the individual, when necessary for the performance of a contract or where authorised by EU or member state law. In addition, where automated processing is permitted, measures must be in place to protect the individual (eg, the right to present their point of view). Automated processing can apply to sensitive personal data (as outlined under the Data Protection Act 2018) on the basis of express consent or reasons of substantial public interest.

Many of the big data companies have important locations for their businesses in Ireland. The Data Protection Commissioner (DPC) is tasked with investigating breaches of data regulation by these companies where such breaches occur in this jurisdiction. The DPC opened an inquiry into Facebook in 2019 on how it stored user login data, and in 2018 the DPC investigated Facebook for non-compliance with its obligation under the GDPR to implement technical and organisational measures to ensure the security and safeguarding of the personal data it processes. In 2020, the DPC opened an inquiry into Google's processing of location data and transparency surrounding that processing, and in the previous year it investigated Google's use of personal data in relation to online advertising. The DPC has also recently inquired into Twitter's compliance with GDPR.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no laws or regulations that require data to be stored locally in Ireland. The Data Protection Act 2018 not detail specific security measures that a data controller or data processor must have in place, though the European Communities (Electronic Communications Networks and Services) (Privacy and Communications) Regulations 2011 detail some requirements specific to the electronic communications services sector. Instead the Data Protection Act 2018 places an obligation on data controllers to ensure that data is processed in a manner that ensures 'appropriate security of the data'. The measures used by the data controller must ensure that a level of security is provided that is proportionate to the harm that may result from destruction, loss, alternation or disclosure of the data.

Data controllers and data processors are also obliged to ensure that their staff and 'other persons at the place of work' are aware of security measures and comply with them. The legal obligation to keep personal data secure applies to every data controller and data processor, regardless of size.

Section 96 of the Data Protection Act 2018 specifies conditions that must be met before personal data may be transferred to third countries. Organisations that transfer personal data from Ireland to third countries (ie, places outside of the European Economic Area) need to ensure that the country in question provides an adequate level of data protection. Some third countries have been approved for this purpose by the EU Commission. The adequacy decision of the European Commission that underpinned the US 'Safe Harbour' arrangement has now been invalidated by a decision of the CJEU of 6 October 2015 (Case C-362/14). Consequently, it is no longer lawful to make transfers on the basis of the EU–US Safe Harbour framework. This was replaced by the EU–US Privacy Shield, which imposes stronger obligations on US companies to take measures to protect personal data.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

In its Strategy Statement for 2019–2021, ComReg identified the main trends it considers will both shape the sector and pose regulatory challenges over this period. These are:

- continued evolution of fixed and mobile networks: future electronic communications networks such as, for example, 5G where standards are still evolving may potentially have differing regulatory requirements and it is as yet unclear what the effective regulation of these evolving networks will entail;
- an increase in connected 'things': while the current electronic communications ecosystem focuses primarily on how people connect, the next wave of innovation is anticipated to be in relation to connected 'things', aka the Internet of Things;
- changing regulatory framework: as part of a broader digital strategy in Europe, the regulatory framework for electronic communications introduced in 2002 (and updated in 2009) is under revision;
- non-uniform end-user experiences: accessibility and connectivity have not evolved uniformly, and the experience of end users has not always kept pace with changes in expectations;
- expanding set of related markets relevant to the regulation of electronic communications: effective regulation requires an understanding of the complex electronic communications ecosystem, especially when electronic communications are an enabler of innovation in related markets; and
- mobile coverage is an issue of national importance as highlighted by its inclusion as a priority in the programme for government, and the formation of a Mobile Phone and Broadband Taskforce.

The implementation of the EECC will be the biggest change to the Irish telecommunications framework in 2020.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The broadcasting sector in Ireland is regulated by the Broadcasting Act 2009 (as amended) (the Broadcasting Act), which established a content regulator, the Broadcasting Authority of Ireland (BAI) and sets out the regulatory framework for the media and broadcasting sector in Ireland. ComReg's role in respect of the broadcasting sector is limited to the issuing of licences under the Wireless Telegraphy Acts, in respect of wireless equipment and assignment of required radio spectrum.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Non-EU applicants for broadcasting contracts are required to have their place of residence or registered office within the EU or as otherwise required by EU law.

The framework for the ownership and control policy of the BAI is set out in the Broadcasting Act, which requires the BAI, in awarding a sound broadcasting contract or television programme service contract (or consenting to a change of control of the holder of a broadcasting contract), to have regard, inter alia, to the desirability of allowing any person or group of persons to have control of or substantial interests in an 'undue number' of sound broadcasting services, or an 'undue amount' of communications media in a specified area. The BAI has also issued an Ownership and Control Policy, setting out the regulatory approach that the BAI will take and the rules that will be enforced regarding ownership and control of broadcasting services. The policy will be used by the BAI to assess applications for broadcasting contracts and requests for variations to ownership and control structures of contract holders.

Media mergers must be notified to both the the Irish Competition and Consumer Protection Commission (CCPC) and the Minister for Communications. The CCPC is responsible for carrying out the substantive competition review to determine whether the merger is likely to give rise to a substantial lessening of competition. It is the role of the Minister for Communications to assess 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the State' and this includes a review of 'diversity of ownership and diversity of content'. The 2014 Act provides for a set of 'relevant criteria' by which the Minister for Communications must assess whether the media merger will be likely to affect plurality of the media in the state. In particular, the relevant criteria include considering, inter alia, the undesirability of allowing one undertaking to hold significant interests within a sector of media business, the promotion of media plurality and the adequacy of the existing state-funded broadcasters to protect the public interest in plurality of the media in the state. The Department of Communications, Climate Action and Environment (DCCAE) published Media Merger Guidelines in May 2015. In the interests of transparency, the Minister now publishes summary details of the rationale for clearing media mergers (following the *Sky/21st Century Fox* media merger in 2017).

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The BAI is responsible for the licensing of the national television service, and content on digital, cable, multimedia displays and satellite systems. The licensing of content on these systems is an ongoing process with no time frame for applications, no competitive licensing process and one-off application fees (these depend on the licence being acquired but are typically less than €2,000).

The BAI is responsible for the licensing of independent radio broadcasting services in Ireland and Part 6 of the Broadcasting Act sets out the mechanism by which the BAI shall undertake the licensing process for commercial, community temporary and institutional radio services.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The European Communities (Audiovisual Media Services) Regulations 2010 and the European Communities (Audiovisual Media Services) (Amendment) Regulations 2012 (the AVMS Regulations) implement the Audiovisual Media Services Directive 2010. The AVMS Regulations provide that broadcasters, where practicable and by appropriate means, must progressively reserve for European works a majority proportion of their transmission time (excluding the time appointed to news, sporting events, games, advertising and teletext services) having regard to their various public responsibilities. In 2018, both the European Parliament and Council approved updates to the Audiovisual Media Services Directive, and this will lead to changes to the Irish regime following implementation. Draft legislation has been prepared by the DCCAE (implementing the revised directive and including 'online harm' additions) and this is being reviewed through the normal Irish legislative process. One fundamental change being proposed is the creation of a new regulator, the Media Commission, to regulate both linear and non-linear broadcasting.

The AVMS Regulations outline that, where practicable and by appropriate means, broadcasters must progressively reserve at least 10 per cent of their transmission time (excluding the time applied to news, sports events, games, advertising and teletext services) for European works created by producers who are independent of broadcasters, or reserve 10 per cent of their programming budget for European works that are created by producers who are independent of broadcasters, having regard to its various public responsibilities.

The AVMS Regulations require member states to ensure that on-demand audiovisual media services also promote European works; however, quotas for European works are not imposed on non-linear audiovisual services.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The BAI is currently tasked with the development, review and revision of codes and rules in relation to advertising standards to be observed by broadcasters, and consideration of and adjudication on complaints concerning material that is broadcast, including advertising. The Broadcasting Act provides that advertising codes must protect the interests of the audience and in particular, any advertising relating to matters of direct or indirect interest to children must protect the interests of

children and their health. By way of example, the BAI has issued General and Children's Commercial Communications Codes, including rules to be applied to the promotion of high fat, salt and sugar foods to children. Further rules are set out in the AVMS Regulations in relation to 'audiovisual commercial communications' on on-demand services. On 28 March 2017, the BAI launched its revised General Commercial Communications Code, which sets out the rules with which Irish radio and television stations must comply when it comes to airing advertising, sponsorship, product placement and other forms of commercial communications. The revised Code came into effect on 1 June 2017. It was developed by the BAI following a statutory review of the current Code and a public consultation on a revised draft. Last-minute changes made to the code before the launch included rules regarding commercial communications for financial services and products and the provision of greater clarity on the distinction between sponsorship and product placement. Alcohol advertising bans near schools or play areas came into effect in November 2019.

The Broadcasting Act does not apply to broadcasting services that are provided through the internet or to non-linear services, but this will change following the implementation of the revised Audiovisual Media Services Directive.

A voluntary self-regulatory code is also in operation and is administered by the Advertising Standards Authority of Ireland (ASAI), which sets out guidelines for advertising in relation to a range of topics including food, financial services and business products. This code is applicable to online advertising. On 1 March 2016, the new ASAI Code of Standards for Advertising and Marketing Communications in Ireland came into effect. The Updated Code features new sections on e-cigarettes and gambling and revised sections on food (including rules for advertisements addressed to children), health and beauty and environmental claims.

In addition to the above, broadcasters should observe relevant national and European rules on advertising of specific types of products and services (eg, tobacco, health foods, air fares, etc) and consumer protection rules on types of advertising practice permitted (eg, consumer information requirements, misleading information rules, etc).

Must-carry obligations

22 | Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

The Broadcasting Act requires 'appropriate network providers' to ensure, if requested, the retransmission by or through their appropriate network of each free-to-air television service provided for the time being by RTÉ, TG4 and TV3's free-to-air service. Appropriate network is defined as an electronic communications network (ECN) provided by a person (the 'appropriate network provider') that is used for the distribution or transmission of broadcasting services to the public. The appropriate network provider is not permitted to impose a charge for the above-mentioned channels.

A public service broadcasting charge was suggested by previous governments as a means of funding public broadcasting in light of the changing ways that viewers now access public service broadcasting. However, such plans have been shelved and, the current Minister for Communications recently announced that there was little chance of this being introduced and the government would not introduce the necessary enabling legislation.

Regulation of new media content

23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

The Internet Services Providers Association of Ireland (ISPAI) has responsibility for supervising the ongoing evolution of self-regulation of the internet in Ireland and has set out guidelines in its Code of Practice and Ethics (the Code) that ISPAI members should take into account when operating.

In its statement of policy, the ISPAI acknowledges that its members must observe their legal obligation to remove illegal content when informed by organs of the state or as otherwise required by law. The general requirements of the Code issued by the ISPAI include a requirement on all members to use best endeavours to ensure that services (excluding third-party content) and promotional material do not contain anything that is illegal, or is likely to mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise. They must also ensure that services and promotional material are not used to promote or facilitate any practices that are contrary to Irish law, nor must any services contain material that incites violence, cruelty, racial hatred or prejudice or discrimination of any kind.

Members' ISPs are also required to register with www.hotline.ie, which is a notification service to facilitate the reporting of suspected breaches under the Child Trafficking and Pornography Act, 1998 (as amended by the Child Trafficking and Pornography (Amendment) Act, 2004) and the removal of illegal material from internet websites.

The On-Demand Audiovisual Media Services Code of Conduct is an industry developed code which covers on-demand audiovisual services in Ireland, addressing topics such as advertising, content standards and dispute resolution.

The regulation of new media content will change following the implementation of the revised Audiovisual Media Services Directive and the creation of the new regulator, the Media Commission.

Digital switchover

24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Digital switchover occurred on 24 October 2012. The 800MHz band had been used for analogue terrestrial television services. This spectrum was auctioned off (along with the 900MHz and 1,800MHz spectrum) in autumn 2012 for use electronic communications services (ECSs).

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

As required by the legislative framework, ComReg has moved towards a position where it will issue licences on a technology and service-neutral basis and that new rights of use will issue on a service and technology-neutral basis. For example, ComReg awarded the 3.6GHz spectrum band in 2017, following a lengthy consultation process on a service and technology-neutral basis (ie, holders of the new rights of use may choose to provide any service capable of being delivered using the assigned spectrum). For instance, they could distribute television programming content, subject to complying with the relevant technical conditions and with any necessary broadcasting content authorisations or they could adopt some other use.

ComReg 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 ECSs where this is necessary (eg, to avoid harmful interference, safeguard the efficient use of spectrum).

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The Competition Acts 2002–2017 provide for special additional rules for 'media mergers' (ie, a merger or acquisition in which two or more of the undertakings involved carry on a media business in the state, or alternatively that one or more of the undertakings involved carries on a media business in the state and one or more of the undertakings involved carries on a media business elsewhere).

A 'media business' means the business (whether all or part of an undertaking's business) of:

- the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the internet;
- transmitting, retransmitting or relaying a broadcasting service;
- providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service; or
- making available on an electronic communications network any written, audiovisual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making such material available.

Media mergers are notifiable to both the CCPC and the Minister for Communications (regardless of the turnover of the undertakings concerned) to assess whether the media merger would be contrary to the public interest in protecting the plurality of the media in the state. The 2014 Act provides for a set of 'relevant criteria' by which the Minister for Communications must assess whether the media merger will be likely to affect plurality of the media in the state. In particular, the relevant criteria include considering, inter alia, the undesirability of allowing one undertaking to hold significant interests within a sector of media business, the promotion of media plurality and the adequacy of the existing state-funded broadcasters to protect the public interest in plurality of the media in the state. The BAI may play a role in assessing media plurality should the transaction be referred to a Phase II process by the Minister for Communications.

In terms of steps the authorities may require companies to take as a result of a media merger review, the Minister for Communications may determine that the media merger be put into effect, determine that the media merger be put into effect subject to conditions or determine that the media merger may not be put into effect.

The DCCAE's Media Merger Guidelines provide guidance on the media merger process and the DCCAE now publishes information regarding its process and a summary of each media merger determination in the interests of transparency.

In June 2019, BAI published two new documents:

- policy on media plurality setting out how the BAI will support media plurality in the future. It sets out a definition for media plurality, outlines why media plurality is important, details policy objectives and outlines the measures the BAI takes and will take to promote and support media plurality in Ireland; and
- the Ownership and Control Policy, which will be used by the BAI to assess requests for changes to the ownership and control of existing broadcasting services. The policy provides guidance and rules for the BAI when considering the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of media services in the Irish State.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

In February 2017, the BAI published a strategy statement for 2017–2019 setting out seven strategic goals and objectives for the period. The chairperson of the BAI, Professor Pauric Travers outlined its commitment to ensuring that Irish audiences have access to a range of quality content at the launch of the strategy statement 2017–2019. The BAI has not published a strategy for the subsequent period.

There has been a marked increase in the number of media mergers in the state, a trend that can be seen across the EU as traditional media outlets need to consolidate to ensure continued survival in a difficult environment. Twenty-four media mergers have been notified and cleared by the CCPC and the Minister for Communications since the introduction of the media merger regime in 2014. There has only been one Phase II media merger in the state, which involved the proposed acquisition of the Celtic Media Group by Independent News & Media and was referred to the BAI for a full media merger examination (first Phase II in the state). No ministerial decision was made by the Minister for Communications as the parties terminated the transaction during the lengthy process by mutual consent. The proposed acquisition of the *Irish Examiner* by the *Irish Times* received CCPC clearance on 24 April 2018 and in June 2018, the Minister for Communication also cleared the transaction.

The primary legislative focus for the Department of Communications will be the implementation of the revised Audiovisual Media Services Directive, which may impact significantly on how non-traditional media companies and broadcasters operate in Ireland through enhanced regulation and potentially introducing a licensing regime for the first time. In relation to traditional broadcasters, it remains to be seen whether Ireland will impose financial contributions (direct investments or levies payable to a fund) on broadcasters and providers who are targeting their national audiences from other member states (the revised legislation leaves this decision to each member state's discretion).

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The Broadcasting Authority of Ireland (BAI) is responsible for the regulation of the broadcasting and audiovisual content sector.

The Irish Competition and Consumer Protection Commission (CCPC) is responsible for administering and enforcing the Competition Acts 2002–2017 across all sectors.

ComReg is responsible for the regulation of the electronic communications sector and ComReg has co-competition powers with the CCPC that enable it to pursue issues arising in the electronic communications sector under competition law and to take action in respect of anticompetitive agreements and abuse of dominance. ComReg and the BAI are each party to a cooperation agreement with the CCPC to facilitate cooperation, avoid duplication and ensure consistency between the parties insofar as their activities consist of, or relate to, a competition issue.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

A decision of ComReg may either be challenged by way of judicial review or for decisions made under the Regulatory Framework a merits-based appeal in accordance with the Framework Regulations in the High Court. Under the Framework Regulations, the appeal must be brought by a user or undertaking that is 'affected' by the decision, and must be lodged within 28 calendar days of the date after the user or undertaking has been notified of the decision. An appeal can be brought on the basis of law or errors of fact. Where the appeal is made to the High Court, either party may seek for the matter to be transferred to the Commercial Court, which is a specialist part of the High Court that generally hears appeals within six months of the date the appeal is lodged. Lodgement of an appeal against a decision of ComReg does not automatically 'stay' that decision, unless an application for a stay or for interim relief has been made.

Judicial review proceedings should be launched at the earliest opportunity or in any event within three months from the date when grounds for the application first arose (eg, date of a ComReg decision (although this can be extended by the court if it considers that there is good and sufficient reason to do so)). The Irish courts have jurisdiction to examine the procedural fairness and lawfulness of decisions of public bodies in judicial review proceedings, rather than the merits of a decision.

Any other procedures available to remedy the matter must usually be exhausted before bringing judicial review proceedings.

A decision of the BAI may be challenged by way of judicial review in the High Court (as above). In addition, a decision by the BAI to terminate or suspend a contract made under part 6 or part 8 of the Broadcasting Act may be appealed by the holder of the contract to the High Court pursuant to section 51 of the Broadcasting Act.

A decision by the Minister for Communications in respect of a media merger must be brought in the High Court not later than 40 working days from the date of determination. Alternatively, this period may be extended by the High Court if it considers that there is a substantial reason why the application was not brought in the period and it is just to grant leave to appeal outside the period.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

There has been a marked increase in the number of media mergers notified since the 2014 media merger regime was implemented. Twenty-seven media mergers have been notified and cleared by the CCPC and the Minister (with an additional two reviewed by the Minister following European Commission clearance).

Some notable media mergers include:

- the 2016 proposed acquisition by Independent News & Media of seven regional newspapers that made up the Celtic Media Group. No ministerial decision was made as the parties terminated the transaction by mutual consent during the extended merger process;
- the 2017 clearance of *21st Century Fox/Sky* with no commitments; and
- the 2018 clearance of *Trinity Mirror/Northern & Shell* with binding CCPC commitments.

The *Irish Times* notified the CCPC of its intention to purchase the *Irish Examiner* (the effect of which would reduce the number of 'quality daily broadsheets' from three to two) and received Phase II CCPC clearance on 24 April 2018. In June 2018, the Minister for Communication made a determination that the proposed merger would not adversely affect the plurality of media in the state. The Minister noted that, because of the financial position of the target company, the proposed transaction may in fact preserve the diversity of content and thus protect media plurality in the state.

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