



Rialtas na hÉireann
Government of Ireland

Communications Regulation (Enforcement) Bill 2022

Summary Document

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Table of Contents

Table of Contents.....	i
Background to the Communications Regulation (Enforcement) Bill.....	2
The Communications Regulation (Enforcement) Bill: Overview.....	5
The Bill in Greater Detail	7
Amendments to Act of 2002	12

Background to the Communications Regulation (Enforcement) Bill

The European Electronic Communications Code (“the Code”) represents a review and consolidation of the regulatory regime for the electronic communications sector in Europe.

The Code is a “recast” Directive that updates and consolidates the existing EU legislative framework regulating the electronic communications sector, which includes the regulation of electronic communications networks; electronic communications services; associated facilities and services; the authorisation of networks and services; radio spectrum use and numbering resources; access to and interconnection of electronic communications networks and associated facilities; and the protection of end-users.

Responsibility for transposing the Code rests with the Department for the Environment, Climate and Communications. The Code will be transposed using two legislative instruments: the Communications Regulation (Enforcement) Bill 2022 (“the Bill”) and the forthcoming European Communities (Electronic Communications) Regulations 2022.

Enforcement

To be effective, the new regulatory framework will need to be enforced. Enforcement in the Code is primarily set out in two provisions, Article 29 and Article 30.

Article 29

A key deliverable of the Bill will be to fulfil the requirement in Article 29(1) “... **[to] lay down rules on penalties... applicable to infringements of national provisions adopted pursuant to the Directive or of any binding decision adopted by the Commission, the national regulatory authority or other competent authority pursuant to this Directive**”.

Article 29 provides that within the limits of national law, the national regulatory authority (NRA) and other competent authorities (CA) shall have the power to impose such penalties. Specific provision is made in Article 29(2) for the imposition of penalties for knowingly, or grossly negligently providing misleading, erroneous or incomplete information in respect of the geographical survey under Article 22.

Article 30

Article 30(1) provides, **inter alia**, that CAs and supervise compliance with the conditions of the general authorisation or of rights of use for numbering resources, with the specific obligations referred to in Article 13(2) and with the obligation to use radio spectrum efficiently and in accordance with Articles 4, 45(1) and 47. CAs shall have information gathering powers to verify compliance with these obligations (Article 30(1)§2) and financial penalties may be imposed for failure to provide information (Article 30(4)). Where non-compliance is found, the CA is required to notify the undertaking and afford it an opportunity to state its views within a reasonable time (Article 30(2)). CAs will have the power to require the cessation of a breach and to take appropriate measures to ensure compliance (including the power to impose penalties and to issue orders to cease or delay the provision of a service or bundle of services where significant harm to competition would otherwise result)(Article 30(3)). In the case of serious or repeated breaches, where measures under Article 30(3) have failed to ensure compliance, CAs will be empowered to prevent an undertaking from continuing to provide ECN or ECS, or suspend or withdraw rights of use. Penalties imposed are to be effective, proportionate and dissuasive and may be imposed even if the breach has since been rectified (Article 30(5)). CAs may also take urgent interim measures to remedy a situation in advance of a final decision where it has evidence of a breach representing an **“immediate and serious threat to public safety, public security or public health or risks creating serious economic or operational problems for other providers or users of [ECN, ECS] or other users of the radio spectrum”** (Article 30(6)).

Appeals

Appeals against enforcement sanctions, or other decision, taken by a competent authority are provided for in **Article 31** of the Code, which requires that **“an effective mechanism exist”** which would allow **“any user of undertaking providing [ECS, ECN] or associated facilities who is affected by a decision of a competent authority... the right of appeal against that decision to an appeal body that is independent of the parties involved.”** Such an appeal must duly take the merits of the case into account.

The Bill will transpose Articles 29, 30 and 31 of the Code.

ComReg’s Enforcement Powers

The Commission for Communications Regulation (“ComReg”) is the competent authority for the purpose of enforcing the existing framework, which includes the Framework Regulations,

the Access Regulations, the Authorisation Regulations and the Universal Services Regulations. Enforcement of these regulation is by way of both civil and criminal sanctions. Civil sanctions may only be imposed by the High Court¹.

For some time, updating ComReg's enforcement powers has been an objective of Government. In June 2020, in **the Programme for Government 2020: Our Shared Future**, the Government committed to:

Give the Commission for Communications Regulation (ComReg) greater powers of enforcement, with a particular focus on improving competition, innovation and customer service within the communications sector.

And to:

Enable regulatory bodies such as ComReg, the Central Bank and the CCPC to have greater use of administrative penalties to sanction rogue operators, as is the norm in other EU Member States.

Updating ComReg's enforcement powers was included as a key strategic action of the Department in the Department's current Statement of Strategy, **Le Chéile, 2021 – 2023**:

Effective operation of the European Electronic Communication Code and the development of legislative proposals to strengthen ComReg's enforcement powers.

Prior to this, in the Department's **2019 – 2021 Statement of Strategy**, reviewing ComReg's enforcement powers was categorised as a Key Performance Indicator (KPI) for ensuring **“that the Irish regulatory framework is robust and clear, is in line with EU obligations, international best practice and promotes certainty, investment and sustainability, while delivering for citizens”**. This KPI was further elaborated as follows:

¹ In respect of civil sanctions, the power vested in ComReg to seek a financial penalties through the High Court is currently rooted in Article 10 of the Authorisation Directive 2002 (as amended by the Better Regulation Directive 2009), which provides, so far as is material, that “Member States shall empower the relevant authorities to impose (a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect” and Article 21a of the Framework Directive 2002 (as amended), which provides that “Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive”. The power to apply to the High Court for the imposition of a financial penalty to enforce the four existing Regulations can be seen transposed in the following Regulations: Regulation 37 of the Framework Regulations 2011, Regulation 19 of the Access Regulations 2011, Regulation 16 of the Authorisation Regulations 2011 and Regulation 31 the Universal Service Regulations 2011.

ComReg legislation updated to clearly set out the regulatory environment (including changes required on foot of the Digital Single Market package and new EU Electronic Communications Regulatory Code), particularly in relation to enforcement powers, promoting competition, protecting the interests of users and supporting investment

This Bill will provide ComReg with an enhanced and updated enforcement regime, fulfilling these clearly stated objectives of the Government, and in so doing, will ensure Ireland's regulatory landscape for electronic communications is robust and dynamic enough to meet the needs of the electronic communications sector over the coming years.

The Communications Regulation (Enforcement) Bill:

Overview

The Communications Regulation (Enforcement) Bill ("the Bill") will achieve five main objectives:

Transposition of the Code: Enforcement

The Bill will designate ComReg as the competent authority for the purpose of enforcing the Code and transpose the enforcement elements of this Directive.

A New Civil and Updated Criminal Enforcement Regime for ComReg

The Bill will provide a newly established civil enforcement regime and make changes to the criminal enforcement regime. These changes will give effect to the enforcement provisions of the Code, but will also be used for enforcement of other relevant communications legislation going forward.

The new civil enforcement regime will include new investigation and adjudication powers for ComReg. It will empower ComReg **to make declarations of non-compliance**, impose administrative financial sanctions up to a maximum of €5million or 10% of annual turnover (whichever is the greater) and to require undertakings to pay compensation to end-users, subject to confirmation by the High Court. ComReg will also be empowered to enter into settlement agreements, accept binding commitments from undertakings and impose interim measures. These new powers, most notably the power to impose administrative financial sanctions, will ensure effective, dissuasive and efficient enforcement in the electronic communications sector. It will also bring the communications sector and the powers available to ComReg into line with many other sectoral regulators, such as the Data

Protection Commission, the Commission for the Regulation of Utilities (CRU) and the Central Bank. In addition, it will bring the communications sector and ComReg into line with other regulatory regimes currently being developed, such as the forthcoming Media Commission and the Competition and Consumer Protection Commission's new competition powers.

The maximum available penalty for the commission of indictable offences is also proposed to be reviewed and brought in line with the penalties available for civil enforcement.

Updating ComReg's civil enforcement regime reflects agreed Government policy and was included as an objective in the Programme for Government 2020.

Transposition of the Code: Security

The Bill will transpose the security provisions of the Code and, thereby provide a mechanism for the Minister to specify security measures by Regulation and to make guidelines relating to network security and to provide a legislative basis to enforce the Electronic Communications Security Measures. The transposition of the security provisions of the Code will ensure that electronic communications services and networks providers are required to ensure the security of their systems. The Bill will also enable the Minister and ComReg to continue to develop the security measures for providers to follow, ensuring that security measures are dynamic and responsive to developing security threats.

New Consumer Protection Measures

A number of new customer service protections, developed in close cooperation with ComReg, are proposed in this Bill and include the following: an enhanced alternative dispute resolution process for consumers, a new power for ComReg to set enforceable minimum quality of service standards that operators must guarantee to their consumers, a new compensation scheme for specific customer service failings by operators, including for missed installation appointments and delays in switching of numbers, and a new "Customer Charter" which will act as a "one-stop-shop" for customers to see the standard of service they can expect from their providers. These measures will also give effect to Article 25, 104 and 106(8) of the Code.

Amendments to the Act of 2002

Finally, the Bill will make several amendments to the Communications Regulation Act, 2002 (the 2002 Act). This Act sets out ComReg's functions and many of its investigatory and prosecutorial powers. The proposed amendments will amend Parts 2, 3 and 5 of the Communications Regulation Act, 2002 to update provisions concerning, **inter alia**, the

service of notifications and decisions by ComReg, legal privilege, and ComReg's powers to gather information for the purpose of its functions. These amendments will increase the overall effectiveness of ComReg's enforcement processes, which will be complementary to the new civil enforcement regime provided for in the Bill.

The Bill in Greater Detail

Civil Enforcement

Regulatory Breaches

The Bill will establish the concept of a "regulatory breach" in the electronic communications sector. A regulatory breach will be a civil breach to which the civil enforcement process established by the Bill will apply. Civil breaches under the Code will be classified as regulatory breaches, but so will future civil breaches that will fall to be enforced by ComReg. Certain obligations under the Bill will also be categorised as regulatory breaches.

Investigations

The Bill will provide for investigations to be carried out by officials in ComReg. These investigations will be initiated on foot of complaints or on an own initiative basis.

Officials in ComReg who are empowered to carry out these investigations will be afforded a suite of investigatory powers, including those provided to authorised officers appointed pursuant to Section 39 of the Communications Regulation Act 2002.

During the course of an investigation, the subject of those investigations will be consulted and given an opportunity to respond to the investigation, prior to an investigation report being sent forward to adjudication.

Settlement and Commitments

Prior to a decision being made by an Adjudication Officer, ComReg will be permitted to enter into settlement agreements and to accept binding commitments from persons who are subject to investigations.

Adjudications

Upon the completion of an investigation, an investigation report will be provided to one or more Adjudication Officers.

The Bill will make specific provision to ensure the independence and impartiality of Adjudication Officers. They will be independent from the investigation and must have had no involvement with the matter that is the subject of the investigation.

Adjudication Officers will be required to review the investigation report provided and will be able to request further information, receive submissions and conduct oral hearings, if considered necessary, or if requested by the parties.

Upon considering the investigation report and any further evidence adduced during the process of adjudication, the Adjudication Officer may make a finding that the person² the subject of the investigation has committed a regulatory breach or that they have not committed a regulatory breach.

If the Adjudication Officer finds that a regulatory breach has occurred, they will be empowered to impose, **inter alia**, any of the following remedies:

- an administrative financial sanction
- the payment of compensation
- the payment of a refund
- the suspension or withdrawal of an authorisation (only for specific breaches, as set out in Article 30(5) of the Code)

Available Remedies

The Bill will establish a suite of remedies available to the Adjudication Officer to impose on finding a regulatory breach has occurred.

Administrative financial sanctions will be available and will be capped at €5million or 10% of annual national turnover, whichever is the greater.

Payment of compensation will also be available and that will similarly be capped at €5million or 10% of annual national turnover, whichever is the greater.

² Section 18(c) of the Information Act 2005: (c) Person. "Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly;

It will be possible to impose an administrative financial sanction and compensation for the same breach, however the cumulative amount of both combined will be capped at €5million or 10% of annual national turnover, whichever is the greater.

Payment of refunds will also be provided for, though these will not be subject to the same financial caps as either administrative financial sanctions or compensation.

The suspension or withdrawal of rights will be a specific remedy that will only be applicable for a limited set of breaches, as set down in Article 30(5) of the Code.

A range of factors will be considered when determining the appropriate level and type of sanction and ComReg will be empowered to issue guidance in respect of these matters.

Appeals and Court Confirmation

Decisions of an Adjudication Officer will be appealable to the High Court within a specified period of time (currently expected to be 28 days). On hearing the appeal, the Court will be able to confirm the decision or, where it is satisfied by reference to the grounds of appeal that a serious or significant error of law or fact, or a series of minor errors of law or fact which when taken together amount to a serious or significant error, was made in making the decision, or that the decision was made without complying with fair procedures, to annul, vary or remit the decision for reconsideration.

Findings of non-compliance and the imposition of a remedy will require confirmation by the High Court. This confirmation will occur upon the expiration of the time allowed for an appeal against the decision of the Adjudication Officer. Decisions will be confirmed unless they are irrational or erroneous in their reasoning or contain a clear error of law.

Criminal Enforcement

The Bill will provide for a higher penalty for the commission of an indictable offence which is stated in the relevant regulations to be an offence to which a “statutory penalty” applies. The higher level of penalty will be a fine not exceeding €5,000,000.

Choice of Enforcement Method

An obligation that is capable of being subject to both civil and criminal enforcement can only be enforced using one of these routes. The initiation of either criminal or civil enforcement will result in the other enforcement method being not being available for enforcement of that same breach.

ComReg will retain their ability to prosecute summary offences. Offences which are to be tried on indictment will be prosecuted by the DPP.

Security Provisions

The Bill will transpose Articles 40 and 41 of the Code.

In doing that, the Bill will require ECS/N to take appropriate measures to ensure the security of their networks and to notify the Minister of any security incident which had a significant impact on their network or service.

The Minister will be empowered to specify security measures by Regulation which will elaborate on the types of technical and organisational measures that providers of ECS/N shall take in meeting the obligations to ensure the security of their networks. The Minister will also be empowered to make guidelines for the purpose of providing practical guidance to providers of ECS/N on the implementation of the security measures.

ComReg will be designated as the competent authority for the purpose of enforcing the security obligations.

Consumer Measures

Quality of Service and a “Customer Charter”

The Bill will transpose Article 104 of the Code by permitting ComReg to require providers of Internet Access Services (IAS) and Interpersonal Communications Services (ICS) to publish information about the quality of their services. It also allows for the establishment of a “customer charter”, the aim of which is to provide consumers with one easily accessible and comparable place to get information as to the quality of service provided by an operator.

The Setting of Quality of Service Standards

The Bill will allow ComReg to specify minimum quality of service standards that must be met by providers of IAS or NB-ICS in a range of areas, including customer service, complaint handling, outages and repairs, switching, billing and refunds, disconnections and connections. Failure to meet these standards will result in providers being subject to potential enforcement actions and / or the direct payment of compensation to consumers.

Compensation Scheme

The Bill will transpose Article 106(6) of the Code by providing for a compensation scheme which will entitle consumers to automatic compensation in specific instances for breaches of Article 106 of the Code, including delays in porting / switching, missed service / installation appointments, and for failure to meet the minimum quality of service standards established by ComReg.

In the first instance, providers will be required to determine the level of compensation payable for each compensable breach. The Bill will, however, provide for ComReg to impose a minimum level of compensation for each compensable breach should that be required.

Alternative Dispute Resolution

The Bill will transpose Article 25 of the Code and provide for an Alternative Dispute Resolution (ADR) procedure for end-users of ECS/N. This ADR process will be an enhanced version of the ADR process currently in operation pursuant to Regulation 27 of S.I. 337 of 2011.

The Bill will also maintain the requirement for operators to have a “Code of Practice” for settling unresolved disputes.

Amendments to Act of 2002

Section 2 of the Act will be amended to ensure that the definitions used in the 2002 Act align to the greatest extent possible with the definitions used in the Code.

ComReg’s functions will be amended in Section 10 of the 2002 Act to include a new functions as followings:

- performing the functions assigned to it under the Code, and
- advising the Minister on matters relating to its function.

ComReg’s information gathering powers in section 13D will be broadened to allow the information to be required from a broader category and to permit information collected for one purpose to be used for a subsequent purpose.

A new section 13EA will allow ComReg to share information with the Minister, if requested, for the purpose of formulating policy. Any shared information will be required to be treated confidentially by the Minister.

Section 45 of the Act of 2002, which makes it an offence to overcharge, will now also preclude providers from charging for a product which was **neither required nor provided**, which had been an identified gap in the previous provision. The term “consumer” will also be replaced with the term “end-user”, to better align with the Code.

Section 46 of the 2002 Act, will be given broader application, with ComReg being given the power to make an application to restrain a provider from contravening Article 105 and 106 of the Code, as well as overcharging, as is currently the case.

Section 60 of the Act of 2002 will be amended to simplify the serving a notice electronically under the Act by removing the requirement to also service the notice physically when a notice is served electronically.

A new Section 61 will be inserted into the Act of 2002 which will establish a process for addressing disputes in respect of potentially privileged or irrelevant information, providing that the High Court shall determine, on application from the party claiming privilege or irrelevance, whether the information is in fact privileged or irrelevant.