



Commission for
Communications Regulation

Response to Consultation

ComReg response to Department of Communications, Marine and Natural Resources consultation on the Draft Electronic Communications Miscellaneous Provisions Bill 2006

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1 Introduction

This document sets out the response of the Commission for Communications Regulation (ComReg) to the legislative proposals published by the Minister for Communications, Marine and Natural Resources in January 2006.

ComReg is designated as the national regulatory authority for the electronic communications and postal sectors along with being responsible for the management of the national radio spectrum resource. As an integral part of its functions, ComReg has been seeking to move the electronic communications sector forward as quickly as possible in order to provide to Irish consumers the level of price choice and quality available in other EU member states. While compliance with ComReg rulings is normally eventually achieved, this can very often take a very long time and can require the diversion of considerable resources by ComReg to bring compliance about. It has been seeking to reduce and where possible, avoid compliance problems arising from gaps in current enforcement powers and to this end has requested that perceived gaps in existing legislation be addressed and that some provisions which it had not been possible to retain in the transposition of the European Electronic Communications Regulatory Package, such as indictable offences, be restored by means of primary legislation.

ComReg welcomes the publication of the draft legislative proposals which are wide ranging and which confer new powers and obligations on ComReg in a number of areas. ComReg is of the view that for a regulator to be effective in the performance of its duties, it must have sufficient powers to ensure that its decisions, properly taken in accordance with the law and the objectives of regulation, are implemented. It particularly welcomes, therefore, the draft provisions in relation to overcharging, the enforcement of regulatory decisions, summons powers for ComReg and the conduct of court proceedings. ComReg is conscious of its obligations in relation to consumer protection and considers that the proposed provisions in relation to overcharging and the introduction of additional offences in relation to non compliance with regulatory obligations will enhance its ability in this area.

ComReg notes that additional functions and obligations are being proposed for it and considers that if these proposals are to be followed up on, adequate resources will need to be put in place to ensure the effective carrying out of those functions. The Department should liaise closely with ComReg in order to put the necessary framework and arrangements in place.

2 ComReg comments on the Bill

Part 2 New Provisions

2.1: Head 3 ComReg Budget and Work Programme

ComReg agrees that the publication of clear information regarding its work programme is appropriate. A guiding principle of the office since its inception has been to try to ensure as much visibility and transparency as possible in the carrying out of its duties. In particular it has been ongoing ComReg policy to publish its work programmes. ComReg continues to keep the usefulness and effectiveness of this process under review and updates its approach in light of changing needs. ComReg agrees that the publication of an estimate of its financial outgoings is a worthwhile exercise and will complement existing financial information in its annual report. ComReg will work with the Department to devise an agreed format for presentation of its budget to the Minister which will be informative and will distinguish between the main areas of activity of the office.

2.2: Head 4 ComReg's Powers in relation to Overcharging

In general ComReg welcomes the provision of extra powers in relation to overcharging by electronic communications providers. Imposing an obligation not to overcharge together with the creation of an appropriate sanctions regime will encourage best practice in this area. ComReg's proposals below should be read in this light and are intended to find ways of ensuring that the regime proposed is as effective as possible.

While the text as proposed does make overcharging an offence it would appear that an *obligation* not to overcharge has not been included. The creation of an express obligation would allow ComReg to use its powers to monitor compliance with obligations under the 2002 Act, including the use of authorised officer powers.

In general while a new category of offence is proposed there appears to be no option to pursue civil enforcement. This would give ComReg the option of pursuing criminal sanctions where the non-compliance case was considered more serious or civil sanctions with the lower standard of proof as appropriate. The civil enforcement procedures could be modelled on those in the European Electronic Communications Regulatory Package of 2003 as referenced in Head 4.6. However ComReg also believes that it should be possible to pursue an order from the High Court for the imposition of civil actions for instances of overcharging which have occurred in the past and which are no longer ongoing. The possibility of civil enforcement with the lower standard of proof for past breaches will contribute to operators' incentives to maintain high standards of billing accuracy.

ComReg believes that consideration should be given to including a provision to create an obligation on undertakings to ensure billing accuracy. It may also be useful to provide ComReg with powers which would allow it to specify in more detail the technical aspects of billing accuracy.

Another recommendation in relation to overcharging would be to put in place an obligation on operators to take appropriate remedial action as directed by ComReg where an error has occurred; and for ComReg to have enforcement powers to ensure that such remedial action takes place.

4.1 The terminology here should reflect the Universal Service Regulations which use the terms “charges”, “prices” and “tariffs” (see particularly the Universal Service Regulations, Regulation 17(2) (d)). It should also be clear that all charges in excess of the correct amount are included, not just charging in excess of the published tariff – for example charging for services which were not provided.

Head 4.2 should read “is overcharging or has overcharged”. It should be made clear that past non-compliance may be pursued with either civil or criminal sanctions to aid enforcement and increase deterrence.

In relation to Head 4.3 ComReg understands that the purpose of such an audit is to gather evidence in relation to a possible offence under head 4.1. Also, it should be made clear that this provision for an audit is in addition to other types of “investigation” referred to in 4.2. This should be clarified in the final text.

In relation to Head 6 ComReg does not believe that the notification process set out is appropriate to the prosecution of an offence and this should be separately provided for as regards civil enforcement measures. It should also be made clear that it is open to ComReg to prosecute over charging in the past which has since been rectified.

The process in head 4.5 duplicates the process in the first head 4.6 (there are two heads 4.6) and conflicts with the creation of the offence in head 4.1 and therefore should be deleted

The second head 4.6 relating to the ability to appeal to ECAP would appear to be better suited to instances where civil proceedings are being pursued and should not apply when a criminal prosecution is being pursued.

2.3: Head 5 Summons Powers for ComReg and Court Proceedings

Head 5.1: Summons Powers

ComReg welcomes the provisions of this head which it considers to be positive in relation to its ability to conduct investigations and to pursue court proceedings. Many regulatory bodies have the power to summon people to make statements on oath and to produce documents in order to investigate a relevant matter. ComReg considers that the provision of such a power to it would assist in its investigative functions either on foot of a ComReg initiated investigation or a complaint from another operator or user in respect of whether an operator had breached its obligations.

Head 5.2 (1): Admissibility of Expert Evidence in Court Proceedings

The reference in this section should be to expert evidence in the “electronic communications sector” rather than to the “telecoms sector”. With regard to the admissibility of expert evidence, ComReg believes that in any proceedings in order to avoid difficulties and delays which might arise, the admissibility of such evidence should be provided for by statute.

Head 5.3: Provision of Information to Juries

ComReg supports the proposal in relation to the provision of information to juries. Where an offence is being tried on indictment the decision as to the guilt or innocence of the defendant is a matter for a jury. In some instances it is considered that a jury may have difficulty with the economic and regulatory rationale behind certain offences and that the provision of documentation to which the members could refer would assist in the reaching of an informed verdict.

Head 5.4: Admissibility of documents into evidence and Head 5.5 : Presumptions as to admissions in documents admitted into evidence

ComReg notes the statement in the notes on head 5.4 that in a criminal trial the onus of proof is on the prosecutor and that in a civil trial the onus of proof is on the person making the assertion. It recognises the difficulties in relying on certain inferences to be made without adducing evidence as to the truth of the inferences and in those circumstances supports the proposal in the narrative heads that similar presumptions should apply in court proceedings to those applicable to the Competition Authority under the Competition Act 2002.

The reference to the Regulatory Package of 2003 is assumed to be to the European Electronic Communications Regulatory Package of 2003 as mentioned in Head 5.2 (1).

Part 3 Enforcement of Regulatory Decisions

ComReg welcomes the creation of a number of new offences in this part of the Bill and the restoration of the potential level of financial penalty for indictable offences which had been available to it under the Communications Regulation Act 2002 prior to the introduction of the European Electronic Communications Regulatory Package of 2003 and which it feels will enhance its enforcement powers in addition to acting as a deterrent to non-compliance.

As it stands, breaches by an operator of many of its obligations under the European Electronic Communications regulatory Package will incur no criminal liability whatsoever. ComReg believes that this situation should be rectified and considers that while, at face value, the purpose of making breaches of regulatory obligations into criminal offences is to punish breaches of those legal obligations, the effect is greater than that “punishment effect”.

Criminalisation serves a compliance purpose over and above its punishment purpose. Even without actual prosecutions, making certain breaches of regulatory obligations criminal offences serves a number of useful purposes:

- it indicates the seriousness which lawmakers attach to the breaches,
- it encourages compliance as it may inform decision making processes by operators,
- it encourages compliance because it may affect relations with shareholders, bankers, customers and trading partners.

ComReg agrees that there should not be blanket criminalisation of all of the regulations and considers also that the penalties should be proportionate to the breach. It supports the Departments proposals, as set out in part 3 of the draft narrative scheme of the Bill, subject to the comments and suggestions set out hereafter.

It is presumed that, where relevant, ComReg's power under Section 43 of the Communications Regulation Act, 2002 to prosecute summary offences will be extended to offences under this Bill.

ComReg is also of the view that the obligation to notify a finding of non compliance is only appropriate for civil actions and not for criminal prosecutions in part because the incentive to comply is diluted by such a procedure.

ComReg has identified a number of offences which should be added to the list in the relevant heads.

2.4: Head 6 Summary Offences

Head 6.1

ComReg suggests that there is a need to make it clear that it is failure by an undertaking to comply with obligations imposed by the Regulations that is to be an offence and therefore suggests Head 6.1 could be amended with the addition of the underlined text as follows:

“Provide for the creation of new summary offences, for failure by an undertaking to comply with obligations pursuant to the pre-existing provisions set out below”

ComReg also notes there is inconsistency with Head 8.2 relating to indictable offences as regards the following:

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, SI No 305 of 2003
Regulation 5(3): failure by an undertaking designated with SMP to offer access and interconnection on terms and conditions consistent with obligations imposed by ComReg pursuant to Regulation 9 is listed here but should also be included in Head 8.2 among the list of indictable offences for failure to comply with SMP obligations.

Head 6.2:

ComReg suggests that non-compliance with the following obligations should be included otherwise non-compliance with these obligations carries no criminal sanction and the incentive to comply is diminished (it should be noted that these are non-SMP measures):

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, SI No 305 of 2003

Regulation 6(2); failure by an undertaking that controls access to end-users to meet obligations imposed by ComReg in relation to interconnection or access

Regulation 6(3); failure by an undertaking to meet obligations imposed by ComReg in relation to access to facilities

ComReg also suggests that non-compliance with the following obligations should be expressly included in this head to ensure that it is clear what is meant by failure to comply with SMP obligations imposed by ComReg pursuant to Regulation 27 (4) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, SI No 307 of 2003:

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, SI No 305 of 2003

Regulation 9: failure by an undertaking designated with SMP to comply with obligations imposed by ComReg pursuant to Regulations 10 to 14

Regulation 10: failure to comply with transparency obligations imposed by ComReg

Regulation 11: failure to comply with non-discrimination obligations imposed by ComReg

Regulation 12: failure to comply with accounting separation obligations imposed by ComReg

Regulation 13: failure to comply with obligations imposed by ComReg to meet reasonable requests for access to specific network elements and associated facilities

Regulation 14: failure to comply with obligations imposed by ComReg relating to cost recovery and price controls

- European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, SI No 308 of 2003

Regulation 16 (2): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to carrier selection and carrier pre-selection regarding their implementation on other networks or in other ways.

Regulation 16 (3): failure by an undertaking designated with SMP on whom ComReg has imposed obligations in relation to carrier selection and carrier pre-selection, to ensure that pricing is cost oriented and direct charges to subscribers are not a disincentive

ComReg suggests that non-compliance with the following obligations should be included, otherwise non-compliance with these measures carries no criminal sanction and the incentive to comply is diminished (it should be noted that these are non-SMP measures):

Regulation 18 (2): failure by an undertaking to provide to end users and consumers such of the information set out in schedule 4 as the Regulator shall specify

Regulation 19 (1): failure by an undertaking to comply with obligations imposed by ComReg regarding the integrity of the network

Regulation 24: failure by an undertaking to comply with obligations imposed by ComReg regarding non-geographic numbers

Regulation 28(3): failure to comply with a direction to alter or add to a code of practice

2.5: Head 7 Continuing Fines

ComReg considers it appropriate that a court should have the power to impose continuing fines in relation to ongoing breaches of specific legislative provisions. Such a power already applies to other offences. It is for instance available to a court in relation to certain breaches of the Wireless Telegraphy Acts and of the Competition Acts as amended.

With regard to the provisions of the Head as drafted, it appears that the reference to Regulation 27 (4) of SI No 307 of 2003 is being used as shorthand for failure to comply with SMP obligations by an undertaking which has been designated by ComReg as having SMP in accordance with Regulation 27(4). SMP obligations are not imposed under the regulation in question which only gives ComReg the power to impose such obligations under the relevant regulations. Accordingly, the reference should be to an offence of failure to comply with SMP obligations imposed by ComReg on an undertaking designated as having SMP, in accordance with Regulation 27(4). For clarification express reference should be made to all the relevant SMP obligations as follows:

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, SI No 305 of 2003

Regulation 5(3): failure by an undertaking designated with SMP to offer access and interconnection on terms and conditions consistent with obligations imposed by ComReg pursuant to Regulation 9

Regulation 9: failure by an undertaking designated with SMP to comply with obligations imposed by ComReg pursuant to Regulations 10 to 14

Regulation 10: failure to comply with transparency obligations imposed by ComReg

Regulation 11: failure to comply with non-discrimination obligations imposed by ComReg

Regulation 12: failure to comply with accounting separation obligations imposed by ComReg

Regulation 13: failure to comply with obligations imposed by ComReg to meet reasonable requests for access to specific network elements and associated facilities

Regulation 14: failure to comply with obligations imposed by ComReg relating to cost recovery and price controls

- European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, SI No 308 of 2003

Regulations 14 (1) and (3): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to controls on retail markets

Regulation 15 (1): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to controls on the minimum set of leased lines

Regulation 16 (1): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to carrier selection and carrier pre-selection.

Regulation 16 (2): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to carrier selection and carrier pre-selection regarding their implementation on other networks or in other ways.

Regulation 16 (3): failure by an undertaking designated with SMP on whom ComReg has imposed obligations in relation to carrier selection and carrier pre-selection, to ensure that pricing is cost oriented and direct charges to subscribers are not a disincentive

2.6: Head 8 Indictable Offences

Head 8.1 ComReg suggests that to avoid confusion reference should be to the term defined in Head 2 “ComReg” and not “Regulator” which has not been defined.

Head 8.2 ComReg’s comments above regarding Head 7 in relation to Regulation 27(4) of SI No 307 of 2003 apply to this section also. The offence referred to should be one of failure to comply with SMP obligations imposed by ComReg on an undertaking which it has designated as having SMP in accordance with Regulation 27(4).

Various provisions of the European Electronic Communications Regulatory Package provide the power to impose SMP obligations. For clarification express reference should be made to all the relevant SMP obligations as follows:

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, SI No 305 of 2003

Regulation 5(3): failure by an undertaking designated with SMP to offer access and interconnection on terms and conditions consistent with obligations imposed by ComReg pursuant to Regulation 9. ComReg notes that non-compliance with Regulation 5(3) insofar as it refers to Regulation 9, which obliges ComReg to impose SMP obligations as set out in Regulations 10 to 14 on an operator which it has designated as having SMP on a relevant market is also included in Head 6.1 among the list of summary offences. It should also be included in this list of indictable offences, as it relates to SMP obligations.

Regulation 9: failure by an undertaking designated with SMP to comply with obligations imposed by ComReg pursuant to Regulations 10 to 14

Regulation 10: failure to comply with transparency obligations imposed by ComReg

Regulation 11: failure to comply with non-discrimination obligations imposed by ComReg

Regulation 12: failure to comply with accounting separation obligations imposed by ComReg

Regulation 13: failure to comply with obligations imposed by ComReg to meet reasonable requests for access to specific network elements and associated facilities

Regulation 14: failure to comply with obligations imposed by ComReg relating to cost recovery and price controls

- European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, SI No 308 of 2003

Regulations 14 (1) and (3): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to controls on retail markets

Regulation 15 (1): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to controls on the minimum set of leased lines

Regulation 16 (1): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to carrier selection and carrier pre-selection.

Regulation 16 (2): failure by an undertaking designated with SMP to comply with obligations imposed by ComReg in relation to carrier selection and carrier pre-selection regarding their implementation on other networks or in other ways.

Regulation 16 (3): failure by an undertaking designated with SMP on whom ComReg has imposed obligations in relation to carrier selection and carrier pre-selection, to ensure that pricing is cost oriented and direct charges to subscribers are not a disincentive

2.7: Head 9 Offences for failure to comply with Direction Notice

Heads 9.1 and 9.2

ComReg has been given the power to issue directions to an undertaking to do or refrain from doing anything which ComReg specifies in a direction relating to an obligation under the European Electronic Communications Regulatory Package of 2003. Such directions may be required to ensure the effective regulation of the sector. In the absence of suitable provisions, an undertaking can ignore a direction without risking criminal liability or being subject to criminal enforcement. In those circumstances, ComReg supports the creation, in the draft heads, of a summary offence for failure to comply with a direction and suggests that prosecution on indictment should be provided for as failure to comply with a direction could in some instances have serious implications and the potential maximum fine of €5,000 resulting from summary prosecution may be ineffective.

Heads 9.3 and 9.4

The power to make directions specifying measures in relation to all obligations is provided for in the Regulations listed in the Head 9.1. It is not apparent, however, what the benefit of the provisions at Heads 9.3 and 9.4 are and accordingly, ComReg considers that they should be omitted.

2.8: Head 10 Extension of Section 44 of the Communications Regulation Act, 2002 provision

Head 10.1

ComReg welcomes the proposal, in Head 10.1, to make summary offences under this Bill offences to which Section 44 of the Communications Regulation Act 2002 applies.

Head 10.2

ComReg notes that Framework Regulation 3 (1) of SI No 307 of 2003 as currently drafted excludes Section 44 notices from the list of ComReg actions which are subject to appeal. It considers therefore that no amendment is needed to Regulation 3 (1) to give effect to the exclusion of notices in relation to summary offences created under this Bill because they are already excluded under that Regulation.

Part 4 Emergency Call Handling

2.9: Head 11 Emergency Call Handling

Head 11.1 Setting up of an Emergency Call Answering Service

The establishment of an ECAS is a matter of Government policy. To date this function has been performed by eircom and its predecessors as a continuation of a service provided by the State.

- The provision of emergency call handling is complex, involves public policy and ensuring its effective operation is a function of central Government. The efficient provision of the service in the manner proposed will require a significant degree of coordination between public bodies. It is essential that the all bodies/parties charged with administering or monitoring the function are adequately resourced to enable them to effectively perform their respective roles.
- There is a need to create a clear obligation as to who is to pay for the ECAS.
- Achieving the effective implementation of this critical life and death service in the way and structure proposed in the draft narrative Head requires careful consideration and needs a significant degree of co-ordination.
- ComReg considers it appropriate that the Minister should be the contracting entity on behalf of the State and that the setting of guidelines will be a Ministerial function as set out in the notes but suggests that this should be made explicit in the legislation.
- It is presumed that the metrics for measuring the service quality will be determined by the Minister and set out in the contract. The entity charged with monitoring the service quality performance should, in ComReg's view, be closely involved in the process of determining what the appropriate metrics to be monitored should be.

- The proposed call handling charge to be paid to the ECAS Operator should be part of the tender criteria. Tendering parties will find it very difficult to make a proposal in the absence of a price. Setting a price in advance will, however, require a detailed understanding of the service.

Head 11.2 Modification of ComReg's Functions

Irrespective of which body carries out the functions under this head, a number of potential inconsistencies arise in relation to the function of monitoring the quality of service being provided by an ECAS, which the legislation will need to address.

- There is a requirement in the Universal Service Directive (Directive 2002/22/EC) that Member States ensure that emergency calls are appropriately answered and handled in a manner best suited to the national organisation of emergency systems. Under existing Regulations in the European Electronic Communications Regulatory Package of 2003 all providers of Publicly Available Telephone Services (PATS) have an obligation to ensure that end users are able to call the emergency services free of charge by using 112 and 999. To date all PATS operators have discharged that obligation by routing such calls to the call handling centres operated by eircom. The issue arose as to who should operate the centre and who should pay for the running of the centre. In place of eircom the State is appointing a body to operate the centre through this proposed legislation. It would potentially be possible for a PATS provider to operate a similar centre in order to connect its customers to the relevant emergency service. Clarification is needed as to whether all PATS providers will have an obligation to use the ECAS.
- Consideration will also have to be given to the interaction between the draft legislation and the provisions contained in Regulation 3(4) (c) of the Universal Service Regulations(S.I 308 of 2003).
- An obligation should be created for undertakings which use the ECAS to pay the call handling charges and to contribute to the sinking fund, if the latter is considered necessary.
- Provision should be made in the head for the funding and resourcing of the functions related to monitoring service quality, determining the appropriate call fee and managing the sinking fund.
- Consideration should be given to the necessity for the existence and operation of a sinking fund in circumstances where it is proposed that the operation of the ECAS will be subject to periodic tendering.

Part 5 Regulation of IEDR

ComReg believes that the title of Part 5 “Regulation of the IEDR” is too restrictive. It appears to refer only to the body currently operating the .ie domain name and suggests that the function being transferred to ComReg is restricted to the regulation of that body only. A better title would be “Domain Name Registration”, which would align with Part 4 of the Electronic Commerce Act, 2000.

2.10: Head 12 Regulation of the Internet .ie Domain name by ComReg

ComReg accepts the decision to transfer the Minister’s powers in relation to Domain Name Registration to it. It considers, however, that the provisions of Head 12.1 should be included in primary legislation and not in regulations made by ComReg itself as provided for in the draft narrative.

In accepting the function of regulating the sector, it needs to be noted that this new activity falls outside the areas normally regulated by ComReg and as such will require additional resources with the requisite skill sets.

In an emergency situation ComReg would, so as to avoid any possible interruption of .ie domain registration, need to be empowered to appoint a skilled entity quickly, operating under a framework that had been carefully determined before the emergency arose. However procedures set out in the Bill (when supplemented by Section 31 of the Electronic Commerce Act, 2000) may in reality be too cumbersome to allow this to take place sufficiently quickly to meet the objectives outlined.. In order to address this eventuality, ComReg proposes that a provision be included in the Head to provide that notwithstanding the provisions of Section 31 of the Electronic Commerce Act, 2000, where ComReg considers that the circumstances so warrant, it may with the consent of the Minister and without following the procedures set down in the Act, designate a registration authority on an interim basis for a period not exceeding one year.

ComReg has the following comments in relation to the detailed provisions of Head 12.1:

Bullet 1: The transfer of the Minister’s powers and obligations under Section 31 of the Electronic Commerce Act, 2000 should be done by means of the current Bill rather than by regulations made by ComReg. In addition, the head as drafted appears to give ComReg a power to transfer by regulation, to a third party, the powers currently vested in the Minister in relation to the regulation of the .ie domain name.

Bullet 2: Might not be sufficient in itself to allow the current .ie registry to be replaced in an emergency situation. For example, access to other file systems (such as zone files) might be needed. ComReg suggests, therefore, that the following narrative which better capture what is needed should be included: “access by ComReg to all .ie domain [name] databases and associated files it deems necessary, on an ongoing basis and in whatever format and manner it thinks fit”. This provision

also should be set out in primary legislation rather than in regulations made by ComReg.

Bullets 3 and 4: ComReg considers that the creation of an offence of failure to comply with regulations should be done in primary legislation rather than in regulations made by ComReg and the penalty should also be set down in primary legislation as is done in Section 31(3) of the Act of 2000.

We believe a fifth bullet should also be added to 12.1 to specifically address the industry levy which ComReg may apply (see costs and benefits section of the consultation). This is a separate levy from the levy traditionally applied to the electronic communications industry by ComReg and already catered for in legislation. It is also oriented towards a different industry segment and therefore needs to be based on a separate statutory provision.

Similarly, it would be more general to refer in Head 12 and bullets 1-3 to the “.ie domain”, rather than “.ie domain name”, as the latter could be construed as referring only to the root domain, whereas the former is inclusive of the whole domain space.

3: Other Relevant Provisions to be considered for inclusion in the Bill

3.1 Administrative Fining Powers

The European Commission in its 7th and 9th implementation reports has noted that there is an enforcement weakness in Ireland due to constitutional issues over the ability of the NRA to impose fines, noting this causes serious problems for the functioning of the single market as a whole.

The framework, as implemented in Ireland, seems to regard technical infringements as more serious (being criminal offences) than economic offences, although it would appear that the latter have the potential, at least, to be more harmful to consumers in the long term. The combination of the awkward breach notification procedure with the lack of offences means that there is no penalty for non-compliance before it is enforced. In other words, if an undertaking wishes to behave in a way which damages competition or consumers, it can do so freely until told to stop. There is no mechanism for recovering the supernormal profits made while the behaviour persisted, or for rectifying the harm to competition.

In event of ComReg finding that a regulated undertaking has breached an obligation, ComReg considers that the non-compliant undertaking should be subject to a civil sanction for that non-compliance even if it subsequently starts to comply. The existing provision for administrative fines only allows for the imposition of a fine by the High Court if the undertaking continues not to comply. Past non-compliance is only subject to criminal prosecution.

To give effect to the power to impose a civil fine ComReg considers that it should have the power not only to find non-compliance as currently provided in the

Enforcement provisions of the European Electronic Communications Regulatory Package of 2003, but to also the following:

- The power to determine the amount of the fine it considers should be imposed
- The power to publish that determination
- The power to seek an order from the High Court confirming the finding of the past non-compliance and the amount of the fine

The current heads do not address the issue of administrative fines. ComReg accepts that a judicial body would have to confirm the amount of the fine and ComReg considers that the High Court could do this. Under the community law principles of equivalence and effectiveness ComReg considers it appropriate that it be provided with national laws equivalent to similar bodies such as IFSRA, and national legislation giving effect to the directives, which require that ComReg be able to directly impose penalties. IFSRA may impose administrative fines under the Central Bank Act, 2004. Further this principle has found favour in other jurisdictions and has been discussed in Ireland.¹ It is noted that Articles 10(3) and (4) of the Authorisation Directive explicitly make provision for NRAs to have the power to impose financial penalties.

ComReg's proposed powers to impose administrative fines in this way would significantly increase the incentive to comply because they could address instances of past non compliance. ComReg considers that an appeal in these circumstances should be via the courts.

3.2 Concurrent Competition Powers and Structural Remedies

ComReg considers that it would be appropriate to include in the Bill a provision for the granting of concurrent competition powers to ComReg.

ComReg currently has no competition law powers. The granting of concurrent powers would be a logical corollary to ComReg's powers under the European Communications Regulatory Package, which are based on competition law principles. An analogous situation exists in the UK, where the possession of such powers by Ofcom has proved to be a useful tool in its regulatory toolbox.

ComReg proposes that it be granted concurrent powers under the Competition Act 2002 relating to restrictive agreements and abuse of a dominant position and powers (Sections 4 and 5). It also proposes that it be given power to make reference to the Competition Authority to carry out a market investigation which could result in the imposition of remedies which would include those structural remedies available in the UK under the Enterprise Act 2002. The powers in question are similar to those granted to Ofcom in the UK. The second proposal may require an addition to the powers of the Competition Authority under the Competition Act 2002 which would include remedies similar to those available in the UK under the Enterprise Act 2002.

¹ See "Competition" Page 216, Vol 11, Edition 8.