



Commission for
Communications Regulation

Information Notice

**Response to Department of Jobs,
Enterprise and Innovation Consultation
on Proposed European Directive
Empowering National Competition
Authorities to be more Effective**

Information Notice

Reference: ComReg 17/49

Date: 6 June 2017

Legal Disclaimer

This Information Notice is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation (ComReg) is not bound by it, nor does it necessarily set out ComReg's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this Information Notice and the due exercise by ComReg of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of ComReg. Inappropriate reliance ought not therefore to be placed on the contents of this Information Notice.

Contents

1	Overview	3
2	ComReg Response	4

1 Overview

- 1.1 The Commission for Communications Regulation ('ComReg'), through the exercise of its *ex ante* regulatory role, seeks to create the conditions necessary for competition to develop by establishing the framework under which service providers may enter and operate within electronic communications markets.
- 1.2 In parallel with this role and following legislative changes in 2007, ComReg also shares responsibility with the Competition and Consumer Protection Commission ('CCPC') for investigating breaches of competition law in the electronic communications sector on an *ex post* basis. Further details in relation to ComReg's competition law role, functions and powers are available in the published 2010 Information Notice¹.
- 1.3 In 2015, the European Commission, through the Directorate General ('DG') for Competition, consulted with stakeholders on how to empower national competition authorities ('NCAs') to be more effective enforcers of competition law ('DG Competition Consultation')². Subsequently, in 2016 DG Competition invited interested parties, via a questionnaire, to further share their experience and provide feedback on potential EU legislative actions to further strengthen the enforcement and sanctioning tools of NCAs.
- 1.4 ComReg responded to the DG Competition questionnaire, with a copy of ComReg's response published in ComReg Document 16/18³.
- 1.5 In March 2017 DG Competition published a proposed Directive ('Directive') intended to empower NCAs to be more effective enforcers of competition law and to ensure the proper functioning of the internal market⁴. The Directive has been forwarded to the European Parliament and the Council for adoption.
- 1.6 In May 2017 the Department of Jobs, Enterprise and Innovation ('DJEI') published a consultation⁵ seeking views from interested parties on the Directive ('DJEI Consultation').
- 1.7 This Information Notice sets out ComReg's response to the DJEI Consultation, the details of which are set out in Section 2 below.
- 1.8 ComReg thanks the DJEI for the opportunity to provide its views on the Directive and looks forward to working with the DJEI and other stakeholders during the process of the Directive's finalisation and ultimate transposition into Irish law.

¹ Guidance on the Submission of Competition Complaints relating to the Electronic Communications Sector, Information Notice, [ComReg Document 10/110](#), December 2010 ('2010 Information Notice').

² See http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

³ Information Notice, Response to DG Competition Consultation on Empowering National Competition Authorities to be more Effective, [ComReg Document 16/18](#), March 2016.

⁴ See details at <http://ec.europa.eu/competition/antitrust/nca.html>.

⁵ See details at: <https://www.djei.ie/en/Consultations/Consultations-files/DJEI-Public-Consultation-Paper-ECN-proposal.pdf>.

2 ComReg Response

Background

- 2.1 The DJEI Consultation refers to the European Commission's 2014 Communication on Ten Years of Council Regulation No 1/2003⁶ ('2014 EC Communication') which found that there is scope for NCAs of EU Member States to be more effective enforcers of competition law and identified a number of areas for action to boost effective enforcement by the NCAs, namely to guarantee that NCAs
- (a) have adequate resources and are sufficiently independent;
 - (b) have an effective toolbox;
 - (c) can impose effective fines; and
 - (d) have effective leniency programmes.
- 2.2 ComReg welcomes the recognition of the need for action in the above areas, with this now embodied in the aims of the Directive which seeks to achieve the following specific objectives:
- (a) ensuring all NCAs have effective investigation and decision-making tools;
 - (b) ensuring that all NCAs are able to impose effective deterrent fines;
 - (c) ensuring that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions; and
 - (d) ensuring that NCAs have sufficient resources and can enforce the EU competition rules independently.
- 2.3 ComReg notes that it has consistently advocated for administrative fining powers, most recently in its submission ('2016 LRC Submission') to the Law Reform Commission ('LRC') regarding the Fourth Programme of law reform and the issues papers - Regulatory Issues and Corporate Offences ('LRC Issues Paper')⁷.
- 2.4 Below, ComReg sets out its views on matters which are relevant to achieving the above aims of the Directive. In this respect ComReg offers comments in relation to:
- (a) the rationale for the reform of competition law enforcement (see paragraphs 2.5 to 2.8 below);
 - (b) the analysis and reasoning to support the Directive (see paragraph 2.9 below);
 - (c) the independence and resourcing of NCAs set out in Article s 4 and 5 of the Directive (see paragraph 2.10 to 2.13 below);

⁶ See http://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf

⁷ Information Notice, Response to Regulatory Enforcement and Corporate Offences Issues Paper from the Law Reform Commission, [ComReg Document 16/25](#), April 2016.

- (d) the enforcement powers set out in Articles 6 to 11 of the Directive (see paragraphs 2.14 to 2.18 below); and
- (e) the enforcement penalties set out in Articles 12 to 15 of the Directive (see paragraphs 2.19 to 2.31 below).

Rationale for Reform of Competition Law Enforcement

- 2.5 Competition objectives are set to pursue public welfare objectives, such as competitive markets and consumer empowerment amongst other things. Competition law breaches harm consumers, firms and industry. Effective compliance with competition law is therefore critical to the economy in general. The availability of robust and effective enforcement powers is, in turn, crucial to ensuring markets function effectively.
- 2.6 Effective powers of enforcement and sanction ensure that action by NCAs is a genuine deterrent, both to the party being punished and to other relevant stakeholders.
- 2.7 ComReg is supportive of the aims of the Directive and notes that it seeks to address a range of enforcement related issues, including penalties and sanctions and thereby providing more effective deterrents to and consequences for anti-competitive behaviour
- 2.8 In this regard, ComReg's view is that the State through the DJEI should support the proposed Directive which expressly addresses the policy objectives and provides:
 - (a) for an effective and consistent enforcement regime applicable to all NCAs to be put in place;
 - (b) that effective penalties for competition infringements be established, with the NCA having the ability to impose penalties and express the maximum quantum of penalty as a percentage of annual turnover⁸; and
 - (c) that NCAs must be independent in the exercise of their functions and powers, as well as having the necessary human, financial and capital resources in doing so.

Analysis and Reasoning to Support the Directive

- 2.9 ComReg considers the provisions of the Directive will help ensure the delivery of EU Competition policy objectives by addressing the following:
 - (a) **Enhanced NCA independence:** with effective deterrent penalties and provision for proportionate sanctions through penalties and orders imposed by the NCA directly without having to first resort to national courts;

⁸ These provisions are consistent with other EU legislation and the implementation of same in Ireland, providing the NCA with the power to impose administrative penalties to a maximum of 10% of annual turnover, such as in the energy sector under the Gas and Electricity Directives transposed via the Energy Act 2016 (noting the enforcement provisions of which were commenced in April 2017).

- (b) **More efficient sanctions and penalties** because administrative penalties utilise NCA expertise, knowledge of facts and national markets without having to first resort to the national courts;
- (c) **Harmonised administrative penalty provisions** through the provision of the same set of competencies for the imposition of penalties which allows for a coherent competition approach for all NCAs. This is consistent with other recent sectoral EU legislation while also providing for a mechanism to address national constitutional limits (the Gas and Electricity Directives and the GDPR are recent models);
- (d) **Proportionate and dissuasive penalties** because they are linked to annual turnover and again harmonised throughout Member States with a specified upper limit that is sufficiently high to act as a credible deterrent. The ability to index fines to turnover achieved as a result of a breach enables an intervention which is not only proportionate to the breach, but also provides a strong economic deterrent. This is consistent with sector specific EU legislation; and
- (e) **Recent EU precedents:** ComReg notes that there have been a number of recent EU precedents which are informative on the issue of administrative fines, namely the EU General Data Protection Regulation⁹ ('GDPR'), the Electricity Directive¹⁰ and the Gas Directive¹¹. The GDPR expressly empowers National Regulatory Authorities ('NRAs') to impose administrative fines with express upper limits of 2%-4% of worldwide turnover. The GDPR is the most recent precedent whereby the EU Commission has seen the need to address disparity in terms of NRAs' ability to take effective deterrent action, through the application of proportionate financial sanctions and penalties. Articles 58(2), 83(1), 83(2), 83(4), 83(5), 83(8) and 83(9) in the GDPR are a helpful precedent. The Electricity Directive (Article 37(4)) and the Gas Directive (Article 41(4)) Directives also expressly empower NRAs to impose administrative fines, with express upper limits of 10% of annual turnover of the operator or undertaking. The language in the Electricity Directive and Gas Directive has been transposed in Ireland through the Energy Act 2016¹² to give the Commission for Energy Regulation the power to impose administrative penalties, albeit with a requirement for subsequent confirmation by the court before the penalty imposed can take effect.

⁹ [Regulation EU 2016/679](#).

¹⁰ [Directive 2009/72/EC](#).

¹¹ [Directive 2009/73/EC](#).

¹² [Energy Act 2016](#), No. 12 of 2016.

- (f) **BEREC Opinions:** There are also two published BEREC¹³ opinions on the ongoing review of the EU Electronic Communications Regulatory Framework which have made reference to the above issues. Although these comments are made in respect of *ex ante* regulatory powers, the same principles apply to *ex post* competition powers set out in the Directive.

Firstly, the 2015 BEREC Opinion¹⁴ on the Review of the EU Electronic Communications Regulatory Framework states that:

"A further point is that an NRA's independence is affected by its ability to enforce regulation. The Framework generally leaves enforcement provisions to national legislators to develop, but this can lead to huge disparities in terms of NRAs' ability to take effective deterrent action, for instance through the application of proportionate sanctions through penalties and orders without having to resort to national courts. For instance, Article 10 of the Authorisation Directive gives Member States the discretion to empower the relevant national authority to impose "dissuasive financial penalties where appropriate". The Directive should be amended to confirm that this power should be given to the sectoral NRA."

Secondly, a 2016 BEREC high-level Opinion on the European Commission's proposals for a Review of the EU Electronic Communications Regulatory Framework¹⁵ states that:

¹³ Body of European Regulators for Electronic Communications as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009. BEREC is an EU established agency responsible for supporting the regulation of the electronic communications markets in the European Union. See http://berec.europa.eu/eng/about_berec/what_is_berec/.

¹⁴ See http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/5577-berec-opinion-on-the-review-of-the-eu-electronic-communications-regulatory-framework, BoR (15) 206, page 59.

¹⁵ See http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6615-berec-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework, BoR (16) 213, page 11.

“BEREC therefore welcomes the Commission’s proposals to strengthen the independence requirements on NRAs, including in particular NRAs’ autonomy in respect of the implementation of their budgetary allocation. We also welcome that the proposals broaden the minimum set of core competences of those independent NRAs. We note the importance of NRAs’ ability to ensure a coherent regulatory approach in their respective national markets, and that all NRAs around the table have the same set of competences, to enable BEREC to pursue coherent harmonisation initiatives. Independence is also affected by an NRA’s ability to enforce regulation through the application of proportionate sanctions through penalties and orders, without having to resort to national courts, and the Code should be amended to confirm that this power should be given to the sectoral NRA.”

Independence and Resourcing of NCAs

- 2.10 ComReg submits that the provisions in Articles 4 and 5 of the Directive should be supported by the State, through DJEI, in context of the current consideration of the proposed Directive by the EU Council Working Party on Competition¹⁶.
- 2.11 Articles 4 and 5 of the Directive seek to ensure that NCAs are effective enforcers of competition law by guaranteeing both their independence and by ensuring that they have adequate human, financial and technical resources.
- 2.12 ComReg notes that, insofar as its independence is concerned, this is catered for under the Communications Regulation Act 2002 (as amended)¹⁷, although Article 2 of the Directive goes further in this regard.
- 2.13 ComReg notes that given the Directive provides a number of significant enhancements across a range of areas (including but not limited to those referred to in this submission), it will be particularly important to ensure that ComReg has sufficient human, financial and technical resources available to it in order to discharge its enhanced competition law functions.

Enforcement Powers – Articles 6 to 11 of the Directive

- 2.14 ComReg submits that the provisions in Articles 6 to 11 of the Directive should be supported by the State, through DJEI, in the context of the current consideration of the proposed Directive by the EU Council Working Party on Competition.
- 2.15 Enforcement powers need to be effective in order to provide for a meaningful deterrent. To be effective, the threat of enforcement must, therefore, be real. This means that any enforcement procedure must be timely and efficient, particularly where there are high value dynamic markets and limited NCA resources.

¹⁶ As noted in the DJEI Consultation, negotiations at EU level, via the EU Working Group on Competition are expected to commence shortly on the Directive.

¹⁷ See section 11 of the Communications Act 2002 (as amended).

- 2.16 Currently there is an *ad-hoc* approach by Member States to the legislative approach to enforcement powers, with slightly different procedures applying to, for example, search powers and summons powers. As a result, there is not a reliable set of precedents that can apply to enforcement powers exercised by all NCAs, and courts have to apply a case-by-case approach which is neither efficient nor ultimately useful.
- 2.17 ComReg submits that there is need for a consistent legislative approach towards enforcement powers exercised by NCAs which would improve the efficiency and effectiveness of competition law.
- 2.18 In this respect ComReg notes that many of the range of enforcement measures set out in Articles 6 to 11 of the Directive are already available to ComReg under the Communications Regulation Act 2002 (as amended), including (but not limited to) the power to inspect premises¹⁸, and the power to request information¹⁹. Akin to Article 11 of the Directive, the Competition Act 2002 (as amended) also includes provisions concerning an NCA's ability to accept commitments.

Enforcement Penalties - Articles 12 to 15 of the Directive

- 2.19 ComReg submits that the provisions in Articles 12 to 15 of the Directive should be supported by the State, through DJEI, in the context of the current consideration of the proposed Directive by the EU Council Working Party on Competition.
- 2.20 Concerns on the lack of an effective civil enforcement regime have been raised both nationally and by the EU. The EC's Directive is to empower NCAs to be more effective enforcers of the EU competition rules with a proposed standardised approach to enforcement across Member States (including in circumstances where cross-border cooperation between NCAs may be required). The responses to the DG Competition Consultation highlighted the need for effective enforcement across the EU which could be better achieved by a convergence of enforcement powers, in particular, given the increasing scope for more 'borderless' markets (such as in the increasingly prominent digital and online sectors). As noted in the EC's Impact Assessment²⁰, such an approach could facilitate the following benefits:
- (a) **for consumers** – if all NCAs have a sufficient enforcement toolkit which is actively used and helps enable a level playing field across Europe, that should boost both consumer confidence and effective competition that ultimately delivers significant benefits to consumers in terms of increased choice, lower prices and more innovation;

¹⁸ Sections 39 and 40 of the Communications Regulation Act 2002 (as amended).

¹⁹ Section 13D of the Communications Regulation Act 2002 (as amended).

²⁰ See http://ec.europa.eu/competition/antitrust/impact_assessment_report_en.pdf.

- (b) **for businesses** – a level playing field also serves to boost business confidence and creates an environment in which markets can develop efficiently across EU borders and in which businesses can compete effectively throughout the EU;
 - (c) **for the EU-wide economy and markets** – effective enforcement of the antitrust rules across the EU supports competition in the Single Market, which itself helps to create jobs and deliver productivity and economic growth; and
 - (d) **for enforcers** – ensuring NCAs are appropriately set up, independent and have the necessary tools and resources to do their jobs increases effective enforcement of the rules, and enhances the scope for beneficial cooperation between enforcers where there are cross-border issues.
- 2.21 Other jurisdictions have valuable models which evidence how civil fining regimes can best meet the need for regulatory enforcement to be effective, proportionate and dissuasive. ComReg welcomes the confirmation of this evidence as set out in the LRC’s Issues Paper. For example, in Spain as in most civil law jurisdictions, administrative fines are imposed directly by the NRA for breaches of obligations under the electronic communications framework. Additionally, common law jurisdictions also have valuable models. For example, the UK allows for the imposition of fines by administrative bodies and Australia has a model that also embraces administrative fines.
- 2.22 It should, however, be noted that civil fines are not intended to replace criminal law enforcement, but to complement it. The provisions in Articles 12 and 13 of the Directive are without prejudice to national laws providing for the imposition of sanctions in criminal judicial proceedings. It should also be noted that it can be argued that civil fines may involve a lenient alternative to criminal punishments that allow corporate bodies to treat the cost of financial sanctions simply as part of the price of doing business²¹. Therefore, to be effective, their maximum statutory levels need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance²². Legislation should provide NCAs with a range of options for pursuing financial sanctions, including fines following criminal prosecution, fines imposed by NCAs rather than courts, and fines imposed by a court following a civil action by an NCA. NCAs should have adequate discretion to choose the tools that best achieve their statutory objectives.

²¹ Coglianesse and Ors, “The Role of Government in Corporate Governance” (2004) Regulatory Policy Program, Center for Business and Government, John F. Kennedy School of Government, Harvard University.

²² Elderfield, “Opening Remarks by Deputy Governor (Financial Regulation) Matthew Elderfield to Central Bank Enforcement Conference” (Central Bank Enforcement Conference, Dublin, 11 December 2012).

- 2.23 Fines must also be proportionate to the non-compliance to which they are applied. In cases where the maximum civil financial sanction is not high enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution²³. The provision in Article 14 of the Directive to empower NCAs to impose maximum fines no less than 10% of worldwide turnover should, in ComReg's view, support the aim of effective enforcement and deterrence.
- 2.24 EU legislation requires sanctions and penalties to be effective, proportionate and deterrent. Proportionality is a keystone of good EU and administrative law. The ability to index fines to turnover achieved as a result of a breach, enables enforcement which is not only proportionate to the harm, but also provides a strong economic deterrent.
- 2.25 Criminal prosecutions are often not an effective and efficient approach to ensuring compliance. In most cases (with the exception of some consumer cases), criminal prosecution may be either not practical or appropriate because of the evidentiary requirements, the complex economic analysis which may be required, and the criminal standard of proof. As a result, a market participant may not view criminal prosecution as likely and therefore the risk of prosecution may not act as a realistic deterrent in those cases. In such cases, a civil fining regime may be more practical and appropriate. Competition law, criminal offences are appropriate only for what are known as "hard-core" cartel offences, which are readily understood by a jury. Nevertheless, at present, all competition infringements are criminal offences.
- 2.26 While civil enforcement may, depending on the circumstances, be more appropriate to non-hard core competition offences than criminal prosecution, the challenge is that the current orders that a civil court can impose are not effective. In general, the court in such a case is limited to making a declaration or issuing an injunction. A fine would be an appropriate penalty, but the civil courts would need to impose a fine of sufficient size to be effective.
- 2.27 For penalties to be dissuasive and a realistic deterrent to the potential gains from non-compliance they need to be proportionate to the harm incurred to the market and proportionate to the turnover of the infringing entity. In severe cases, the potential benefits from breaking the law may be several million euros. Unless penalties can match or exceed these potential gains, businesses could make a commercial decision to break the law, with any financial penalty being viewed as merely a de facto tax or levy, rather than an actual punishment intended to act as a deterrent. EU law consistently requires that competent authorities should be empowered to impose pecuniary penalties which are sufficiently high to be effective, proportionate and deterrent, in order to offset expected benefits from behaviour which infringes the requirements laid down in EU legislation.
- 2.28 As noted by the LRC in its Issues Paper²⁴:

²³ de Moor-van Vugt, "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 5, 37.

²⁴ See paragraph 2.19 of the LRC Issues Paper.

“Although concerns have been raised in relation to their adequacy, effectiveness and constitutionality, it would appear possible to design a civil financial sanction regime that is sufficiently strong to deter non-compliance while respecting the constitutional requirements.”

- 2.29 Without fully empowered competition enforcement regimes comparable with other jurisdictions, other positive changes and improvements to the competition landscape may lose their value in application.
- 2.30 Based on the research and evidentiary findings referred to above, ComReg submits that the State, through the DJEI, is in a position to support the Directive as drafted and advocate for non-criminal fines. In Ireland, such fines could be provided for under two headings:
- (a) fines imposed by courts in civil cases, and
 - (b) administrative fines imposed directly by NCAs.
- 2.31 Fines imposed directly by the courts in civil cases are a very effective method of deterrence, if such fines are proportionate to the infringement in question. A number of different models of fining power have been pursued by the State in recent years. Some are essentially voluntary (e.g. on the spot fines). One can pay the fine imposed or instead go through the judicial process. Others involve application by the NCA to court. It should also be noted that where agencies are given certain powers of a quasi-judicial nature, the legislature has to observe the principle of *nemo iudex in causa sua*. Thus, for example, one finds provisions in the Energy Act 2016²⁵; the GDPR; the 2016 Irish Data Protection Bill²⁶; the Broadcasting Act, 2009 for a Compliance Committee; and provisions in Part III C of The Central Bank Act, 1942 (as amended) for an appeal to an Appeals Tribunal. Under the Constitution, limited powers and functions of a judicial nature can, therefore, be conferred on bodies other than courts.

²⁵ See <http://www.irishstatutebook.ie/eli/2016/act/12/enacted/en/html?q=energy+act>

²⁶ See [http://www.justice.ie/en/JELR/General_Scheme_of_Data_Protection_Bill_\(May_2017\).pdf/Files/General_Scheme_of_Data_Protection_Bill_\(May_2017\).pdf](http://www.justice.ie/en/JELR/General_Scheme_of_Data_Protection_Bill_(May_2017).pdf/Files/General_Scheme_of_Data_Protection_Bill_(May_2017).pdf).