

# Communications Regulation Bill 2022

Bill No. 86 of 2022

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## Abstract

The Bill transposes the enforcement and security provisions of Directive (EU) 2018/1972, which established the European Electronic Communications Code (EECC). It enhances the enforcement provisions that apply to ComReg, providing for independent adjudicators and the imposition of administrative sanctions, as well as providing a statutory footing for Electronic Communications Security Measures (ECSMs). It also provides for several consumer protection mechanisms required by the EECC and makes necessary amendments to the *Communications Regulation Act 2002*.



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## Introduction and Background

In 2016, the European Commission presented a [proposed Directive](#) to “recast” four existing Directives governing the regulatory framework for electronic communications.<sup>1</sup> These Directives are:

- The Framework Directive<sup>2</sup>
- The Authorisation Directive<sup>3</sup>
- The Access Directive<sup>4</sup>, and
- The Universal Services Directive<sup>5</sup>

The proposal led to the adoption of [Directive \(EU\) 2018/1972](#), which established the European Electronic Communications Code (EECC).<sup>6</sup> According to the European Commission, the EECC updates and merges the framework governing the European telecommunications sector. It harmonises the rules governing electronic communications services throughout the EU, with rules aimed at ensuring higher quality of services, better consumer protection and universal broadband services.<sup>7</sup>

Most of the EECC is being transposed into Irish law by secondary legislation, the [European Communications Code Regulations 2022](#) (the Code Regulations).<sup>8</sup> These will enter into force upon the enactment and commencement of the Bill. The [Communications Regulation Bill](#) (the Bill) gives effect to the EECC provisions not included in the Code Regulations, as well as making a number of further provisions at national level in relation to enforcement and amendments to the [Communications Regulation Act 2002](#) (the Principal Act).

Overall, the Bill has five main objectives:

1. Transpose the enforcement provisions of the EECC. The main provisions in this regard are understood to be Articles 29, 30 and 31. The Bill will also designate ComReg as the competent authority for enforcing the EECC.
2. Update and enhance ComReg’s enforcement powers. These provisions follow on from a Programme for Government commitment to enhance ComReg’s enforcement regime. The

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<sup>1</sup> European Commission, [Proposal for a Directive of the European Parliament and the Council establishing the European Electronic Communications Code \(Recast\)](#), 12 October 2016, *COM(2016) 590 final*.

<sup>2</sup> [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services](#) [2002] OJ L 108/33.

<sup>3</sup> [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services](#) [2002] OJ L 108/21.

<sup>4</sup> [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities](#) [2002] OJ L 108/7.

<sup>5</sup> [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services](#) [2002] OJ L 108/51.

<sup>6</sup> [Directive \(EU\) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code](#) [2018] OJ L 321/36.

<sup>7</sup> European Commission, [Electronic communications law](#) (webpage), last updated 7 June 2022.

<sup>8</sup> [European Union \(Electronic Communications Code\) Regulations 2022](#), S.I. No. 444 of 2022.

Bill, in particular, provides for independent adjudication officers and the imposing of administrative sanctions.

3. Transpose the security provisions of the EECC and give statutory underpinning to Electronic Communications Security Measures (ECSMs). The security provisions of the EECC are Articles 40 and 41.
4. Provide for a limited number of new consumer protection provisions for the sector. This includes transposing Articles 25, 104 and 106(8) of the EECC.
5. Update the Communications Regulation Act 2002 to align the Act with the EECC and make necessary amendments to ComReg's current functions and powers.

This Bill Digest focuses on the primary legislation relating to the transposition of the EECC only (the Bill) and does not propose to consider elements of the EECC included in the Code Regulations. It is structured into three parts as follows:

- Introduction and Background
- Policy and Legislative Context (also addressing the Regulatory Impact Assessment and Pre-legislative Scrutiny), and
- Principal Provisions of the Bill

The below table sets out technical terms and abbreviations which are referred to in this Digest.

**Table: Glossary and abbreviations**

Term	Meaning
BEREC	Body of European Regulators for Electronic Communications – This is the EU-level regulatory body for the telecommunications market.
ComReg	Commission for Communications Regulation
CSIRT	Computer Security Incident Response Team – The Bill provides that this is a unit in the Department.
Department	Department of the Environment, Climate and Communications
ECN	Electronic Communications Network
ECS	Electronic Communications Service
EECC	European Electronic Communications Code – This was established by Directive (EU) 2018/1972, referred to as the EECC in this document.
ENISA	European Union Agency for Cybersecurity
IAS	Internet access service
LRC	Law Reform Commission
NB-ICS	Number-based interpersonal communications service
NESC	National Economic and Social Council
NI-ICS	Number-independent interpersonal communications service
NIS Directive	Network and Information Systems Directive – This refers to Directive (EU) 2016/1148.
OTT	Over the top – This refers to providers that offer services directly to end-users, bypassing traditional operators (e.g. broadcast or satellite).
PLS	Pre-Legislative Scrutiny
Principal Act	<i>Communications Regulation Act 2002</i>
RIA	Regulatory Impact Assessment
2002 Act	<i>Competition Act 2002</i>

## Basis for the EECC

According to the Department, in its Information Note, the draft Directive was part of a package of legislative texts and action plans, forming part of the review of the telecoms regulatory framework promoted by the [2015 Digital Single Market Communication](#) (the 2015 Communication).<sup>9</sup>

The resulting legislation, Directive 2018/1972, also known as the **European Electronic Communications Code** (EECC), was adopted (by the European Parliament and the Council) through the EU's Ordinary Legislative Procedure on 11 December 2018.<sup>10</sup> It entered into force on the third day following its publication in the Official Journal of the EU (20 December 2018).<sup>11</sup> The Directive required Member States to apply measures for transposing its provisions into national law by 21 December 2020 (an effective transposition period of two years). Some limited derogations to this requirement are set out in Article 124 of the Directive.

In its Explanatory Memorandum for the proposal, the European Commission opens with the following:

“Since the last revision of the regulatory framework for electronic communications in 2009, the sector has significantly evolved and its role as an enabler of the online economy has grown. Market structures have evolved, with monopolistic market power becoming increasingly limited, and at the same time connectivity has become a widely pervasive feature of economic life. Consumers and businesses are increasingly relying on data and internet access services instead of telephony and other traditional communication services.”<sup>12</sup>

The European Commission highlights the emergence of new, previously unknown market players, such as over-the-top players (OTTs), which are service providers offering a wide variety of applications and services, including communications services, over the internet. Further, the Commission also highlights the increased demand for high-quality fixed and wireless connectivity and the rise and popularity of online content services and the continued evolution of electronic communications.<sup>13</sup>

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<sup>9</sup> Department of Communications, Climate Action and the Environment, [Information Note – EECC](#) {laid before the Houses of the Oireachtas with the draft proposal}, 12 October 2016.

<sup>10</sup> The ordinary legislative procedure is the main procedure used by the European Parliament and the Council of the European Union for jointly adopting EU legislation. See EurLex, Glossary of summaries, [Ordinary Legislative Procedure \(Codecision\)](#) (webpage).

<sup>11</sup> [Directive \(EU\) 2018/1972 of the European Parliament and the Council of 11 December 2018 establishing the European Electronic Communications Code](#) [2018] OJ L 321/36,

<sup>12</sup> European Commission, [Proposal for a Directive of the European Parliament and the Council establishing the European Electronic Communications Code \(Recast\)](#), 12 October 2016, COM(2016) 590 final, at p.2.

<sup>13</sup> Ibid.

## Infringement Proceedings

Before discussing the policy and legislative context for the Bill, it is important to reference the ongoing infringement proceedings against Ireland for failure to transpose the EECC by the December 2020 deadline. A Reasoned Opinion was issued to Ireland on 23 September 2021 and subsequently referred Ireland to the European Court of Justice on 6 April 2022.<sup>14</sup>

Infringement cases are an issue that is not unique to Ireland, but rather an issue concerning every Member State. The number of open infringement proceedings against Ireland in the European Commission's 2021 Annual Report on Monitoring the Application of EU Law is set out in the below table, with late transpositions accounting for just over half of these cases.<sup>15</sup>

**Table: Open Infringement Cases - Ireland**

Type of Infringement	No. of Cases
Infringements of regulations, treaties, decisions	7
Infringements for incorrect transposition and/or incorrect application of directives	22
Late transposition infringements	30
<b>Total Infringements</b>	<b>59</b>

Source: European Commission, General Overview, Monitoring the Application of European Union Law, Annual Report 2021.

Putting the above figures into context, the total number of open infringement cases involving the EU27 and the UK is 1,930 cases. Nonetheless, infringement proceedings may result in actions before the Court of Justice and substantial financial penalties.

In respect of the EECC, the European Commission noted in its 2021 report that it launched infringement proceedings against 24 Member States for failure to transpose it on time, and pursued these proceedings further against 20 Member States later in 2021.<sup>16</sup> Ireland was referred to the European Court of Justice with nine other Member States in April of this year.<sup>17</sup>

<sup>14</sup> See European Commission, Digital Economy and Society Index 2022 – Ireland, July 2022.

<sup>15</sup> European Commission, [General Overview, Monitoring the Application of European Union Law](#) (factsheet), July 2022.

<sup>16</sup> European Commission, [Report from the Commission – Monitoring the application of European Union Law, 2021 Annual Report](#), COM(2022) 344 final, 15 July 2022, at p.8.

<sup>17</sup> European Commission, [EU Electronic Communications Code: Commission refers 10 Member States to the Court of Justice of the EU](#) (press release), 6 April 2022.

## Policy and Legislative Context

This section of the Digest examines the policy and legislative context to the Bill and provides an overview of the key considerations the Bill provides for, including the adoption of an enforcement regime that involves administrative financial sanctions and independent adjudication officers.<sup>18</sup> The Bill also provides for enhanced security provisions, which are to operate under a common EU framework, as well as providing for certain consumer protection provisions included in the EECC. Finally, this section will also consider the Regulatory Impact Assessment (RIA) and Pre-legislative Scrutiny of the Bill's General Scheme.

In the Programme for Government, a commitment was made to give greater enforcement powers to ComReg in the context of the National Economic Plan and Broadband. In particular, the Programme states the following:

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.<sup>19</sup>

While most of the EECC will be transposed by secondary legislation, the use of primary legislation relates to providing further enforcement powers for ComReg, in line with the above commitment. The Department indicated at the outset of the drafting process that certain provisions of the EECC will be transposed by primary legislation.<sup>20</sup> These provisions are set out in the below table.

**Table: Provisions of the EECC transposed by the Bill**

EECC Article	Subject
Article 25	Alternative Dispute Resolution
Article 29	Penalties
Article 30	Compliance with the conditions of the general authorisation or of rights of use for radio spectrum and for numbers resources and compliance with specific obligations (urgent interim measures)
Article 31	Right of appeal
Article 40	Security of networks and services
Article 41	Implementation and enforcement
Article 104	Quality of service related to internet access services and publicly available interpersonal communications services
Article 106(8)	Provider switching and number portability (end-user compensation)

Source: Department of the Environment, Climate and Communications and the EECC

<sup>18</sup> A similar approach was enacted through the [Competition \(Amendment\) Act 2022](#), which transposed the ECN+ Directive into Irish law. See also [Directive \(EU\) 1/2019 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market](#) [2019] OJ L 11/3.

<sup>19</sup> Government of Ireland, [Programme for Government – Our Shared Future](#) (PDF download), p.23.

<sup>20</sup> Department of the Environment, Climate and Communications, [Communications Regulation \(Enforcement\) Bill – Summary Document](#) (PDF download), December 2021, at pp.2-3 and 10-11.



## Use of Primary Legislation to Transpose the EECC

During the pre-legislative scrutiny process, the Department further stressed the need for primary legislation, stating the following:

“... advice was received by the Department from the Office of the Attorney General that this was not permissible and that primary legislation would be required to transpose the enforcement provisions of the Code and to designate ComReg as the body responsible for the Code’s enforcement. This Bill will address the issues raised in the Attorney General’s advice.”

Under [section 3 of the European Communities Act 1972](#), EU legislation may be transposed into Irish law by secondary legislation. However, Irish case law has recognised that if the transposition of EU legislation involves the definition of the policies and principles at national level, this would require primary legislation.

In *Citywest Press v An Comhairle Oiliúna*<sup>21</sup>, cited also in *Meagher v Minister for Agriculture*<sup>22</sup>, the Supreme Court outlined the following test:

“In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power.”<sup>23</sup>

In *Meagher*, the court held that as the ‘principles and policies’ (as outlined in the *Cityview Press* case) were to be found in European Law, the making of an SI based on that law was not an unauthorised delegation of legislative power.<sup>24</sup>

## ComReg Enforcement Powers

As well as transposing the EECC, the Bill seeks to enhance the enforcement powers of ComReg as well as make a number of amendments to the [Communications Regulation Act 2002](#) to align its functions with the EECC and introduce new functions.

ComReg was established on 1 December 2002 in place of the Director of Telecommunications Regulation. It is a statutory body responsible for the regulation of electronic communications services (ECS), electronic communications networks (ECN), associated facilities and the postal sector.<sup>25</sup> Its regulatory functions in the electronic communications sector include

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<sup>21</sup> *Citywest Press v An Comhairle Oiliúna*, [1980] IR 381.

<sup>22</sup> *Meagher v Minister for Agriculture* [1994] 1 IR 329.

<sup>23</sup> *Citywest Press v An Comhairle Oiliúna*, [1980] IR 381, per O’Higgins CJ.

<sup>24</sup> *Meagher v Minister for Agriculture* [1994] 1 IR 329, per Denham J.

<sup>25</sup> Commission for Communications Regulation, [Electronic Communications Strategy Statement 2021-2023](#), at p.4.

telecommunications, radio communications, broadcasting transmission and premium rate services. It is also responsible for facilitating competition, consumer protection and encouraging innovation.<sup>26</sup>

Currently, ComReg has some enforcement powers under Parts 2A and Part 3 of the [Communications Regulation Act 2002](#).

Part 2A relates to special powers to require persons to give evidence or produce documents. This specific power is set out in section 38A of the Act, with the following provisions providing for matters such as the providing of evidence under oath or affirmation, and for circumstances where such evidence is not taken in private. This Part also provides for offences for failing to appear before ComReg, refusing to be sworn or to answer questions.

Part 3 sets out the provisions regarding enforcement, with some of the main provisions including the following:

- [Section 39](#) sets out the roles and functions of authorised officers, as well as making provision for search warrants for suspected offences and the prosecution of offences as summary offences.
- [Section 43](#) provides that ComReg may prosecute summary offences under the Act..
- [Section 45](#) of the Act requires undertakings not to overcharge or to charge for services not supplied.
- [Section 46](#) allows ComReg to apply to the High Court to restrain repeated contravention of this provision under section 45.
- [Section 46A](#) allows for special powers for the Minister to make regulations giving effect to EU legislation relating to communications matters, which include powers to provide for offences.

In its Summary Document for the Bill, the Department noted ComReg's current role in enforcing the existing framework, which includes the Framework Regulations, the Access Regulations, the Authorisation Regulations and the Universal Services Regulations. Further to this, the Department referenced the updating of ComReg's enforcement powers as a key strategic action of its 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.<sup>27</sup>

In its [Electronic Communications Strategy Statement](#) for 2021 to 2023, ComReg referenced the need for "proper and sufficient" enforcement powers if it is to be an effective regulator, stating that it continues to seek powers to meet current and future challenges in delivering on its statutory and

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<sup>26</sup> Commission for Communications Regulation, [What We Do](#) (webpage).

<sup>27</sup> Department of the Environment, Climate and Communications, [Communications Regulation \(Enforcement\) Bill – Summary Document](#) (PDF download), December 2021, at p.4. See also Department of the Environment, Climate and Communications, [Le Chéile 23 – Statement of Strategy 2021-2023](#) (PDF download), at p.18.

regulatory remit.<sup>28</sup> Further, it notes three areas where it states that its enforcement regime could be improved:

- The ability of ComReg to impose administrative financial sanctions in appropriate circumstances,
- An increase in the maximum fine that may be imposed for criminal offences following conviction on indictment, and
- Regulatory powers, and in particular, certain inspection, investigation and enforcement powers should be standardised across all regulatory bodies.<sup>29</sup>

It added that it has made a number of submissions to the Law Reform Commission (LRC) since 2012 on the necessity for its enforcement regime to embody effective deterrence mechanisms.<sup>30</sup>

## **EECC Enforcement Provisions transposed by the Bill**

### **Article 29: Penalties**

This requires Member States to lay down rules on penalties, including fines and non-criminal pre-determined or periodic payments, for infringements of national provisions adopted pursuant to the EECC or any binding decision pursuant to its provisions adopted by the European Commission or the national regulatory or other competent authority. Such penalties are to be imposed by national regulatory or other competent authorities.

Article 29(2) makes a specific limitation to the procedure set out in Article 22(3) of the EECC, which relates to geographical surveys for network deployments.<sup>31</sup> This obliges Member States to limit penalties in the context of this procedure only to instances where an undertaking or public authority knowingly or through gross negligence provided misleading, erroneous or incomplete information.

### **Article 30: Compliance with certain provisions**

This requires Member States to ensure that their relevant competent authorities monitor and supervise compliance by undertakings with the conditions of general authorisation or rights of use for radio spectrum and for numbering resources, as well as with specific obligations set out in the Article. Competent authorities are also empowered to require such undertakings to provide all necessary information to verify compliance with obligations set out in the Article.

Article 30(2) requires the competent authority, where it finds an undertaking not to be in compliance, to notify the undertaking concerned and give it an opportunity to state its views.

Article 30(3) further provides that the competent authority may require the cessation of such a breach or take such appropriate and proportionate measures to bring it into compliance, including

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<sup>28</sup> Commission for Communications Regulation, Electronic Communications Strategy Statement, 2021 to 2023, at p.72.

<sup>29</sup> Ibid, at pp.72-73.

<sup>30</sup> Ibid33, at p.73.

<sup>31</sup> Article 22(3) is transposed by Regulation 100(8) of the Code Regulations.

financial penalties and orders to cease or delay the provision of services / bundles of services which may harm competition if continued.<sup>32</sup>

Article 30(4) makes further provision for competent authorities to impose financial penalties on undertakings for failures to provide information in accordance with obligations under Articles 21(1)(a), 21(1)(b) or Article 69.

Article 30(5) makes provision for competent authorities to impose penalties in the case of serious or repeated breaches of the conditions of general authorisation or of the rights of use for radio spectrum or for numbering resources.

Article 30(6) makes provision for competent authorities to take urgent interim measures to remedy a situation ahead of reaching a final decision. This applies where a competent authority has evidence of a breach of obligations which:

- Represents an immediate or service threat to public safety, public security or public health, or
- Risks creating serious economic or operational problems for other providers or users of electronic communications networks / services or other users of radio spectrum.

Article 30(6) also elaborates on the procedural elements for urgent interim measures and sets a maximum time limit for such measures of three months, extendable by a further three months where enforcement procedures have not been completed. Finally, Article 30(7) makes provision for a right to appeal for any measures taken under Article 30.

### **Article 31: Appeals**

Article 31(1) requires Member States to ensure effective mechanisms under which any user or undertaking providing ECN/ECS or associated facilities who is affected by a decision of a competent authority to have a right of appeal. This appeal body must be independent of the parties involved, and of any external intervention or political pressure, and may be a court. The appeal body must have appropriate expertise to carry out the appeal functions. Member States are further obliged to ensure the merits of the case are taken into account.

Article 31(2) requires the body to give written reasons for its decision if it is not judicial in character, as well as requiring Member States to ensure the appeal mechanism is effective.

Article 31(3) makes provision for the collection of certain information and the provision of this information to the European Commission and BEREC upon reasoned request.

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<sup>32</sup> Such orders are pending on access obligations imposed following a market analysis under Article 67 of the EECC.

## Law Reform Commission Report – Regulatory Enforcement and Corporate Offences

In its 2018 Report on [Regulatory Powers and Corporate Offences](#), the LRC compared eight regulators in respect of six types of power, namely:

- Investigation / Inquiry
- Powers of Search and Investigation (Authorised Officers)
- Warning / Compliance Notice (Negative Enforcement)
- Civil Financial Sanctions
- Summary Prosecution
- Contract / Licensing Actions<sup>33</sup>

Of the six types of powers considered, only civil financial sanctions were not afforded to ComReg. Similarly, at the time, the CCPC did not have these powers in relation to competition law, although these powers were provided for in the [Competition \(Amendment\) Act 2022](#).

### Enforcement Pyramid

The LRC 2018 Report references what it describes as the ‘enforcement pyramid’, also making it clear that administrative financial sanctions are a crucial part of this pyramid.<sup>34</sup> The enforcement pyramid arises from the term ‘responsive regulation’, which was noted by a 2011 Report of the National Economic and Social Council (NESC), [Quality and Standards in Human Services in Ireland: Overview of Concepts and Practice](#).<sup>35</sup> That report stated the following as included in the key elements of the theory of responsive regulation:

- Regulation is viewed along a continuum that encompasses distinct approaches;
- The regulator/overseer begins at the base of the pyramid with persuasion;
- A single regulatory mechanism is seldom sufficient as the weaknesses of one mechanism must be complemented by the strengths of another; and
- There must be a capacity for escalation if persuasion fails.<sup>36</sup>

Referencing Braithwaite, the NESC further noted that approaches involving self-regulation are at the bottom of the pyramid, with regulation increasing in intensity as it moves upwards through what is described as meta-regulation and command and control.<sup>37</sup> In its 2018 Report, the LRC illustrated the enforcement pyramid and examples of the regulatory approaches in each stage through a graphic which is reproduced below.<sup>38</sup>

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<sup>33</sup> Law Reform Commission, [Report – Regulatory Powers and Corporate Offences](#), LRC 119-2018, at pp.71-73.

<sup>34</sup> Ibid, at pp.42-44.

<sup>35</sup> National Economic and Social Council, [Quality and Standards in Human Services in Ireland: Overview of Concepts and Practice](#), December 2011.

<sup>36</sup> Ibid, at p.18.

<sup>37</sup> Ibid, at p.19, citing Braithwaite, J. (2002), *Restorative Justice and Responsive Regulation*, New York: Oxford University Press.

<sup>38</sup> Law Reform Commission, [Report – Regulatory Powers and Corporate Offences](#), LRC 119-2018, at p.44.

**Figure: Enforcement Pyramid**

Source: Reproduced from Law Reform Commission, Report on Regulatory Enforcement and Corporate Offences (itself adapted from Macrory, Regulatory Justice: Making Sanctions Effective (2006))

In the context of this Bill, the Department has referenced to the concept of the ‘enforcement pyramid’ identified in the 2018 LRC Report in the RIA for the Bill, highlighting two recommendations of the LRC.<sup>39</sup>

The first recommendation is that economic regulators are given a “core regulatory toolkit”, which consists of the following:

1. Power to issue a range of warning directions or notices, including to obtain information by written request and “cease and desist” notices;
2. Power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;
3. Power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or produce documents (including provision for determining issues of privilege);
4. Power to impose administrative financial sanctions (subject to court oversight, to ensure compliance with constitutional requirements);
5. Power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes;
6. Power to bring summary criminal prosecutions (prosecutions on indictment are referred to the Director of Public Prosecutions).<sup>40</sup>

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<sup>39</sup> Department of the Environment, Climate and Communications, [Regulatory Impact Assessment – Communications Regulation Bill 2022](#) (PDF download), July 2022, at pp.12-14. See also Law Reform Commission, [Report – Regulatory Powers and Corporate Offences](#), LRC 119-2018, at pp.95-96.

<sup>40</sup> Department of the Environment, Climate and Communications, [Regulatory Impact Assessment – Communications Regulation Bill 2022](#) (PDF download), July 2022, at pp.12-13.

The RIA further states that the Bill will ensure that the ComReg would be enabled to exercise each of the powers in the “core regulatory toolkit”.

The second recommendation of the LRC involved giving these powers to all regulators by way of a standard template applied through a single act, but the Department stated that this was beyond the scope of work on the Bill and not considered.<sup>41</sup>

Administrative sanctions have been enacted through the [Competition \(Amendment\) Act 2022](#) and are part of the regime proposed by the [Online Safety and Media Regulation Bill](#)<sup>42</sup>.

## Administration of Justice

### Administrative Financial Sanctions

When applying administrative sanctions, a possible issue arises in relation to the administration of justice. Article 34.1 of the Constitution provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

However, this is qualified by Article 37 of the Constitution, which allows for the exercise of “limited functions of a judicial nature” by bodies other than courts. This gives rise to the question of what constitutes an administration of justice and what constitutes a limited function.

In *McDonald v Bord na gCon*, Kenny J listed five criteria that could help define whether a civil process should be regarded as an administration of justice:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment; and
5. The making of an order by the Court, which as a matter of history is an order characteristic of Courts in this country.<sup>43</sup>

On the issue of administrative fines / sanctions, the High Court considered this issue in *Purcell v Central Bank of Ireland*<sup>44</sup>, finding that administrative fines issued by a regulatory body and confirmed by a court, and imposed within a well-defined regulatory process, do not amount to an administration of justice under Article 34.1. The court also considered the application of Article 38.1 of the Constitution, which provides that no person shall be tried on any criminal charge save in due

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<sup>41</sup> Ibid, at p.13.

<sup>42</sup> At the time of writing, the Online Safety and Media Regulation Bill was before Dáil Éireann.

<sup>43</sup> *McDonald v Bord na gCon*, [1965] IR 217, per Kenny J.

<sup>44</sup> *Purcell v Central Bank of Ireland* [2016] IEHC 514.

course of law. It noted the Supreme Court consideration of the distinction between the criminal and civil processes in *Melling v O'Mathghamhna*, where the Court highlighted the following essential features of a criminal offence:

1. its character as an offence against the community;
2. the detention or taking custody of a suspect and/or the entry of a criminal charge;
3. the punitive nature of the sanction;
4. the requirement of *mens rea*.<sup>45</sup>

In *Purcell*, the Court held that none of the indications of a criminal offence identified in *Melling* are present.<sup>46</sup>

Administrative financial sanctions are often referred to as “administrative fines”. In its 2018 report on [Regulatory Enforcement and Corporate Offences](#), the LRC highlighted that the term ‘fine’ is misleading, as this term is more properly associated with criminal sanctions. It suggested instead the term ‘administrative financial sanctions’.<sup>47</sup>

The L&RS previously considered administrative financial sanctions in its [2019 Spotlight](#) on the topic, which discusses the above issues in greater detail.<sup>48</sup>

### Independence of Adjudicators

The 2021 Supreme Court decision in *Zalewski v Workplace Relations Commission*<sup>49</sup> is cited as a further consideration when establishing a stronger enforcement regime for ComReg. This case was also a consideration in the introduction of similar civil enforcement regimes, such as those of the Competition and Consumer Protection Commission under the [Competition \(Amendment\) Act 2022](#).<sup>50</sup>

In *Zalewski*, the Court considered the requirements for determining what constitutes the administration of justice, finding that the adjudication procedure of the Workplace Relations Commission (WRC) amounted to an administration of justice. However, the Court stopped short of holding it as constitutionally repugnant as it was an administration of justice on a limited nature permitted by Article 37 of the Constitution.<sup>51</sup> The Court also commented on some of the procedural elements of the WRC process, holding that there is no “justification for a blanket prohibition on hearings in public before the adjudication officer”, and criticised the absence of an oath in WRC hearings.<sup>52</sup>

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<sup>45</sup> *Melling v O'Mathghamhna* [1962] 1 IR 1. *Mens rea* is a Latin term which refers to the blameworthy state of mind which must accompany a criminal offence.

<sup>46</sup> *Purcell v Central Bank of Ireland* [2016] IEHC 514., per Hedigan J at [8.8].

<sup>47</sup> Law Reform Commission, [Report – Regulatory Powers and Corporate Offences](#), LRC 119-2018, at p.99.

<sup>48</sup> Oireachtas Library & Research Service, 2019, [Spotlight: Administrative financial sanctions](#).

<sup>49</sup> *Zalewski v Workplace Relations Commission* [2021] IESC 24.

<sup>50</sup> See Oireachtas Library & Research Service, 2022, [Bill Digest: Competition \(Amendment\) Bill 2022](#).

<sup>51</sup> *Zalewski v The Workplace Relations Commission* [2021] IESC 24. Article 37 of the Constitution relates to the exercise of limited functions and powers of a judicial nature.

<sup>52</sup> *Ibid*, per O'Donnell J at [142] and [144].



The Court considered the *McDonald* criteria outlined above and concluded that these must be applied with some flexibility. As stated by O'Donnell J in his judgment:

"The administration of justice is not, however, to be defined by, or limited to, those areas traditionally dealt with by the courts. The proper scope of the administration of justice is not determined simply by analogy with what was done by the courts as a matter of history, and still less by the form of orders traditionally made by them. It may be possible to say, even if no single test can be advanced, that an area is something intrinsically within the scope of the administration of justice. ...

Even if it is considered an impossible task, as a matter of pure theory, to define with precision the exact boundaries of the administration of justice or to offer a single infallible litmus test, we can still identify areas which can be agreed to be part of the administration of justice."<sup>53</sup>

O'Donnell J also addressed the issue of the independence of an adjudication officer and stressed that "[i]ndependence and impartiality are fundamental components of the capacity to administer justice", further noting that:

"... [t]hese considerations are not peculiar to the Irish constitutional order: guaranteed impartiality and independence are also essential requirements for any adjudication within the scope of European law, or in accordance with Article 6 E.C.H.R. and the jurisprudence of the E.Ct.H.R."<sup>54</sup>

A more detailed analysis of the decision in *Zalewski* is included in the [Bill Digest](#) on the *Workplace Relations (Miscellaneous Amendments) Bill*.<sup>55</sup>

The Regulatory Impact Assessment (RIA) for the Bill addresses the considerations posed by the decision in *Zalewski* for a civil enforcement regime, which required the Department to consider the impact of the judgment on the drafting of the Bill. On this point, the RIA states the following:

"The impact of these judgements, and the clarity they bring to how administration of justice can be done within the parameters of the Constitution, required careful consideration when the Communications Regulation Bill was being drafted. Considerable engagement ensued between DECC and the AGO to ensure that the enforcement regime as drafted in this Bill complied with the rigorous requirements imposed by the judgement."<sup>56</sup>

## Security Measures

Articles 40 and 41 of the EECC collectively make up the security provisions of the EECC, which are to be transposed into Irish law by the Bill.

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<sup>53</sup> Ibid, per O'Donnell J at [96].

<sup>54</sup> Ibid, per O'Donnell J at [147].

<sup>55</sup> Oireachtas Library & Research Service, 2021, [L&RS Bill Digest: Workplace Relations \(Miscellaneous Amendments\) Bill 2021](#), at pp.8-11.

<sup>56</sup> Department of the Environment, Climate and Communications, [Regulatory Impact Assessment – Communications Regulation Bill 2022](#) (PDF download), July 2022, at p.12.

Before describing the measures set out in the EECC, it is important to note that proposals to revise the Network Information Services (NIS) Directive may involve repealing Articles 40 and 41 of the EECC.<sup>57</sup> In its Opinion on the proposed NIS 2 Directive, BEREC noted that while there is a rationale to place all infrastructures under one security framework, it expressed deep concern at the potential fragmentation of the EECC.<sup>58</sup> BEREC also expressed concern on how the principle of proportionality would be accounted for in NIS 2, as is currently the case for Articles 40 and 41 of the EECC, as the absence of provisions on proportionality in NIS 2 may constitute a barrier to market entry for smaller providers.<sup>59</sup>

### **Article 40 – Security of networks and services**

Article 40(1) requires Member States to ensure that providers take appropriate and proportionate technical and organisation measures to appropriately manage the risks posed to the security of networks and services. Having regard to the state of the art, they must ensure a level of security appropriate to the risk presented and in particular, measures (including encryption where appropriate) must be taken to prevent and minimise the impact of security incidents on users and other networks and services. It also sets out a role for ENISA in coordinating Member States to avoid diverging requirements.

Article 40(2) provides for an obligation on providers to notify the competent authority (in Ireland's case, ComReg) of a security incident that has had a significant impact on the operation of networks and services. It also sets out parameters for determining the significance of a security incident's impact, and also provides for circumstances where the competent authority must inform other competent authorities and ENISA, as well as the public where it determines it in the public interest to do so. Competent authorities may inform the public themselves or require this of providers. Competent authorities are also required to provide a summary report to the European Commission and ENISA on notifications received and action taken.

Article 40(3) requires Member States to ensure that providers inform their users of protective measures or remedies where there is a particular and significant threat of a security incident, and inform users of the threat itself where appropriate.

Article 40(4) clarifies that the provisions of Article 40 are without prejudice to the GDPR and the Privacy and Electronic Communications Directive.

Article 40(5) provides that the European Commission may adopt implementing acts (an EU equivalent of a statutory instrument) that detail the technical and organisational measures referred to in Article 40.1 and circumstances, format and procedures applicable to Article 40.2.<sup>60</sup> These

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<sup>57</sup> European Commission, [Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive \(EU\) 2016/1148, COM\(2020\) 823 final](#), 16 December 2020. Article 40 of the proposed NIS 2 Directive proposes to delete Articles 40 and 41 of the EECC.

<sup>58</sup> BEREC, [BEREC Opinion on the proposed NIS 2 Directive and its effect on Electronic Communications](#), at p.2.

<sup>59</sup> Ibid, at p.6. Article 3(4) of the EECC requires that national regulatory and other competent authorities act "impartially, objectively, transparently and in a non-discriminatory and proportionate manner".

<sup>60</sup> Further, the European Commission is limited to adopting implementing acts in accordance with the examination procedure referred to in Article 118(4) of the EECC.

must take “utmost account” of the opinions of ENISA and must be based on European and international standards. Member States are not prevented from adopting additional requirements in pursuance of Article 40.1 objectives.

### Article 41 – Implementation and Enforcement

Article 41 requires Member States to ensure that their competent authorities are empowered to do the following:

- Issue binding instructions to providers, including instructions on measures required to remedy a security incident or prevent one from occurring when a significant threat has been identified and time limits for implementation (Article 40.1),
- Require providers to provide information needed to assess the security of their networks and services (including documented security policies) and, at their cost, submit to a security audit carried out by either a qualified independent body or the competent authority and submit same to the competent authority (Article 40(2)).
- Have all powers necessary to investigate cases of non-compliance and the effects of such on the security of the networks and services (Article 40(3)).
- Obtain the assistance of the CSIRT designated under Article 9 of Directive (EU) 2016/1148 on issues falling within the tasks of CSIRTs under that Directive (Article 40(4)).

Article 40(5) further provides that competent authorities must consult and cooperate with law enforcement authorities, competent authorities under Article 8(1) of Directive (EU) 2016/1148 and national data protection authorities, where it is appropriate to do so, and this is in accordance with national law.

### Electronic Communications Security Measures

Provision for a statutory basis for ECSMs was indicated by the Department during the pre-legislative scrutiny process. According to the Department, Ireland’s modern digitally connected society and economy is highly dependent on reliable and secure electronic communications networks and services.<sup>61</sup>

In February 2022, the Government indicated that the ECSMs would be underpinned by the transposition of the EECC:

“The security measures contained in the ECSMs will be provided with a legislative basis through the transposition of the European Electronic Communications Code. The consultation on the ECSMs concluded at the end of January and the responses are currently being reviewed.”<sup>62</sup>

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<sup>61</sup> Department of the Environment, Climate and Communications, Electronic Communications Security Measures, at p.4.

<sup>62</sup> Ossian Smyth TD, Minister of State at the Department of the Environment, Climate and Communications, [Response to Parliamentary Question No. 199, Cybersecurity Policy](#), Written Answer, *Dáil Éireann Debate*, 8 February 2022.

During the pre-legislative scrutiny process, the Department told the Committee that the Bill would serve as the legislative basis for ECSMs and that ComReg would also be provided with additional enforcement powers to ensure compliance with the security provisions:

The Bill proposes to allow the Minister to make regulations specifying the types of security measures that providers shall take, thus providing a statutory basis for ECSMs, which are a detailed set of technical security measures produced by the NCSC in consultation with ComReg and industry to secure the State's electronic communications infrastructure. Finally, the security provisions provide additional supervisory and enforcement powers to ComReg to ensure compliance with the security provisions.<sup>63</sup>

### Framework for ECSMs – EU 5G Security Toolbox

In November 2021, the Government announced the agreement of measures aimed at enhancing the security of electronic communications including 5G. In doing so, it specified the 'EU 5G Security Toolbox' as the framework that Ireland will use in securing its electronic communications networks.<sup>64</sup> Further to this announcement, the Department also stated an intention to introduce primary legislation that would allow the Minister to assess the risk profile of providers of electronic communications network equipment and to designate certain vendors as high risk. Further, this legislation would also allow for certain parts of electronic communications networks to be designated as critical.<sup>65</sup>

In its [Recommendation C\(2019\)2335, Cybersecurity of 5G networks](#), the European Commission recognised 5G networks as a "major enabler for future digital services and a priority for the Digital Single Market strategy", adding that once rolled out, 5G networks would form the backbone for a wide range of services.<sup>66</sup> In particular, the European Commission noted the following:

"The dependence of many critical services on 5G networks would make the consequences of systemic and widespread disruption particularly serious. As a result, ensuring the cybersecurity of 5G networks is an issue of strategic importance for the Union, at a time when cyber-attacks are on the rise and more sophisticated than ever."<sup>67</sup>

The Recommendation sets out actions to be taken at Member State level as well as coordinating actions at EU level. These actions include the development of a common toolbox. In setting out the parameters of the toolbox, the Recommendation identifies what it should include:

- a) an inventory of the types of security risks that can affect the cybersecurity of 5G networks (e.g. supply chain risk, software vulnerability risk, access control risk, risks arising from the legal and policy framework to which suppliers of information and communications technologies equipment may be subject in third countries); and

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<sup>63</sup> Department of the Environment, Climate and Communications, [Opening Statement to the Joint Committee on Transport and Communications](#), 23 February 2022.

<sup>64</sup> Department of the Environment, Climate and Communications, [Government agrees measures to enhance the security of electronic communications including 5G networks](#) (press release), 23 November 2021.

<sup>65</sup> Ibid.

<sup>66</sup> [Commission Recommendation \(EU\) 2019/534 of 26 March 2019, Cybersecurity of 5G networks](#), [2019] OJ L 88/42, Recital 1.

<sup>67</sup> Ibid, Recital 3.

- b) a set of possible mitigating measures (e.g. third-party certification for hardware, software or services, formal hardware and software tests or conformity checks, processes to ensure access controls exist and are enforced, identifying products, services or suppliers that are considered potentially not secure, etc.). These measures should address every type of security risk identified in one or more Member States following the risk assessment.<sup>68</sup>

In March 2021, the European Commission adopted the [EU Toolbox for 5G Security](#), which it described as “a set of robust and comprehensive measures for an EU coordinated approach to secure 5G networks”.<sup>69</sup> Following the approach of the EU 5G Security Toolbox, the National Cyber Security Centre (NCSC) and ComReg established an industry working group to design a set of security measures that would meet the recommendations of this approach.<sup>70</sup>

## Consumer Protection Measures

### Article 25: Out-of-court dispute resolution

This requires Member States to ensure that the national regulatory authority, another competent authority, or at least one independent body with proven expertise in the application of the below Articles of the EECC is listed as an alternative dispute resolution body with a view to resolving disputes between providers and consumers arising from the EECC and relating to the performance of contracts.

- Article 102: Information requirements for contracts (transposed by Regulation 87 of the Code Regulations)
- Article 103: Transparency, comparison of offers and publication of information (transposed by Regulation 88 of the Code Regulations)
- Article 104: Quality of service related to internet access services and publicly available interpersonal communications services (transposed by primary legislation – see below)
- Article 105: Contract duration and termination (Transposed by Regulation 89 of the Code Regulations)
- Article 106: Provider switching and number portability (transposed by Regulation 90 of the Code Regulations, except Article 106(8) on compensation)
- Article 107: Bundled offers (transposed by Regulation 91 of the Code Regulations)
- Article 115: Provision of additional facilities (transposed by Regulation 97 of the Code Regulations)

Member States may also extend the provisions on ADR to end-users other than consumers, with particular reference made to microenterprises and small enterprises.

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<sup>68</sup> Ibid, para.15.

<sup>69</sup> European Commission, [The EU toolbox for 5G security](#) (webpage). This includes a list of downloadable factsheets, which includes versions in Irish and English. Further, the European Commission has also published a [Questions and Answers](#) webpage on the 5G Security Toolbox.

<sup>70</sup> Department of the Environment, Climate and Communications, [Regulatory Impact Assessment – Communications Regulation Bill 2022](#) (PDF download), July 2022, at p.15.

**Article 104: Minimum Quality of Service Standards**

This provides for the publication of quality-of-service information and the setting of **minimum quality of service standards**.

Article 104(1) empowers national regulatory authorities to require providers of internet access services and of publicly available interpersonal communications services to publish information on the quality of their services. This information must be comprehensive, comparable, reliable, user-friendly and up to date. Providers may also be required to provide information on measures taken to ensure equivalence of access for end-users with disabilities, and information on whether the quality of service they provide depends on any external factors.

Article 104(2) makes provision for the specification by national regulatory authorities of the quality of service parameters to be measured, applicable measurement methods and the content, form and manner of the information to be published. It also makes provision for BEREC to adopt guidelines detailing the relevant quality of service parameters.

**Article 106(8): Compensation for End-Users**

This requires Member States to set rules on the compensation of end-users by their providers in an easy and timely manner where a provider fails to comply with the obligations of Article 106, as well as where there are delays in / abuses of porting and switching processes and missed service and installation appointments.

## Regulatory Impact Assessment

In addition to publishing the Bill on 26 September 2022, the Department has also made the RIA available on its website. In the assessment, three distinct options were considered:

1. Do nothing / no policy change (this option notes that the transposition cannot be put into effect without enforcement provisions, which require primary legislation).
2. Solely implementing requirements of EU Directive 2018/1972 (transposing of enforcement provisions of the EECR by primary legislation and remainder by secondary legislation).
3. Implement requirements of EU Directive 2018/1972 & provide for additional improvements to the regulatory regime (transposing the enforcement provisions of the EECR by primary legislation, which at the same time would update ComReg's enforcement powers, provide for additional security and consumer provisions and make further amendments to the Communications Regulation Act 2002).<sup>71</sup>

The RIA identified Option 3 as the preferred option, supporting this with a consideration of the Costs, Benefits and Impacts of each Option.<sup>72</sup> These are summarised in the table overleaf.

Further, the RIA describes the Departmental consultation on the development of the Bill. This included:

- Holding a number of workshops and information sessions with the telecommunications sector and the OTT sector
- Meeting with groups representing persons with disabilities via the Department's Disability Consultative Committee, and
- Engaging with ComReg and the Data Protection Commission.<sup>73</sup>

The Department has indicated close engagement with ComReg throughout the development of the Bill, and also states that the Bill has been provided to the Data Protection Commission under Article 36(4) of the GDPR (which requires consultation with the DPC when preparing legislation that relates to processing of personal data). The Department has also indicated further meetings with industry representative bodies upon publication of the Bill.<sup>74</sup>

Details of presentations made by the Department are accessible as downloadable links on its [European Electronic Communications Code](#) webpage.

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<sup>71</sup> Department of the Environment, Climate and Communications, [Regulatory Impact Assessment – Communications Regulation Bill 2022](#) (PDF download), July 2022, at pp.16-17.

<sup>72</sup> Ibid, at p.17.

<sup>73</sup> Ibid, at p.20.

<sup>74</sup> Ibid, at p.20.

**Table: Summary of options considered in the RIA<sup>75</sup>**

	Option	Summary of Measures in RIA
Costs	1	<ul style="list-style-type: none"> <li>No direct costs, but significant fines from infringement proceedings will apply</li> </ul>
	2	<ul style="list-style-type: none"> <li>No further costs to the Exchequer</li> </ul>
	3	<ul style="list-style-type: none"> <li>Potential for additional costs to the Exchequer due to additional staffing requirements from the adjudication panel, determined by caseload and membership of the panel.</li> <li>Staffing costs will be borne out of ComReg's non-Exchequer based funding model.</li> <li>There is an expected increase in fines income, which will be returned to the Exchequer.</li> </ul>
Benefits	1	<ul style="list-style-type: none"> <li>No specific benefits</li> </ul>
	2	<ul style="list-style-type: none"> <li>Effective transposition of the EECC</li> <li>Remainder of the Code transposed by way of secondary legislation</li> <li>Mitigate against enforcement proceedings being brought against Ireland</li> </ul>
	3	<ul style="list-style-type: none"> <li>Effective transposition of the EECC</li> <li>Transpose the security provisions of the EECC and in doing so enhance the security of the electronic communications sector through improved supervision and enforcement</li> <li>Transpose a number of consumer provisions from the Code and supplement these with new obligations, providing enhanced consumer protection.</li> <li>Mitigate against enforcement proceedings being brought against Ireland</li> <li>Fulfil Programme for Government 2020 to provide ComReg with enhanced enforcement powers</li> <li>Income from sanctions would accrue to the Exchequer and act as a deterrent to other undertakings</li> </ul>
Impacts	1	<ul style="list-style-type: none"> <li>Would lead to infringement proceedings being brought against Ireland, resulting in a lump sum penalty and daily fines until Ireland complies with EU obligations</li> <li>Loss of trust in Ireland at European level and its regulatory regime for communications, which would negatively affect its competitiveness</li> <li>Programme for Government commitment on ComReg's enforcement powers not achieved</li> <li>No ability to enforce ECSMs</li> <li>No enhanced consumer protection measures</li> </ul>
	2	<ul style="list-style-type: none"> <li>Ireland complies with EU obligations to effectively transpose the EECC</li> <li>Programme for Government commitment on ComReg's enforcement powers not achieved</li> <li>No ability to enforce ECSMs</li> <li>No enhanced consumer protection measures</li> </ul>
	3	<ul style="list-style-type: none"> <li>Ireland complies with EU obligations to effectively transpose the EECC</li> <li>Improved enforcement by ComReg of the electronic communications regulatory framework in Ireland</li> <li>Would foster an environment of compliance by ECN/ECS providers in the State</li> <li>Increase in income for Exchequer from administrative sanctions</li> <li>Administrative sanctions act as a deterrent</li> <li>Effective enforcement for ECSMs</li> <li>Enhanced consumer protection measures</li> </ul>

Source: L&RS, based on Regulatory Impact Assessment – Communications Regulation Bill 2022

<sup>75</sup> Ibid, at pp.17-19.



## Pre-legislative Scrutiny

Earlier in 2022, a General Scheme for the Bill (then known as the Communications Regulation (Enforcement) Bill) was made available to the Joint Committee on Transport and Communications for pre-legislative scrutiny. Under this process, [hearings on the General Scheme of the Bill](#) were held on 23 February 2022, during which the Committee engaged with representatives of the Department and the Commission for Communications Regulation (ComReg). The Committee also received one stakeholder submission, from BT Ireland. The [Report of the Committee](#) (PLS Report) was published on 24 June 2022.

During hearings, the Department informed the Committee that the Bill would have five distinct aims:

1. Transpose the enforcement provisions of the EECC
2. Update and enhance ComReg's enforcement powers
3. Transpose the security provisions of the EECC
4. Provide for a limited number of new consumer protection provisions for the sector
5. Update the Communications Regulation Act 2002 to align the Act with the EECC and make necessary amendments to ComReg's current functions and powers.<sup>76</sup>

A further issue relating to the current infringement proceedings against Ireland on the delayed transposition of the EECC was also highlighted by the Department in the PLS process, as well as the Department's engagement with the Office of the Attorney General.<sup>77</sup> This was also referenced in the PLS Report.

The first key issue identified by the Committee relates to the enhanced functions of ComReg. In its report, the Committee recalled a previous meeting relating to customer service issues in the telecommunications sector. At that meeting, ComReg highlighted the need for greater enforcement powers for certain rights for consumers, stating the following:

In terms of service providers' other obligations, the European electronic communications code will give consumers some useful new rights, including transparency on contract terms, rights when switching broadband service and in respect of missed appointments. We have already published initial advice to service providers on how they should interpret end user obligations in anticipation of the implementation of the code. There are also consumer rights granted by the unfair commercial practices directive. ComReg does not have the power to enforce these rights for consumers of electronic communications services and we consider that this would be a useful addition to our responsibilities.

It is important that ComReg should be in a position to impose much larger sanctions that would be a genuine deterrent to non-compliance. This would give service providers a

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<sup>76</sup> Department of the Environment, Climate and Communications, [Opening Statement to the Joint Committee on Transport and Communications](#), 23 February 2022.

<sup>77</sup> Ibid.

greater incentive to proactively uphold end user rights, rather than to come into compliance only after ComReg has taken action.<sup>78</sup>

ComReg continued by welcoming the Programme for Government commitment to enhance its enforcement powers. In the PLS meeting held in February, ComReg stated its support for the enforcement provisions proposed by the Bill:

Our general perspective on the Bill, which deals with two elements, is very positive. It will give ComReg both better enforcement powers and some additional powers in the area of consumer protection<sup>79</sup>

Outside of hearings, the Committee received one written submission from BT Ireland, which also addressed the issue of enforcement, emphasising the need for greater enforcement powers in the wholesale sector, stating that:

... enhanced enforcement powers are critical to achieving a truly effective competitive telecommunications market which will produce positive outcomes for the customer. Whilst ComReg has been diligent in creating regulations over the years in line with best practice, it has constantly run into problems with the enforcement of its regulation in relation to the wholesale market. ComReg has succeeded in a number of compliance-related court cases in support of consumers in the retail market, however, this is not the case for the wholesale sector.<sup>80</sup>

In its report, the Committee stated its view that the current enforcement regime is not fit for purpose, highlighting the need for greater enforcement powers, but cautioning against excessive administrative burdens for ComReg.<sup>81</sup> The full excerpt from the report on this issue is reproduced in the table below, which compares issues raised by the Committee and the response of the Department on how the issue was addressed in the Bill.

In addition, the Committee identified the likely divergence between the General Scheme of the Bill and the Bill itself as the second key issue in the report. The report of the Committee noted that Departmental officials advised that there would be additional provisions to ensure that the necessary legal safeguards for non-court decision making bodies are in place. The report also makes reference to a briefing on 26 May 2022, in which Departmental officials outlined that these additional provisions would be limited to Parts 2 and 3 of the legislation, dealing with Civil Enforcement and Appeals.<sup>82</sup> The full excerpt from the report is included in the below table

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<sup>78</sup> Mr Garrett Blaney, Commissioner, Commission for Communications Regulation (ComReg), [Consumer Complaints Process: ComReg](#), Joint Committee on Transport and Communications, *Committee Debate*, 9 December 2020.

<sup>79</sup> Mr Robert Mourik, Chairman, Commission for Communications Regulation (ComReg), [General Scheme of the Communications Regulation \(Enforcement\) Bill: Discussion](#), Joint Committee on Transport and Communications, *Committee Debate*, 23 February 2022.

<sup>80</sup> BT Ireland, [Submission to the Joint Committee on the Pre-Legislative Scrutiny of the Communications Regulation \(Enforcement\) Bill](#), 22 February 2022, at p.2.

<sup>81</sup> Joint Committee on Transport and Communications, [Report on the Pre-legislative Scrutiny of the Communications Regulation \(Enforcement\) Bill](#), June 2022, at p.13.

<sup>82</sup> Joint Committee on Transport and Communications, [Report on the Pre-legislative Scrutiny of the Communications Regulation \(Enforcement\) Bill](#), June 2022, at p.14.

comparing the key issues raised by the Committee and the Departmental response on how the issues have been addressed in the Bill.

### Departmental response to key issues raised

The below table outlines the Department's assessments of how it addressed the two key issues raised by the Committee on its PLS Report. This follows an established process in L&RS Bill Digests where the input of the Department is sought when assessing how the recommendations of, and issues raised by, the relevant Oireachtas Joint Committee are addressed by the Bill. As the Committee made no recommendations, the traffic light dashboard is not used, but the L&RS extended the opportunity to the Department to provide a response to the two key issues outlined in the report, stated in the right-hand side of the table below.

The L&RS is grateful to the Department of the Environment, Climate and Communications for providing the below assessments, which are reproduced below for Members' information.

**Table: Dashboard of PLS issues raised by the Committee and commentary from the Department on whether addressed in the Bill**

Commentary as per the Committee Report	Whether addressed (either in whole or in part) in the Bill
<p><b>3.1 Enhanced Functions of ComReg</b></p> <p>The Committee met with ComReg on 9 December 2020 to discuss the consumer complaints process for the telecommunications sector. At this meeting, the Commissioners highlighted the need for additional enforcement powers in order to address consumers' concerns with service providers. It was highlighted at this stage that the EEC Directive had been passed at EU level, and that it was due to be transposed into national law.</p> <p>The Committee supports the enhancement of ComReg's regulatory functions, as outlined in the General Scheme for this Bill.</p> <p>It is clear to the Committee that the current enforcement regime available to ComReg is not fit for purpose. It is vital that ComReg, as the regulator for the telecommunications sector, be given effective and legally robust enforcement powers to ensure fair competition and a high level of service provision in the sector. It is important that the enforcement regime as set out in legislation is workable, and does not create excess administrative burden on ComReg or consumers.</p>	<p>The Communications Regulation Bill will provide a newly established civil enforcement regime and an updated criminal enforcement procedure for the electronic communications sector. These new enforcement procedures will give effect to the enforcement provisions of the European Electronic Communications Code but will also be utilised for the enforcement of other relevant communications legislation going forward.</p> <p>In respect of the civil enforcement procedures, a suite of new powers will ensure effective, dissuasive, and efficient enforcement of the electronic communications sector. Through providing for the imposition of administrative financial sanctions, this Bill brings ComReg's civil enforcement regime further in line with other equivalent sectoral regulators, such as the Data Protection Commission, the Commission for the Regulation of Utilities and the Central Bank. In respect of the criminal enforcement procedures, the Bill provides for a higher level of financial penalty to be imposed if a person is found to have committed an indictable offence.</p> <p>Updating ComReg's civil enforcement regime reflects agreed Government policy and was included as an objective in the Programme for Government 2020.</p>
<p><b>3.2 Provisions of the Final Bill</b></p> <p>The Committee was informed by the Department that the final Bill would likely differ from the General Scheme, as additional provisions may be necessary to ensure that the civil enforcement regime proposed for ComReg is legally robust following the Supreme Court judgement in the <i>Zalewski v. Adjudication Officer &amp; Ors</i> case in 2021. The Committee also understands that the final Bill will be titled the Communications Regulation (Amendment) Bill, to reflect the broader provision of the legislation beyond enforcement.</p> <p>Throughout the PLS process, the Committee requested regular updates on the progress of drafting, and more detail on the provisions of the final Bill which would differ from the General Scheme. The Department outlined that the final Bill would meet the aims of the General Scheme as approved by Government in December 2021, but with additional provisions to ensure that the necessary legal safeguards for non-court decision making bodies are in place for ComReg to operate a legally robust civil enforcement regime.</p> <p>At a briefing on 26 May, Departmental officials outlined that these additional provisions will be limited to Parts 2 and 3 of the legislation, Civil Enforcement and Appeals. Revisions include detailed provisions for adjudication officers and the independence requirements for the role, and the right of appeal and right to reply.</p>	<p>The impact of recent judgements, and the clarity they bring to how regulators such as ComReg must act to remain within the parameters permitted by the Constitution, required careful consideration when the Communications Regulation Bill was being drafted.</p> <p>Considerable engagement ensued between the Department and the Office of the Attorney General to ensure that the enforcement regime as drafted in this Bill complied with the rigorous requirements imposed by the judgement. This included comprehensive independence requirements for adjudicators, procedural safeguards and a court confirmation and appeals procedure. Following a reordering of the Bill prior to publication, these are now included in Part 6 of the Bill (Administrative Sanctions).</p> <p>Following further advices from the Office of Parliamentary Counsel, this Bill will now be entitled the <i>Communications Regulation Bill 2022</i>.</p>

Sources: Joint Committee [PLS Report](#) and Department of the Environment, Climate and Communications

## Principal Provisions of the Bill

An outline of the Bill has been provided by the Department in the [Explanatory Memorandum](#) published with the Bill on 26 September 2022, which summarises all the provisions of the Bill. This section focuses on the Bill's principal provisions. Given the length of time between the publication of the Bill and the taking of Second Stage debate, it was not possible to cover all sections in detail.

### Part 2: Security of Networks and Services

As highlighted above, as well as transposing the security elements of the EEC, the Bill provides a statutory footing for Electronic Communications Security Measures (ECSMs).

**Section 5** of the Bill sets out definitions for terms referenced in Part 2 of the Bill, including definitions for CSIRT, ENISA, provider, security audit, security incident, security measures guidelines, and security of networks and services.

**Section 6** obliges providers to take appropriate and proportionate technical and organisational measures to manage the risks posed to the security of networks and services. Section 6 also provides for the requirements of such measures. This transposes Article 40(1) of the EEC. The Minister is also empowered, after consulting ComReg, to make regulations in relation to the type of measures to be taken by provider to manage risks. The section requires the Minister to publish a draft of the proposed regulations and allow a 30-day period for written consultation. However, the Minister may make regulations urgently in certain circumstances without prior publication and consultation. Finally, the section also provides for an offence where a person fails to comply with a penal provision under such regulations, punishable by a class A fine (up to €5,000).

**Section 7** empowers the Minister to prepare and publish guidelines, or approve guidelines made or published by another person, on the implementation of technical and organisational measures to manage the risks posed to the security of networks and services ("security measures guidelines"). The matters that may be covered by security measures guidelines are listed in section 7(2). Similar to section 6, the Minister must publish a draft of the proposed security measures guidelines and allow for a 30-day period for written consultation. The Minister is also empowered to make security measures guidelines urgently without prior publication and consultation in certain circumstances.

**Sections 8 to 10** respectively outline the circumstances in which the courts, ComReg and adjudicators are required to have regard to the security measures guidelines.

**Section 11** transposes Article 40(2) of the EEC. This requires providers to notify ComReg without undue delay of any security incident that has had or is having a significant impact on the operation of the providers ECS or ECN. The section outlines the factors that the provider should take into account in order to determine if an incident is significant. The section also stipulates the information to be included in a notification and requires the provider to notify ComReg, as soon as practicable, when the security incident is resolved. The section requires ComReg to inform the Minister of the notification and, where ComReg considers it appropriate having consulted the Minister, to notify the competent authorities of other Member States and ENISA. ComReg may also inform the public of the incident if it considers it appropriate to do so in the public interest and having consulted the Minister. The section provides that a provider who fails to comply with their obligations to notify ComReg under the section may be found guilty of an offence and liable on summary conviction to a class A fine.

**Section 12** transposes Article 40(3) of the EEC. This requires providers of public ECN or publicly available ECS to inform their users who are potentially affected by a particular and significant

threat of a security incident of any protective measures or remedies or, where appropriate, of the threat itself. Under the section, a provider that fails to inform its users of protective measures or remedies commits an offence and is liable on summary conviction, by a class A fine.

**Section 13** requires ComReg to take reasonable steps to ensure providers comply with their obligations under Part 2.

**Section 14** transposes part of Articles 41(1) to 41(3) of the EEC. It provides that ComReg may serve what are known as security measures directions. Under the section, a provider is obliged, upon the request of ComReg, to provide to ComReg the information needed to assess the security of the provider's networks and services, including documented security policies. ComReg is empowered to issue security measures directions on a provider:

- to remedy a security incident,
- to prevent a security incident from reoccurring when a significant threat is identified, or
- to ensure a provider is in compliance with Part 2 of the Bill.

The specific security measures directions that ComReg is empowered to issue include directions:

- To implement specified measures within specified time limits to remedy or prevent a security incident when a significant threat has been identified.
- To provide a statement to ComReg where ComReg has reasonable grounds to believe that the provider is failing / has failed to act in accordance with:
  - Part 2 of the Bill,
  - Regulations under Part 2, or
  - security measures guidelines.
- To provide information needed to assess the security of the provider's networks and services, including documented security policies.
- To submit to a security audit by ComReg or an independent person it nominates, and to make the results of any independent audit available to ComReg. Further provision is made for the provider to bear the costs of the audit.
- To implement specified measures within specified time limits to remedy deficiencies identified from the information provided to assess security or from a security audit.

The section makes further provision for the taking effect of security measures directions. It affords an opportunity for providers served with such directions to make written representations within 14 days of receipt of said directions. Having considered any representations received, ComReg may affirm or withdraw the direction. The direction comes into effect upon the expiration of the period allowed for representations or immediately if ComReg considers it necessary to address a serious imminent risk. The section provides that a provider that fails to comply with a security measures direction is guilty of an offence punishable by a class A fine.

**Section 15** sets out further specific provisions relating to the security audit.

**Section 16** transposes Article 41(4) and Article 41(5) of the EEC. It provides for ComReg to consult, cooperate, share information with, or obtain the assistance of the CSIRT, a Computer Security Incident Response Team from another Member State, or a national regulatory authority from another Member State to whom a task under the Directive has been assigned. It also provides for ComReg to consult and cooperate with An Garda Síochána, the Data Protection Commission and other competent authorities as defined under the section.

**Section 17** provides for and sets out the procedures for an appeal mechanism to the High Court in relation to decisions or requirements of:

- ComReg under Parts 2 or 3 of the Bill or the Code Regulations (except Regulations 98 and 99), or
- The Minister under Regulations 70, 76 or 100 of the Code Regulations.

**Section 18** prohibits further appeal of a decision of the High Court under section 17 to the Court of Appeal unless the High Court grants leave to appeal and certifies that an appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal be allowed.

## Part 3: Measures to Assist Consumers and Other End-Users

### Minimum Quality Standards

**Section 19** provides for a definition of “minimum quality-of-service standard” as the minimum quality-of-service standard specified by ComReg under section 21.

**Section 20** transposes Article 104 of the EECC and provides that ComReg may require providers of internet access services and publicly available interpersonal communications services to publish information for end-users on:

- the quality of their technical services, to the extent that they control at least some elements of the network either directly or by an SLA to that effect,
- the quality of their non-technical services, and
- measures taken to ensure equivalent of access for persons with disabilities.

In line with the EECC, this information must be comprehensive, comparable, reliable, user-friendly and up-to-date. The section provides that ComReg may require providers of publicly available interpersonal communications services to inform customers if the quality of services they provide depends on external factors such as signal transmission or network connectivity. In addition, the section permits ComReg to require this information to be provided within a specified period. Providers must ensure that the quality of service measures undertaken pursuant to this section comply with Regulation (EU) 2015/2120. The section also provides for matters which ComReg must specify, accounting for BEREC guidelines, if it requires information.

**Section 21** empowers ComReg to specify minimum quality-of-service standards to be met by providers of internet access services or publicly available interpersonal communications services when providing such services to end users (including such classes of end-users as ComReg may specify. These standards relate to:

- consumer service,
- complaint handling,
- outages / repairs,
- switching services,
- billing and refunds,
- disconnection policies for the non-payment of bills,
- connections, and
- such other matters relating to the above as the Minister may prescribe.

ComReg is further empowered to make and publish guidelines on minimum quality-of-service standards, to which providers must have regards.

### Customer Charters

**Section 22** empowers ComReg to require providers to prepare, publish and update a customer charter. It also empowers ComReg to specify the form of the charter and the information to be included therein, the manner (including frequency) of updates to the charter, the classes of end-users that the charter must address, and the manner (and frequency) in which the charter must be published and notified to customers. Further, ComReg may also:

- where no minimum levels of quality of service are offered, require a provider to make a statement to this effect in the customer charter or in such other form or manner that ComReg considers appropriate,
- require a provider to measure its performance against the standards set out in the charter and report to ComReg in such form or manner as ComReg specifies, and
- arrange, or require a provider to arrange, an independent audit or review of the performance of the provider against the standard set out in the charter, to be paid for by the provider.

The section also provides for offences, which are punishable on summary conviction by a class A fine, where a provider:

- Fails to prepare, publish or update a customer charter
- Fails to publish a statement where there is no minimum level of quality of service offered by the provider
- Fails to arrange or pay for an audit under the section, or
- Fails to comply with a direction to comply with directions from ComReg under the section.

### End-User Compensation

**Section 23** provides for the circumstances and procedures relating to end-user compensation. It empowers ComReg to set specified failures of a provider of IAS or NB-ICS to comply with a minimum quality-of-service standard, or Regulation 90 of the Code Regulations, which concerns switching providers and number portability. It requires the provider to pay compensation to an end-user for a specified failure.

The section also sets out requirements on providers to prepare and publish a scheme setting out the compensation that end-users are to be entitled to and a transparent procedure for its payment. The requirements for the compensation scheme are also set out in the section.

ComReg may also determine that providers pay compensation in respect of a specified failure without the need for a complaint or claim from an end-user, and it may set the amount of compensation in respect of a specified failure. The section also contains provisions for reporting and independent audits / reviews. In addition, the section includes provisions affirming an end-user's right to pursue compensation by other means and for ComReg or any other person to bring proceedings in respect of a specified failure.



## Part 4: Resolution of Complaints and Disputes

This Part of the Bill sets out the procedures for handling complaints and the alternative dispute resolution process.

### Complaints Handling

**Section 25** requires providers to ensure that they have in place procedures for dealing with complaints and settling disputes with end-users. It empowers ComReg to specify requirements of providers for the purposes of complying with the section, while also empowering the Minister, on the recommendation of or having consulted ComReg, to prescribe measures to be taken by a provider for the purposes of giving effect to the section.

**Section 26** sets out requirements of providers of ECN or ECS for a code of practice for dealing with complaints and settling disputes with end-users. It sets out the matters to be provided for in a code of practice and empowers ComReg to direct a provider to alter or add to its code of practice.

**Section 27** requires providers to report to ComReg every six months on complaints made by end-users and such other matters relating to such complaints as may be specified by ComReg.

**Section 28** empowers ComReg to require providers to collate comparable data in relation to complaints made by end-users and the complaints and dispute settlement procedures that providers have in place. It may also require providers to publish or provide it with this data.

**Section 29** requires providers to inform an end-user who makes a complaint to it of their right to refer the dispute to ComReg for resolution under section 31.

**Section 30** provides for the power of ComReg to serve direction on a provider to implement provisions of its code of practice where it considers that the provider has failed to do so.

### Alternative Dispute Resolution

Sections 31 to 38 of the Bill provide for an alternative dispute resolution process envisaged by Article 25 of the EECC.

**Section 31** provides for the right of an end-user to refer a dispute to ComReg for resolution. ComReg, or such independent person appointed by ComReg, may only carry out the dispute resolution process if a period of 10 days has elapsed since the complaint was made, or the procedures for dispute resolution in a provider's code of practice have been completed. It further provides that the end-user may elect to accept the resolution, where one is proposed by ComReg, or withdraw the dispute at any time up to when a resolution is proposed. The provider is bound by any resolution proposed by ComReg.

**Section 32** provides that ComReg may specify procedures for the resolution of disputes and sets out requirements for such procedures. It further sets out the matters that ComReg must inform an end-user of when a dispute is referred to it.

**Section 33** sets out the process whereby ComReg may direct a provider to comply with a resolution where the provider has failed to do so, also including a number of possible actions. It also sets the maximum compensation at €5,000, or any lesser or greater amount as the Minister may prescribe.

**Section 34** addresses circumstances where a dispute involves parties in more than one Member State, requiring ComReg to coordinate its efforts with any regulatory authority in the other Member States with the objective of resolving the dispute.

**Section 35** provides for the remuneration and expenses of independent persons appointed by ComReg under section 31.

**Section 36** stipulates the provisions of Part 4 that are regulatory provisions, which are:

- Section 25(1),
- Subsections 26(1) and 26(2),
- Section 27, and
- Section 29

Failure to comply with a regulatory provision is a regulatory breach under the Bill. The section also provides for offences, punishable by a class A fine, for failing to comply with the following:

- A requirement under section 25(2)
- An obligation to take a measure prescribed by a regulation under section 25(3) that is stated to be a penal provision
- Subsections 26(1) and 26(2)
- A direction under section 26(3)
- Section 27(a)
- A requirement under section 28
- A direction under section 30, or
- A direction under section 33.

The section does, however, provide for a defence to the prosecution of an offence of failing to comply with section 27, where a provider can show it took all reasonable steps and exercised all due diligence to avoid committing the offence.

**Section 37** provides that ComReg is included in the list of alternative dispute resolution entities maintained by the CCPC under the [European Union \(Alternative Dispute Resolution for Consumer Disputes\) Regulations 2015](#)<sup>83</sup>, but clarifies that those Regulations do not apply to an ADR process undertaken by ComReg or an independent person appointed by ComReg under section 31.

**Section 38** provides that the provisions of Part 4 do not affect the end-user's right to other legal means or proceedings.

## Part 5: Interim Measures

**Section 39** transposes Article 30(6) of the EECC, with allows the competent authorities of Member States to take urgent interim measures. It provides that ComReg may impose urgent interim measures where it has evidence of a breach of a regulatory provision or breach of conditions, or of a substantial risk that either such breach will occur. The breach or risk must:

- represent an immediate or serious threat to public safety, public security or public health, or
- risk creating serious economic or operational problems for other providers or users of ECN or ECS or other users of the radio spectrum.

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<sup>83</sup> [European Union \(Alternative Dispute Resolution for Consumer Disputes\) Regulations 2015](#), S.I. No. 343 of 2015.

An urgent interim measure may include a requirement that the suspect breach cease and that specified measures are taken to remedy the breach, or where there is an anticipated breach, that specified measures are taken to prevent the breach from taking place. This must take place immediately or within a reasonable timeframe.

The section sets out the procedure for issued urgent interim measures, including the provisions concerning the issuing of a notice, the making of written submissions by the person to whom they are directed, the length of time an urgent interim measure is in effect, the varying or revocation of an urgent interim measure and where there is a failure to comply, the making of an order by the High Court compelling compliance.

**Section 40** makes further provision for the High Court to make an order requiring the breach or conduct giving rise to an urgent interim measure to cease immediately or within reasonable time of the measure's expiry, and that specified measures are taken to remedy the breach or effects of the conduct. The High Court is, in particular, empowered to make an order on the same or similar terms as the expired/expiring urgent interim measure, or to extend it for a longer period than provided for in section 39.

## Part 6: Administrative Sanctions

This sets out the process for administrative sanctions introduced by the Bill. It comprises 61 sections divided into nine chapters, making it the largest Part of the Bill, and sets out the civil enforcement structure that the Bill proposes, including the imposition of administrative sanctions and the role of adjudicators.

The structure of Part 6 is set out in the below table. This segment of the Bill Digest does not propose to describe every section in Part 6, but instead focuses on sections that appear to be principal provisions.

**Table: Structure of chapters contained in Part 6 of the Bill**

Chapter	Subject	Sections
1	Interpretation and application of Part 6	41-43
2	Preliminary procedure	44-56
3	Adjudicators	57-64
4	Procedure following referral to adjudicator	65-75
5	Imposition of administrative sanctions	76-81
6	Admissibility of certain evidence	82
7	Restrictions on disclosure of certain information	83-84
8	Appeals, confirmation and judicial review of certain decisions	85-98
9	Revocation, transitional provisions and consequential amendments	99-102

Source: Communications Regulation Bill 2022

### Regulatory Breach

The Bill introduces the concept of a "regulatory breach" in the electronic communications sector, as provided for and defined by **section 2 of the Bill**, which defines such a breach as failure to comply with:

- A regulatory provision
- A commitment under section 49, or
- An urgent interim measure.

## Regulatory Provision

**Section 42** also sets out a more expansive definition for “regulatory provision”, which applies to:

- provisions of the Bill (once enacted) stated as regulatory provisions,
- the Code Regulations,
- provisions of Acts other than the Bill (once enacted) stated as regulatory provisions,
- regulations or a provision of regulations made by the Minister that are prescribed as regulatory provisions for the purposes of Part 6,
- an act, or a provision of an act, adopted by an EU institution that is prescribed by the Minister as a regulatory provision for the purposes of Part 6,
- A regulatory decision (also defined in this section) taken by ComReg, or
- A condition or restriction of a licence granted to a provider under [section 5 of the Wireless Telegraphy Act 1926](#).

The section also empowers the Minister to apply the provisions of Part 6 to regulations made under any Act, or to acts adopted by an EU institution, and to prescribe such regulations / acts, or any provision thereof, as a regulatory provision.

## Chapter 2: Preliminary Procedure

This sets out the procedures under which ComReg may act to resolve a suspected regulatory breach before the request enters the civil enforcement process.

### Agreements with ComReg

**Section 44** empowers ComReg to enter into a binding, written agreement with a person where it suspects on reasonable grounds that the person has committed or is committing a regulatory breach. The terms of the agreement may also include acceptance of administrative sanctions.

Such an agreement may be entered into without an investigation, or where an investigation has started, before an adjudicator has made a decision on the matter under section 72. Section 44 also provides that ComReg may apply to the High Court for an order requiring compliance with the agreement, and to the relevant court to recover sums of money due under an agreement.

### Notices of Suspected Non-Compliance

**Sections 45 and 46** respectively provide for the issuing, by an authorised officer, of a notice of suspected non-compliance where there is a suspected regulatory breach, and a supplementary notice of suspected non-compliance where there is new evidence or an error or inaccuracy in the original notice.

**Section 47** empowers ComReg to revoke notices and supplementary notices, while **section 48** empowers it to publish notices and supplementary notices.

### Commitments and Settlements

**Section 49** sets out a commitments procedure under which ComReg may accept commitments from a person under investigation for a regulatory breach to take or refrain from certain actions.

**Section 50** provides for a settlement procedure under which ComReg may enter into a settlement agreement with a person under investigation for a regulatory breach, provided that this is before the date an adjudicator makes a decision under section 72.

## Investigations and Referral for Adjudication

**Section 51** requires an authorised officer, following an investigation, to either close the investigation and take no further action, or where they suspect a regulatory breach, refer the matter for adjudication.

**Section 52** requires the authorised officer to prepare a referral report and set out the documents, while **section 53** sets out the material to be included by the authorised officer when referring to an adjudicator.

The role of ComReg is set out in **sections 54 and 55**, which respectively allow ComReg to withdraw a matter referred to an adjudication at any time before an adjudication, and set out the procedures under which ComReg may share documents with other persons that it considers appropriate. **Section 55** further provides for an offence where confidential material shared under the section is provided to a third party without ComReg's authorisation, which is punishable by a class A fine.

Finally, the Minister is empowered under **section 56** to make regulations prescribing the procedure for referrals for adjudication on consent for settlements, the withdrawing of referrals, and applications for adjudication on consent relating to court confirmations. ComReg is empowered to make rules detailing these procedures.

## Chapter 3: Adjudicators

### Nomination and Appointment

**Section 57** provides for the nomination of adjudicators by ComReg. Under this provision, ComReg may nominate persons that it considers have relevant expertise to merit appointment. Members of ComReg and its employees / members of staff are also eligible for nomination as adjudicators. However, the Minister must also prescribe categories of persons who may be nominated.

Under **section 58**, the Minister appoints adjudicators, but may refuse to appoint where they are not satisfied that the person meets the requirements and qualifications they prescribed or does not have the independence necessary to be appointed. Further provisions are made to account for persons appointed as adjudication officers under the *Competition Act 2002*, and for the appointment of a Chief Adjudicator.

### Independence of Adjudicators

**Section 59** sets out the provisions in relation to the independence of adjudicators and includes provision for ComReg to put measures in place to ensure such independence and for adjudicators to recuse themselves where there is a conflict of interest. **Section 60** further provides that the Minister may make regulations setting out requirements to be imposed upon the ComReg and adjudicators to implement section 59.

**Section 62** provides for the Minister to make regulations providing for matters including the term of appointment of adjudicators, their remuneration and resignation from office. **Section 63** further makes provision for assistants to adjudicators.

**Section 64** provides that ComReg is not prevented for relying on contracts of service in relation to the performance / non-performance of tasks that do not relate to adjudication, and appointment as an adjudicator does not constitute employment by / within ComReg. As noted above, the Bill allows employees of ComReg to become adjudicators.

## Chapter 4: Procedure following referral to an adjudicator

**Section 65** provides that an adjudicator, as soon as practicable after a referral is made, serve the notified person (a person on whom a notice of suspected non-compliance has been served under section 45) with a copy of section 65 and:

- Where referred under section 50(3)(c), a notice stating the matter is referred for adjudication of consent under section 91 and asking the person for confirmation of the matters set out in the report within 15 days from when the notice is served (extendable by 7 days), or
- Where referred under section 53, a written notice stating that the person may make written submissions on the referral report within 30 days from when the notice is served (extendable by 15 days).

**Section 66** provides for the actions to be taken following a referral under section 50(3)(c), which relates to a settlement. It provides that where the notified person confirms the matter set out in the report, the adjudicator may impose, in accordance with the report, any of the following:

- To cease a regulatory breach or take specified measures to remedy the breach
- A financial penalty under section 76
- Require the payment of a refund under section 77
- Require the payment of compensation under section 78
- Suspend or withdraw an authorisation, rights of use of radio spectrum or rights of use for numbers under section 79.

**Section 67** sets out the actions an adjudicator may take following a referral under section 53 to resolve an issue of fact or enable them to make an adjudication. These include exercising their powers under section 69, requesting further information from the person concerned or any other person, or conduct an oral hearing. It also provides for the circumstances where an oral hearing must be arranged and procedures for requesting further information, including providing other persons with a referral report. The section also provides for an offence of disclosing the existence or content of a referral report to another person with authorisation from ComReg, which is punishable with a class A fine.

**Section 69** sets out the powers of adjudicators, which includes powers to direct authorised officers or notified persons to answer questions, to direct a party (either an authorised officer or notified person) to adduce evidence or produce books, documents or records, or direct a party to clarify any issue of fact as the adjudicator may deem necessary. Provision is made for answers to questions asked of authorised officers or notified persons to not be admissible in criminal proceedings and that a summons to an oral hearing is equivalent to any formal process for enforcing attendance or witnesses and compelling the production of records.

Subsection (5) provides for offences where a person:

- Fails to comply with a notice to attend an oral hearing or produce books, documents or records,
- Fails comply with a direction to answer questions
- Fails to attend a hearing without reasonable excuse
- Refuses to give evidence, produce records they are lawfully required to produce, or answer questions they are lawfully required to answer, or
- Engages in conduct that would constitute contempt if the hearing were a court.

Further offences are provided for in subsections (7), (8) and (9), which are set out respectively as follows:

- The person intentionally or recklessly destroys or otherwise disposes of, falsifies or conceals a book, document or record they are required to produce, or causes / permits its destruction, disposal, falsification or concealment.
- The person provides information or evidence that is false or misleading in a material respect that they know, or ought to have reasonably known, is false or misleading.
- The person who knowingly or recklessly provides information to another person that is false or misleading in a material respect, knowing that the information will be provided to an adjudicator.

These offences are punishable on summary conviction to a class A fine and / or up to 6 months in prison, or on conviction on indictment, to a maximum fine of €250,000 and / or up to 5 years in prison.

**Section 72** sets out the matters that an adjudication must consider when making a decision on a matter referred to them under section 53. The standard of proof is set as on the balance of probabilities. Where the regulatory breach is also a criminal offence, the person found to have committed / to be committing the regulatory breach cannot be prosecuted for that offence as well. The section also sets out the matters to be included in a decision.

**Section 73** lists the administrative sanctions available to an adjudicator, which are as follows:

- To cease a regulatory breach or take specified measures to remedy the breach
- A financial penalty under section 76
- Require the payment of a refund under section 77
- Require the payment of compensation under section 78, and
- Suspend or withdraw an authorisation, rights of use of radio spectrum or rights of use for numbers under section 79.

The section also sets out the procedure for providing a copy of the decision to ComReg and the person to whom it relates. It also sets out a procedure for making written submissions

**Section 74** provides that an adjudication may only take effect once it is confirmed by the High Court under the confirmation procedure set out in section 91. It also provides for the enforcement of financial penalties without the need for further judgment of a court and sets out actions that may be taken where there is a failure to comply with an administrative sanction, including the suspension or withdrawal of an authorisation or rights of use.

**Section 75** provides for the procedure regarding the notice of adjudication. It requires the adjudicator to first provide ComReg with the decision, which in turn notifies the person it concerns. It also sets out procedures on the particulars to be included in a notice, the providing of notices to other persons on the publication of adjudications.

Provision is made for offences where a person discloses the existence or content of an adjudication, or redacted material, before the adjudication's publication. These offences are punishable on summary conviction by a class A fine and / or up to six months in prison, and on conviction on indictment to a maximum fine of €250,000 and / or up to five years in prison.

## Chapter 5: Administrative Sanctions

### Financial Penalties

**Section 76** sets out the criteria that an adjudicator must have regard to when determining the amount of a financial penalty. It further provides for the application of sanctions on a subsidiary of the sanctioned person, or a person of which the sanctioned person is a subsidiary. Section 76 also sets the maximum financial penalties that may be applied by an adjudicator, which are set out as follows:

- **Persons other than natural persons:** the greater of €5,000,000 or 10% of turnover in the State in the financial year preceding the financial year when the regulatory breach last occurred; or
- **Natural persons:** the greater of €500,000 or 10% of the annual income in the year preceding the year when the regulatory breach last occurred.

### Other Sanctions

**Section 77** provides that an adjudicator may require the person to refund an end-user in part or in full where they consider that the end-user was overcharged due to of a regulatory breach.

**Section 78** provides for the payment of compensation where there is a regulatory breach. It further provides that compensation may be paid, even where an end-user also receives a refund, and sets out the matters to be considered when determining the amount of compensation. The maximum amount of compensation payable to an individual end-user is set at €5,000. The maximum amount of total compensation payable for a regulatory breach is set at the same maximum amounts for financial sanctions under section 76 above. This limit also applies where a financial penalty and a requirement to pay compensation are both imposed.

**Section 79** provides that the adjudicator may withdraw or suspend the general authorisation to provide ECN or ECS (except number independent interpersonal communications services) and / or some or all of the person's rights of use of radio spectrum and use of numbering resources, where the adjudicator has received a recommendation from ComReg to withdraw or suspend, and the adjudicator considers that there are or have been serious or repeated breaches of conditions.

## Chapter 8: Appeals, confirmation and judicial review of certain decisions

**Sections 83** sets out requirements on the restriction of statements or admissions made to an authorised officer from being admissible in evidence in criminal proceedings or for perjury where it was provided under oath. It also provides that adjudicators, authorised officers, ComReg, its staff or its agents shall not disclose any confidential information obtained under the Bill once enacted, or information obtained under compulsion under the Bill once enacted or the Principal Act. It further provides for an offence where there is failure to do so, which is punishable by a class A fine and / or up to six months in prison.

**Section 84** provides that where ComReg or an adjudicator provides a document to a person, it may require that some or all of the document may not be viewed by any person except those they may specify. It further provides for an offence where a person allows a document to be viewed or shared with any other person, which is punishable by a class A fine and / or up to six months in prison.

**Section 86** provides that urgent interim measures and adjudications may only be appealed under sections 87 and 88 respectively.



**Section 87** provides that a person to whom an urgent interim measure is directed may appeal the measure to the High Court within 14 days after the service of the notice.

**Section 88** provides that a person subject to an adjudication may appeal against it to the High Court within 28 days after the service of the notice.

**Section 91** provides for the procedure for the confirmation of an adjudication by the High Court where the decision of an adjudicator is not appealed.

**Section 93** sets out the procedure for an adjudicator to refer a question of law to the High Court on its own initiative or at the request of ComReg or a person subject to a referral under section 53.

**Section 94** provides that decisions made under Part 5 or Chapters 1 to 7 of Part 6 may only be challenged by judicial review or in accordance with a process provided for by the Principal Act, or the Bill once enacted.

**Section 95** provides for appeals to the Court of Appeal following a decision of the High Court under section 88, and also provides that appeals under other specified provisions (except appeals relating to the Constitution) may only take place where the High Court certifies that the decision involves a point of law of exceptional public importance and it is desirable in the public interest.

## Part 7: Amendment of Code Regulations

This consists of one provision, **section 103**, which raises the maximum fine provided for by Regulation 108 of the Code Regulations from €500,000 to €10,000,000.

## Part 8: Miscellaneous Amendments

**Section 104** amends the definitions for ‘associated facilities’, ‘electronic communications network’, ‘end-user’ and ‘electronic communications service’ contained in [section 2 of the Principal Act](#). It also inserts definitions for ‘associated service’, ‘end-user of premium rate services’ and ‘interpersonal communications service’ into section 2 of the Principal Act.

**Section 105** amends section 10 of the [Principal Act](#) to add two functions to those of ComReg; to ensure compliance with and perform functions assigned to it under the Code Regulations, and to advise the Minister on the electronic communications market and matters related to its functions when requested. A further amendment is made to remove the restriction on complaints ComReg may investigate under section 10(1) to complaints from end-users and undertakings.

**Section 106** further provides for the insertion of a new section 12A into the Principal Act, which allows for the Minister to request the advice of ComReg on matters relating to the electronic communications market or matters relating to its functions.

**Section 107** replaces [section 13D of the Principal Act](#), which relates to ComReg’s power to obtain information. Under the new section 13D, ComReg may obtain information from an undertaking, a person providing a service in a closely related sector to ECN, ECS or associated facilities, or a premium rate service provision. Further, the new provision allows for ComReg to require the person of whom it required the information to gather, generate or obtain information for the purposes of providing it. The section also provides for offences for failing to comply with a requirement of ComReg or purporting to comply but knowingly or grossly negligently providing misleading, erroneous or incomplete information, both punishable by a class A fine.

**Section 108** provides for the insertion of a section 13EA into the Principal Act. This provides that the Commission may share information with the Minister for the purposes of assisting policy formulation relating to ECN, ECS and associated facilities. The new section also provides for the

notification of the person from whom it was obtained and allows for an opportunity for that person to make written representations.

**Section 109** amends [section 39 of the Principal Act](#) to add new powers for authorised officers and makes further provision to clarify that a reference to a book, document or record is irrespective of the medium on which it is stored.

**Section 112** replaces [section 45 of the Principal Act](#), which relates to an undertaking's obligation to not overcharge or charge for services not supplied. The new provisions extend this requirement beyond undertakings. The new provision also amends the previous fine being stated at €5,000 with a class A fine (also currently up to €5,000).

**Section 113** replaces [section 46 of the Principal Act](#). It sets out the procedures for applying to the High Court for an order to restrain certain repeated or apprehended contraventions for sections 45(1) and (2) of the Principal Act (as amended by the Bill), Regulation 89 or 90 of the Code Regulations (which respectively relate to contract duration and termination, and to switching providers and number portability), or [section 13\(1\) of the \*Communications Regulation \(Premium Rate Services and Electronic Communications Infrastructure\) Act 2010\*](#). The provision sets out the procedures for applying for and granting the order.

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