

# Telecoms and Media

*Contributing editors*

Alexander Brown and Peter Broadhurst



2018

GETTING THE  
DEAL THROUGH 

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# Telecoms and Media 2018

*Contributing editors*

Alexander Brown and Peter Broadhurst  
Simmons & Simmons LLP

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For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

Publisher  
Tom Barnes  
[tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

Subscriptions  
James Spearing  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

Senior business development managers  
Adam Sargent  
[adam.sargent@gettingthedealthrough.com](mailto:adam.sargent@gettingthedealthrough.com)

Dan White  
[dan.white@gettingthedealthrough.com](mailto:dan.white@gettingthedealthrough.com)



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# Preface

## Telecoms and Media 2018

Nineteenth edition

**Getting the Deal Through** is delighted to publish the nineteenth edition of *Telecoms and Media*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**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.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus, Kenya and Serbia.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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.

**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 assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
May 2018

# Ireland

Helen Kelly and Simon Shinkwin

Matheson

## Communications policy

### 1 Regulatory and institutional structure

**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 2002–2011. 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).

As noted in further detail in question 16, the European Commission launched a review of the regulatory framework for electronic communications with the publication of a draft Directive to establish the European Electronic Communications Code (the EECC). The EECC, if adopted, would repeal the current EU regulatory framework, including the Authorisation and Framework Directives and result in a change to the Irish regulatory framework.

No foreign ownership restrictions apply to communications services.

### 2 Authorisation/licensing regime

**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 involves the completion of a notification form, which 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 turnover 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. On 22 December 2015, ComReg Decision No. 08/15 revised the numbering conditions of use and application process and is currently engaging in a public consultation to further revise these conditions of rights of use.

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.

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.

ComReg's Radio Spectrum Management Strategy 2016 to 2018 outlines the indicative work plan items that ComReg has prioritised over this period including further developing ComReg's award proposals in relation to the 700MHz, 1.4GHz, 2.3GHz and 2.6GHz bands to include the award of these bands on a technology neutral basis.

On 22 December 2016 the DCCAE published an article noting that the European Commission had brought forward proposals to coordinate the release of the 694–790MHz (700MHz) spectrum band in all member states by 30 June 2020. The European Commission's proposals will mandate the coordinated release of the 700MHz band to mobile operators and made available for wireless broadband by 30 June 2020 and is a step towards the Commission's plan towards 5G for the EU.

In consultation with ComReg and 2RN (formerly known as RTE 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.

ComReg published its document and final decision on the Mobile Satellite Services with Complementary Ground Component Authorisation Regime in November 2017. The decision sets out the authorisation scheme framework in Ireland for the complementary ground component (CGC) elements of a mobile satellite service, further to European Commission Decision No. 626/2008/EC of 30 June 2008 (the Authorisation Decision), which set forth a process for the selection and authorisation of systems providing mobile satellite services (MSS), and EU Decision No. 2009/449/EC1 (the Selection

Decision) which selected Inmarsat and Solaris (now EchoStar) as the 2GHz MSS operators, and required member states to authorise these operators to provide MSS with CGC in their jurisdictions, and related EU Decisions. The Authorisation Decision requires National Regulatory Authorities to grant to the selected applicants the authorisations necessary for the provision of complementary ground components of mobile satellite systems on their territories. The ComReg decision outlined the licensing framework for awarding a licence once it is satisfied that Inmarsat and Echostar meet all the conditions and criteria laid out in the Authorisation and Selection Decisions.

### 3 Flexibility in spectrum use

#### 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 ECSSs'). 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. In September 2014, ComReg consulted on new spectrum awards in the 2.6GHz bands with possible inclusion of 700MHz, 1.4GHz, 2.3GHz and 3.6GHz bands and adopted a technology-neutral approach to licensing of the bands in question. During the award process for the release of spectrum rights of use in the 3.6GHz band, ComReg published responses to both consultations and indicated that while competition caps would be regarded as fundamental during the bidding process to ensure a pro-competitive outcome, bidders would be free to trade, lease and combine rights of use of spectrum following the auction to the extent that such rights of use of spectrum are designated as being tradable or leasable in the award conditions and in line with competition law and the legal framework for electronic communications in Ireland.

More recently, 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.

ComReg published its response on the Consultation on the 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.

### 4 Ex-ante regulatory obligations

#### 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 (physical) network infrastructure access at a fixed location (AFL): 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 broadband access: eir has been designated with SMP in this market and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control, cost accounting obligations, a national cost orientation obligation and obligations not to cause a retail margin squeeze.
- 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. The methodology for the price control obligation was challenged and the High Court found in part favour of Vodafone. The Court did not conclude the appeal on the applicable pricing methodology pending completion of a cost model by ComReg. Vodafone was ordered to charge a rate of no more than 2.6 cents per minute in the interim. Following a lengthy consultation process, ComReg published a final decision on the parameters for the bottom-up Pure LRIC/Final mobile termination rates (MTR) Model in February 2016. ComReg adopted the Final MTR Model, which calculates the pure LRIC maximum MTR for Ireland on an annual basis (2016–2018), as follows: 0.84 euro cents per minute for 2016; 0.82 euro cents per minute for 2017; and 0.79 euro cents per minute for 2018. Pursuant to Regulations 13 and 18 of the Access Regulations, for each year of the price control period, each mobile service provider designated with SMP shall ensure that its MTR is no more than the rate determined for that year in accordance with the Final MTR Model.

ComReg is currently seeking to impose significant penalties (circa €10 million) on eir over alleged breaches of the Access Regulations by failing to allow access to its network to other telecom providers. This case is currently ongoing before the Commercial Court and eir has initiated proceedings against the State, alleging that ComReg does not have the right to level the particular civil penalties under the Irish regulatory framework.

The Telecom Single Market EU regulation on mobile roaming was introduced across Europe on 15 June 2017. Now roaming customers are



charged the domestic retail price for using their mobile phone when travelling in Europe (seeking to implement a 'Roam Like at Home' experience for customers). This means that customers will be charged their 'Domestic Price' when roaming in the EU subject to a number of exemptions, namely a fair usage policy and anti-abuse measures. ComReg has issued notifications of non-compliance to a number of operators in relation to implementation of the roaming regulation, including Tesco Mobile Ireland.

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. ComReg has brought cases in the Dublin District Court against Vodafone and Yourtel in recent years. 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 'over-charging' complaint).

## 5 Structural or functional separation

### 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.

## 6 Universal service obligations and financing

### 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) (see below). 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 in order 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 Department has concluded the NBP contract award process. On foot 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);

- eir must provide end users with a comprehensive directory of subscribers, whether in printed or electronic form (or both), free of charge and updated at least once a year, based upon information supplied to it in accordance with the National Directory Database (NDD) (in 2014, ComReg decided that the obligation should be amended to allow for consumer preferences for receiving the directory to be recorded on an opt-out basis for two years followed by an opt-in basis for a further two years);
- the maintenance of the 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);
- an accessibility statement must be 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 May 2014, ComReg specified certain requirements to be complied with by all undertakings in order 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. On 7 April 2017 ComReg published the outcome of its assessment of Eircom's 2015 compliance with the annual performance targets set out in Performance Improvement Plan 3. Eircom 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 Eircom's force majeure claim as being the 'exceptional weather events in January, November and December 2015'. In addition, Eircom 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). Eircom 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 Eircom 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. ComReg is 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'.

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



## 7 Number allocation and portability

### 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 Conventions; 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.

## 8 Customer terms and conditions

### 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 eircom, Vodafone, Virgin Media and Sky in March 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 the European Union (Consumer Information, Cancellation and Other Rights) Regulations (following the EU Consumer Rights Directive, ComReg re-iterates in its most recent Strategy Statement and that it intends to use the powers provided for by these regulations to improve consumers' experience of contracts and switching). For example, ComReg has recently (in 2017 and 2018) notified Yourtel, Vodafone, Virgin Media, Three and Sky of findings of non-compliance

with respect to the operators' obligations under the Universal Service Regulations including implementing a contract change without notifying customers of the change and of their right to withdraw without penalty from such contract if they did not accept the modification. ComReg successfully brought a prosecution against Yourtel in February 2018 for failure to respond to a statutory request during its investigation into consumer complaints.

In July 2015, ComReg notified eir of a finding that, during the period November 2011 to July 2015, eir did not comply with the transparency obligation imposed in respect of its Bitstream product. It did not publish on its website sufficient information to identify and justify any differences between the services and facilities set out in the wholesale broadband access reference offer and the comparable services and facilities that eir provided to itself during this period.

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. ComReg also withdrew the allocated 57,741 and 57,575 short codes.

Finally, ComReg and the CCPC have each stepped up enforcement action in relation to consumer issues.

ComReg brought enforcement action against a number of service providers (eir, Virgin Media, Vodafone, Yourtel) in relation to the incorrect charging of customers for electronic communication services. The cases were brought in the Dublin District Court and total fines of €76,000 (Yourtel), €11,000 (eir) and €11,500 (Vodafone) were imposed. Each of the companies committed to putting remediation plans in place to prevent such issues arising in future.

During 2015, the CCPC (under its consumer law powers) initiated a number of enforcement actions by way of compliance notice against certain providers of telecommunication services (ie, Vodafone, Three, eir, Meteor, Virgin Media) for failing to make available information to customers, including the right to cancel distance contracts and the right to return the contract goods or services. No fines were applied to the respective undertakings to the extent that compliance was demonstrated within 14 days of the notice.

In 2016 ComReg has increased its enforcement and after an investigation imposed a €255,000 fixed penalty notice on Virgin Media under section 85 of the Consumer Protection Act 2007 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.

## 9 Net neutrality

### 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. After meetings with European-level

stakeholders in December 2015 and a workshop with high-level academic, legal and technical experts in February 2016, BEREC launched a six-week public consultation on the draft Guidelines, receiving an unprecedented 481,547 contributions.

ComReg has published its 2017 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 notes that the lack of enforcement powers and the lack of Irish legislation on penalties for breaches will hinder its progress in enforcing net neutrality under the TSM Regulation.

## 10 Platform regulation

### 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. 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.

## 11 Next-Generation-Access (NGA) networks

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

In 2013–2014, the DCCA 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 a 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 Department 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. The Minister for Communications has indicated that this will push out the delivery of the NBP to 2019. Currently there is only one bidder left for the NBP project, although it has not yet been formally selected as the preferred or final bidder.

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 Arts, Heritage, Regional, Rural and Gaeltacht Affairs 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 Department 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 which support the objectives of the Mobile Phone and Broadband Taskforce.

## 12 Data protection

### 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 Acts 1998 and 2003.

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. Nevertheless, even though the Data Directive has been struck down, the national implementing measure (ie, the 2011 Act) remains in effect as a matter of Irish law. The legal status of the 2011 Act is not affected by the decision beyond providing a number of grounds on which the 2011 Act may be challenged as unconstitutional or invalid.

The 2011 Privacy Regulations from the EU electronic communications reform package referred to above also apply.

On 25 May 2018 the General Data Protection Regulation (No. 2016/679) (the GDPR) will come into force across the EU. 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.

## 13 Cybersecurity

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

While there is no specific legislation or regulation in place concerning cybersecurity or network security, the National Cyber Security Strategy, published in 2015, is a high-level policy statement from the government acknowledging the challenges with facilitating and enabling the digital economy and society. The strategy is based on key principles such as the rule of law, subsidiarity, noting that we are ultimately responsible for our own security, and proportionality in response to key risks and threats facing us. Key measures include:

- Formally establishing the National Cyber Security Centre, encompassing the national/governmental Computer Security Incident Response Team (CSIRT-IE) and focusing on the protection of critical national information infrastructure in key sectors such as energy and telecommunications.
- Delivering improved security arrangements, in partnership with government departments and key agencies involving situational awareness and incident management.
- Introducing primary legislation to formalise arrangements in law and to comply with EU requirements on capabilities, cooperation and reporting.
- Cooperating with key state agencies, industry partners and international peers in the interests of protecting critical infrastructure, improving situational awareness and incident management along with facilitating education, training and public awareness initiatives.

An updated National Cyber Security Strategy is due to be published later in 2018.

## 14 Big data

### 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 existing 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.

However, wide-ranging changes to the EU data protection regime (to which Ireland is subject) are expected. 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. On 15 December 2015, the European Parliament, the Council and the Commission reached political agreement on the GDPR. Once formally adopted, it will be applicable two years thereafter.

As outlined above, the GDPR will come into force across the EU in May 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'. Article 22 is one of several opaque provisions that leave the full effect of the GDPR on analytics and big data open to interpretation and need to be resolved in the implementation and interpretation of the GDPR before May 2018.

## 15 Data localisation

### 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 Acts 1988 and 2003 do 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 Acts place an obligation on data controllers to have 'appropriate security measures' in place to prevent 'unauthorised access to, or unauthorised alteration, disclosure or destruction of, the data and against their accidental loss or destruction'. When determining measures that provide an 'appropriate' level of security, the Acts provide that a number of factors can be taken into account:

- the state of technological development;
- the cost of implementing the measures;
- the harm that might result; and
- the nature of the data concerned.

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 11 of the Data Protection Acts 1988 and 2003 specify 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.

As a general rule, data controllers should be aware of their obligations with regard to the protection of data subjects' fundamental rights when using these tools. Furthermore, data protection authorities may investigate cases of transfers of data using these transfer tools on foot of complaints or otherwise and can exercise their powers in order to protect individuals.

The general rule is that personal data cannot be transferred to third countries unless the country ensures an adequate level of data protection. The EU Commission has prepared a list of countries that are deemed to provide an adequate standard of data protection. Again, the presence of a country on this list would not preclude the data protection commissioner from using her investigative powers when in receipt of a complaint from an individual concerning the protection of his or her rights and freedoms in relation to the processing of personal data in a third country.

If the country does not provide an adequate standard of data protection, then the Irish data controller must rely on use of approved contractual provisions or one of the other alternative measures, provided for in Irish Law.

The Data Protection Commissioner retains the power to prohibit transfers of personal data to places outside of Ireland, if he considers that data protection rules are likely to be contravened, and that individuals are likely to suffer damage or distress as a result.

## 16 Key trends and expected changes

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

In its Strategy Statement for 2017-2019, 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.
- 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.
- 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. ComReg has initiated a work stream to better understand the factors affecting the mobile consumer experience.

In September 2016, the European Commission launched a review of the regulatory framework for electronic communications with the publication of a draft Directive to establish the EECC. The EECC, if adopted, would repeal the current EU regulatory framework, including the Authorisation and Framework Directives. The EECC is currently in draft form and is being debated and consulted upon, and so it has no legal status at present. However, ComReg is considering provisions of



the EECC that are likely to relate to spectrum leasing and how those provisions ought to be considered at this stage in the design of the proposed leasing framework.

Elsewhere, the new media merger regime (described in question 18) has been in effect since 31 October 2014. Since then, 15 media mergers have been both notified to and approved by the CCPC and the Minister for Communications.

## Media

### 17 Regulatory and institutional structure

**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. In July 2013, ComReg also analysed the wholesale access to the national terrestrial broadcast transmission services market and the wholesale access to the digital terrestrial television multiplexing services market, finding RTÉ Transmission Networks Limited and RTÉ to have SMP respectively. ComReg has imposed obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.

### 18 Ownership restrictions

**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. In addition, the BAI produces an Ownership and Control of media businesses report periodically with a revised report due in H2 2018.

The Competition and Consumer Protection Act 2014 (the 2014 Act) radically amended the existing media merger control regime. As a result, media mergers must be now notified to both the 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 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).

### 19 Licensing requirements

**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 and no competitive licensing process.

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.

### 20 Foreign programmes and local content requirements

**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. There are proposals to amend the Audiovisual Media Services Directive that are currently being debated before parliament and the Irish regime is likely to change if this proposal is passed.

Further, 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.

### 21 Advertising

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

The BAI is 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. In December 2015, the Irish government published proposals to restrict the advertising and marketing of alcohol from 2016 including a broadcast watershed on television and radio, with further restrictions due on cinema and outdoor advertising. Among a wide range of measures including the introduction of minimum pricing for alcohol, it would be illegal to market or advertise alcohol in a manner that is appealing to children. 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.

The Broadcasting Act does not apply to broadcasting services that are provided through the internet or to non-linear services.

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).

## 22 Must-carry obligations

**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 RTE, TG4 and TV3's free-to-air service. Appropriate network is defined as an 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.

## 23 Regulation of new media content

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

The Internet Services Providers Association of Ireland (ISPAAI) 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 ISPAAI members should take into account when operating.

In its statement of policy, the ISPAAI 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 ISPAAI 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](http://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.

## 24 Digital switchover

**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 900MHz and 1,800MHz spectrum) in autumn 2012 for use in electronic communications services.

## 25 Digital formats

**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.

As mentioned in question 3, 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, etc).

## 26 Media plurality

**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.

As mentioned in question 18, 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. As mentioned in question 10, 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 DCCA's Media Merger Guidelines provide guidance on the media merger process and the Department now publishes information regarding its process and a summary of each media merger determination in the interests of transparency.

## 27 Key trends and expected changes

**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 implementation of these strategies remains ongoing. 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.

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 in order to ensure continued survival in a difficult environment. Fifteen media mergers have been notified and cleared by the CCPC and the Minister for Communications (and an additional two mergers reviewed by the Minister following European Commission clearance: *21st Century Fox/Sky* and, more recently, *eir-com/TooHil*) 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 now falls to be considered by the Minister.

## Regulatory agencies and competition law

### 28 Regulatory agencies

**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 BAI is responsible for the regulation of the broadcasting and audio-visual content sector.

The 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.

## 29 Appeal procedure

**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.

**Matheson**

**Helen Kelly**  
**Simon Shinkwin**

**helen.kelly@matheson.com**  
**simon.shinkwin@matheson.com**

70 Sir John Rogerson's Quay  
Dublin 2  
Ireland

Tel: +353 1 232 2000  
Fax: +353 1 232 3333  
www.matheson.com



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**30 Competition law developments****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.**

As set out in question 27, there has been a marked increase in the number of media mergers notified since the 2014 media merger regime was implemented. Fifteen 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; and
- the 2017 clearance of *21st Century Fox/Sky* with no commitments.

As noted above, 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. Given the effect this transaction is likely to have on media plurality in the State, it is expected to receive close scrutiny by the Minister for Communications during the media merger process.

In the telecommunications sector, Tesco received CCPC clearance for the purchase the remaining 50 per cent shareholding of the mobile network virtual operator (MVNO) Tesco Mobile from Three Ireland. Three and Tesco previously operated Tesco Mobile Ireland as a joint venture with Three providing the infrastructure and network on which Tesco Mobile Ireland operates. Tesco Mobile is currently the largest MVNO and the fourth largest network (by customers) operating in Ireland.

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