

# Telecoms and Media

An overview of regulation in  
44 jurisdictions worldwide

# 2013

Contributing editors: Laurent Garzaniti and Natasha Good



**Freshfields Bruckhaus Deringer**



**Published by**  
*Getting the Deal Through*  
**in association with:**

Barretto Ferreira, Kujawski e Brancher  
Sociedade de Advogados (BKBG)  
Bentsi-Enchill, Letsa & Ankomah  
BLP Abogados  
Carey  
Coelho Ribeiro e Associados  
Coulson Harney Advocates  
Debarliev, Dameski & Kelesoska Attorneys at Law  
Djingov, Gouginski, Kyutchukov & Velichkov  
Drew & Napier LLC  
Edward Nathan Sonnenbergs  
Freshfields Bruckhaus Deringer LLP  
Greenberg Traurig SC  
JJ Roca & Asociados  
Lenz & Staehelin  
Matheson  
MJM Barristers & Attorneys  
National Regulatory Agency for Electronic  
Communications and Information Technology – Moldova  
Nikolinakos-Lardas Law Firm  
Oentoeng Suria & Partners  
School of Law, University of the  
Thai Chamber of Commerce  
Seth Dua & Associates  
Stikeman Elliott LLP  
Streamsovers & Köhn  
SyCip Salazar Hernandez & Gatmaitan  
Telecommunications Regulatory Authority – Bahrain  
The Legal Circle  
Webb Henderson  
Wierzbowski Eversheds  
Wiltshire & Grannis LLP  
Wong Jin Nee & Teo  
YangMing Partners  
ZBV Abogados



## Telecoms and Media 2013

### Contributing editors

Laurent Garzaniti and  
Natasha Good  
Freshfields Bruckhaus Deringer LLP

### Business development managers

Alan Lee  
George Ingledew  
Robyn Horsefield  
Dan White

### Marketing assistants

Zosia Demkowicz  
Megan Friedman  
Cady Atkinson  
Robin Synnott

### Admin assistants

Parween Bains  
Sophie Hickey

### Marketing manager (subscriptions)

Rachel Nurse  
Subscriptions@  
GettingTheDealThrough.com

### Head of editorial production

Adam Myers

### Production coordinator

Lydia Gerges

### Senior production editor

Jonathan Cowie

### Chief subeditor

Jonathan Allen

### Production editor

John Harris

### Senior subeditor

Caroline Rawson

### Subeditor

Tim Beaver

### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

### Telecoms and Media 2013

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2013

No photocopying: copyright  
licences do not apply.

First published 2000  
Fourteenth edition 2013

ISSN 1471-0447

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2013, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112

**Law  
Business  
Research**



<b>Overview</b> Laurent Garzaniti, Natasha Good and Hein Hobbelen <i>Freshfields Bruckhaus Deringer LLP</i>	<b>3</b>
<b>Acknowledgements for Verifying Content</b>	<b>6</b>
<b>Argentina</b> Pablo Crescimbeni and María Laura Barbosa <i>ZBV Abogados</i>	<b>7</b>
<b>Australia</b> Angus Henderson, Capucine Hague and Tim Quadrio <i>Webb Henderson</i>	<b>16</b>
<b>Austria</b> Bertram Burtscher and Stefan Köck <i>Freshfields Bruckhaus Deringer LLP</i>	<b>30</b>
<b>Bahrain</b> Alexandre Sérot <i>Telecommunications Regulatory Authority – Bahrain</i>	<b>41</b>
<b>Bangladesh</b> Daniah Khandker, Anita Ghazi Rahman, Mohibul Hassan Chowdhury and Sabrina Afrozé <i>The Legal Circle</i>	<b>49</b>
<b>Belgium</b> Laurent Garzaniti, Thomas Janssens, Hein Hobbelen and Anneleen Straetemans <i>Freshfields Bruckhaus Deringer LLP</i>	<b>57</b>
<b>Bermuda</b> Timothy Frith <i>MJM Barristers &amp; Attorneys</i>	<b>70</b>
<b>Brazil</b> Ricardo Barretto Ferreira and Fabio Ferreira Kujawski <i>Barretto Ferreira, Kujawski e Brancker Sociedade de Advogados (BKBG)</i>	<b>81</b>
<b>Bulgaria</b> Violetta Kunze and Lilia Kisseva <i>Djingov, Gouginski, Kyutchukov &amp; Velichkov</i>	<b>90</b>
<b>Canada</b> David Elder <i>Stikeman Elliott LLP</i>	<b>101</b>
<b>Chile</b> Alfonso Silva and Eduardo Martin <i>Carey</i>	<b>112</b>
<b>China</b> Mark Parsons, Yang Xun, Victoria White and Longbo Wang <i>Freshfields Bruckhaus Deringer LLP</i>	<b>125</b>
<b>Costa Rica</b> Eduardo Calderón, Luis Ortiz, Esteban Alfaro and Andrea Sittenfeld <i>BLP Abogados</i>	<b>143</b>
<b>Dominican Republic</b> Sharin Pablo de Roca and Yumari Torres <i>JJ Roca &amp; Asociados</i>	<b>148</b>
<b>European Union</b> Laurent Garzaniti, Thomas Janssens, Hein Hobbelen and Alexia Burckett St Laurent <i>Freshfields Bruckhaus Deringer LLP</i>	<b>155</b>
<b>France</b> Jérôme Philippe and Aude-Charlotte Guyon <i>Freshfields Bruckhaus Deringer LLP</i>	<b>181</b>
<b>Germany</b> Norbert Nolte and Sibylle Gering <i>Freshfields Bruckhaus Deringer LLP</i>	<b>196</b>
<b>Ghana</b> Josiah Kojo Ankamah-Sey and Susan-Barbara Adjorkor Kumapley <i>Bentsi-Enchill, Letsa &amp; Ankamah</i>	<b>207</b>
<b>Greece</b> Dina Th Kouvelou and Nikos Th Nikolinakos <i>Nikolinakos-Lardas Law Firm</i>	<b>215</b>
<b>Hong Kong</b> Mark Parsons, Victoria White and James Chan <i>Freshfields Bruckhaus Deringer</i>	<b>221</b>
<b>India</b> Atul Dua, Rahul Goel and Anu Monga <i>Seth Dua &amp; Associates</i>	<b>239</b>
<b>Indonesia</b> Noor Meurling, Toby Grainger, Dewi Sawitri and Alwin Redfordi <i>Oentoeng Suria &amp; Partners</i>	<b>249</b>
<b>Ireland</b> Helen Kelly and Claire Morgan <i>Matheson</i>	<b>257</b>
<b>Italy</b> Tommaso Salonicco and Luca Ulissi <i>Freshfields Bruckhaus Deringer LLP</i>	<b>280</b>
<b>Kenya</b> Richard Harney and Kenneth Njuguna <i>Coulson Harney Advocates</i>	<b>293</b>
<b>Macedonia</b> Dragan Dameski and Elena Miceva <i>Debarliev, Dameski &amp; Kelesoska Attorneys at Law</i>	<b>301</b>
<b>Malaysia</b> Jin Nee Wong and Min Lee Boo <i>Wong Jin Nee &amp; Teo</i>	<b>308</b>
<b>Mexico</b> Bertha Alicia Ordaz Avilés and Octavio Lecona Morales <i>Greenberg Traurig SC</i>	<b>319</b>
<b>Moldova</b> Sergiu Sitnic <i>National Regulatory Agency for Electronic Communications and Information Technology</i>	<b>328</b>
<b>Netherlands</b> Onno Brouwer, Winfred Knibbeler and Nima Lorjé <i>Freshfields Bruckhaus Deringer LLP</i>	<b>337</b>
<b>New Zealand</b> Malcolm Webb, Edward Willis and Anisa Purbasari <i>Webb Henderson</i>	<b>346</b>
<b>Nigeria</b> Tamuno Atekebo, Otome Okolo and Chukwuyere E Izuogu <i>Streamsowers &amp; Köhn</i>	<b>354</b>
<b>Philippines</b> Rose Marie M King-Dominguez and Ruben P Acebedo II <i>SyCip Salazar Hernandez &amp; Gatmaitan</i>	<b>362</b>
<b>Poland</b> Arwid Mednis and Artur Salbert <i>Wierzbowski Eversheds</i>	<b>370</b>
<b>Portugal</b> Jaime Medeiros and Mónica Oliveira Costa <i>Coelho Ribeiro e Associados</i>	<b>381</b>
<b>Russia</b> Igor Gerber and Andrey Filippenko <i>Freshfields Bruckhaus Deringer LLP</i>	<b>392</b>
<b>Singapore</b> Chong Kin Lim and Charmian Aw <i>Drew &amp; Napier LLC</i>	<b>408</b>
<b>South Africa</b> Zaid Gardner <i>Edward Nathan Sonnenbergs</i>	<b>430</b>
<b>Spain</b> Sergio Miralles Miravet, Alejandro Milá Valle and Carolina Luna Gordo <i>Freshfields Bruckhaus Deringer LLP</i>	<b>439</b>
<b>Switzerland</b> Marcel Meinhardt, Astrid Waser and Michael Cabalzar <i>Lenz &amp; Staehelin</i>	<b>453</b>
<b>Taiwan</b> Robert C Lee <i>YangMing Partners</i>	<b>462</b>
<b>Thailand</b> Sudharma Yoonaidharma <i>School of Law, University of the Thai Chamber of Commerce</i>	<b>470</b>
<b>United Kingdom</b> Rod Carlton, Mark Sansom and Olivia Hagger <i>Freshfields Bruckhaus Deringer LLP</i>	<b>479</b>
<b>United States</b> John Nakahata, Kent Bressie and Paul Margie <i>Wiltshire &amp; Grannis LLP</i>	<b>497</b>
<b>Quick Reference Tables</b>	<b>507</b>

# Ireland

Helen Kelly and Claire Morgan

Matheson

---

## Communications policy

### 1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure? Has the EU regulatory framework (including the market reviews) been fully transposed into your national law, as far as currently required?

The Irish government's policy in the communications sector is to open up electronic communications networks and services. The stated policy in relation to broadcasting is to serve Irish society by regulating, shaping and supporting the broadcasting environment, so that broadcasting reflects Ireland's diverse and democratic nature. In terms of media ownership, the government's policy is to protect plurality of media by spreading ownership among individuals and undertakings. The minister for communications states the roll-out of broadband to be critical to Ireland's success.

The regulator for communications is the Commission for Communications Regulation (ComReg), which was established by the Communications Regulation Act 2002 (as amended). The objectives of ComReg are set out in section 12 of that Act and in section 16 of the Framework Regulations (defined below), and include the promotion of competition, contributing to the development of the internal market and promotion of the interest of users within the EU. ComReg's objectives reflect the objectives set for the national regulatory authorities by the European Community in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services (Framework Directive), as amended by Directive 2009/140/EC (Better Regulation Directive).

ComReg also has as one of its objectives the efficient use and effective management of radio spectrum and numbers. It is also responsible for regulating premium-rate services. The Department of Communications, Energy and Natural Resources (DCENR) is the relevant government department responsible for the telecoms and media sector. In terms of policymaking and policy development procedure, the minister for communications, energy and natural resources (minister for communications) has powers to issue directions to ComReg, some of which are subject to public consultation prior to their issue. ComReg regularly conducts public consultations on regulatory issues. The framework within which ComReg regulates the electronic communications industry is largely driven by the European Commission and the Body of European Regulators for Electronic Communications (BEREC).

Ireland has implemented the European regulatory framework governing the electronic communications sector by way of primary and secondary legislation (the Irish Regulatory Framework). Primary legislation includes the Communications Regulation Act 2002 (as amended).

In 2011 a number of changes were made to the secondary legislation underpinning the Irish regulatory framework following the adoption of the EU electronic communications reform package in

November 2009 (including the Better Regulation Directive, Directive 2009/136/EC (Citizens' Rights Directive) and Regulation EC No. 1211/2009 (BEREC Regulation)). Five new regulations were signed into law on 1 July 2011 to transpose the reform package, namely:

- the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the Framework Regulations);
- the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (the Access Regulations);
- the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (the Authorisation Regulations);
- the European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2011 (the Universal Service Regulations); and
- the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the Privacy Regulations).

ComReg took over from RegTel as the statutory independent regulator of premium rate services (PRS) in Ireland following the enactment of the Communication Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 on 12 July 2010. New regulations governing the provision of PRS were introduced in June 2012 (Communications Regulation (Licensing of Premium Rate Services) Regulations 2012) and ComReg launched a new code of practice for PRS which came into full effect on 25 July 2012.

ComReg is responsible for monitoring call-handling, fee-setting and quality of service relating to the Emergency Call Answering Service (ECAS), which is currently provided by BT Ireland Limited.

It is expected that the Consumer and Competition Bill will be published early in 2013. The bill is expected to include new rules on media mergers and provide for the amalgamation of the National Consumer Agency and Competition Authority. The Broadcasting Act 2009 established a single content regulator, the Broadcasting Authority of Ireland (BAI) (see questions 3, 36 and 40).

---

### 2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

The Framework Directive (transposed in Ireland by the Framework Regulations) provides that the convergence of the telecoms, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. The statutory instruments implementing the European regulatory framework cover all electronic communications networks (ECN) and electronic communications services (ECS) irrespective of their means of transmission and regardless of the type of information conveyed.

An ECN means transmission systems and, where applicable, switching or routing equipment and other resources (including network elements which are not active) which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including the internet) and mobile terrestrial networks, electricity cable systems (to the extent that they are used for the purpose of transmitting signals), networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

An ECS means a service normally provided for remuneration which consists wholly or mainly of the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, and information society services, as defined in article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

Media services could potentially be categorised as ECS depending on their method of transmission. Broadcasting licensing, content regulation and media ownership, however, are regulated separately and are not covered by the package of statutory instruments implementing the European regulatory framework. The statutory instruments implementing the European regulatory framework neither define nor make any explicit references to the terms 'telecoms' or 'media'. In February 2012 the minister for communications made a statement noting the move away from a traditional vertically integrated model of media provision towards a more disaggregated and internet-focused model, which has driven cross-media mergers with companies increasingly building a deliberately diverse portfolio of media interests. The minister also noted the challenge of adjusting to a changing market, and technological and social trends in a flexible and appropriate manner.

As mentioned in question 1, the Consumer and Competition Bill will amend the current legislation on media mergers. It is expected that the bill will include a definition of 'media' that explicitly includes news materials published on the internet.

### 3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

The broadcasting sector in Ireland is regulated by the Broadcasting Act 2009 (Broadcasting Act), which updated and modernised the legislative framework for broadcasting in Ireland by repealing a large proportion of the broadcasting legislation enacted in Ireland over the past 50 years. The Broadcasting Act established a single content regulator, the BAI, which took over the regulatory functions of the Broadcasting Commission of Ireland (BCI), the Broadcasting Complaints Commission (BCC) and the RTÉ Authority (RTÉ). The Broadcasting Act also introduced stricter enforcement mechanisms and new financial penalties that result in television and radio stations facing fines of up to €250,000 if they infringe broadcasting codes of conduct or rules, or breach the duties of broadcasters within the Broadcasting Act or the provisions in respect of the recording of broadcasts and advertising or licence requirements.

Television broadcasting in Ireland was originally established under the Broadcasting Authority Act 1960. This established RTÉ as the regulator and operator of television broadcasting services, which now include RTÉ 1, RTÉ 2 and TG4 (the Irish-language station) and the then-existing publicly owned radio services, which now comprise Radio 1, 2FM, Radió na Gaeltachta (the Irish-language station) and Lyric FM. TG4 was established as an independent statutory body in April 2007.

The Radio and Television Act 1988 (as repealed by the Broadcasting Act) provided for the establishment of commercially owned

radio broadcasters both locally and nationally. It also provided for the establishment of a commercial television programme service, TV3. These commercial licences (broadcasting contracts) remain in force under the Broadcasting Act. The BAI is also responsible for licensing regional, local, community, community of interest and institutional radio services. The Broadcasting Act also provides for the issue by the BAI of broadcasting contracts in respect of various television programme services, for example, digital, satellite and cable-MMD content contracts.

Digital switchover occurred on 24 October 2012. Terrestrial television broadcasting will now be delivered through more spectrally efficient digital terrestrial television (DTT) signals, which can only be broadcast after going through a multiplex process. The Broadcasting Act provides for the award of multiplex licences, which are required for spectrum rights to provide multiplex services and for such licences to be provided by ComReg to BAI, which awards contracts to multiplex operators through a tendering process. A DTT multiplex operated by RTÉ was launched on 27 May 2011, known as Saorview, to ensure the continued availability of the existing free-to-air services in Ireland, namely RTÉ 1, RTÉ 2, TV3 and TG4 (see question 42 for further details). In February 2011 the minister for communications made an order under the Broadcasting Act conferring a number of additional functions on the BAI to consult with RTÉ and other parties in relation to the provision of services on the RTÉ DTT multiplex. The BAI has made recommendations that a number of new services merit consideration for inclusion on the RTÉ multiplex but has stated that none of these services are in a position to be included in the near future. The BAI has so far been unsuccessful in negotiating contracts for commercial DTT.

ComReg's role in respect of the broadcasting sector covers the issuing of licences under Ireland's Wireless Telegraphy Acts, 1926–2009 (Wireless Telegraphy Acts) in respect of wireless equipment and assignment of required radio spectrum.

ComReg previously designated RTE Transmission Network Limited (RTENL) as having SMP in two wholesale markets, namely the wholesale market for radio broadcasting services on analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial network, and imposed transparency and non-discrimination obligations (ComReg Decision No. D/04/122). ComReg launched a market review in July 2012 to review the relevant Irish broadcasting transmission markets to determine whether ex-ante regulation remains appropriate. ComReg's proposals are set out in question 40.

### Telecoms regulation – general

#### 4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

Yes, without exception.

#### 5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

The Irish government no longer holds shares in any operator in the fixed or mobile telecoms sectors. See question 33 for government involvement in metropolitan area networks.

#### 6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

No.

## 7 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated?  
Under what conditions may public telephone services be provided?

As mentioned in question 2, no distinction is drawn in the Irish regulatory framework for ECN and ECS between the technology involved in the provision of networks and services, or between the provision of services via fixed, mobile or satellite technology.

### General authorisation

The provision of communications services is subject to the regime set out in the Authorisation Regulations, which confers a general right to provide ECN or ECS (or both) provided certain conditions are complied with. Conditions which may be attached to a general authorisation are set out in the schedule to the Authorisation Regulations. Persons wishing to provide ECN or ECS (or both) to third parties must notify ComReg in advance. The notification must contain certain minimum information, and on receipt of a complete notification form, ComReg will add the notifying party to its register of authorised undertakings, which can be viewed at [www.comreg.ie](http://www.comreg.ie).

Additional obligations apply in respect of an authorised operator designated as having significant market power (SMP), or as being a universal service provider (see question 9).

### Wireless telegraphy licences

In addition to complying with the conditions of the general authorisation, mobile phone operators and providers of fixed wireless services need to obtain a licence under the Wireless Telegraphy Acts. In respect of the installation, maintenance and use of fixed satellite earth stations, a licence must also be obtained under the Wireless Telegraphy Acts.

### Publicly available telephone services

Whether an undertaking is providing a publicly available telephone service (PATS) or not will affect both its rights and obligations (see question 31 in respect of VoIP). PATS means a service available to the public for originating and receiving, directly or indirectly, national and international calls. PATS are provided through a number or numbers in a national or international telephone numbering plan.

### Numbering

All undertakings and users of numbers from Ireland's National Numbering Scheme (NNS) must comply with the Irish Numbering Conventions, which set down rules relating to the allocation and permitted use of numbers allocated from the NNS. ComReg does not charge any fees for number allocations at present. The most recent version of the National Numbering Conventions (v. 7) was issued by ComReg on 9 March 2011 (ComReg Document No. 11/17).

## 8 Satellite facilities and submarine cables

In addition to the requirements under question 7, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

The Wireless Telegraphy (Fixed Satellite Earth Stations and Teleport Facility) Regulations 2007 apply in respect of the installation, maintenance and use of certain fixed satellite earth stations. Various statutory instruments have been passed exempting satellite earth stations from the requirements of the Wireless Telegraphy Acts. Satellite earth station equipment should comply with the provisions of the European Communities (Satellite Earth Station Equipment) Regulations 1998.

A foreshore licence is required from the DCENR in respect of the landing of a submarine cable in Ireland.

## 9 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

Eircom Limited (Eircom) has been designated as the universal service provider (USP) since 2006, and in June 2012, ComReg confirmed the re-designation of Eircom as the USP for a further two-year period until June 2014 (see below). The universal service obligation (USO) applies only to basic telecoms services and does not apply to next-generation access and VoIP. ComReg recently consulted on whether broadband availability should be included in the USO, but made a decision to forbear from regulatory intervention in the area of broadband as a USO for the time being, to observe the effects of technological developments and market provision on broadband availability, although ComReg plans to re-examine the issue in 2014 (ComReg Document No. 12/71). Pursuant to its designation as USP, and pursuant to its obligations under section 3 of the Universal Service Regulations, Eircom must satisfy any reasonable request to provide, at a fixed location, connections to the public telephone network and access to a publicly available telephone service (PATS).

ComReg has imposed legally binding performance targets on Eircom in connection with Eircom's principal obligation to provide access at a fixed location. The performance targets came into effect on 28 May 2008, and Eircom is subject to monitoring and reporting obligations in respect of its compliance with the performance targets and is required to submit performance data to ComReg that is reported on ComReg's website on a quarterly basis.

Further, Eircom, as USP, must also comply with the following obligations:

- Eircom is required to provide end-users with a comprehensive directory of subscribers, whether in printed or electronic form (or both), free of charge and updated at least once a year, based upon information supplied to it in accordance with the National Directory Database (NDD). Eircom is also required to maintain the NDD, which is a record of all subscribers of PATS in the state who have not refused to be included in the NDD. ComReg recently consulted on the possibility of putting the maintenance and management of the NDD out to tender, but concluded that Eircom should continue to maintain the NDD until 30 June 2014 (see ComReg Document No. 12/11);
- Eircom is obliged to ensure that public pay telephones are provided to meet the reasonable needs of end-users in terms of geographical coverage, number of telephones, accessibility of such telephones to users with disabilities and the quality of services;
- Eircom is required to provide specific measures for users with disabilities and is required to maintain a code of practice concerning the provision of services for people with disabilities; and
- Eircom must also adhere to the principle of maintaining affordability for universal services, as discussed in question 17.

Failure by Eircom to comply with these obligations constitutes an offence under the Universal Service Regulations.

On 28 May 2008 ComReg set legally binding performance targets in relation to Eircom's quality of service performance with respect to certain aspects of the USO. These targets relate to timescales for connection, fault rate occurrence and fault repair times. Subsequently Eircom established a USO quality of service performance improvement programme for the periods 2010–2011 and 2011–2012. Eircom put in place performance bonds (totalling €10 million) to guarantee its performance. For the period 2011–2012 Eircom paid out €525,000 for failure to meet its fault repair targets. A new performance improvement programme has been put in place for the period 2012–2014, again backed by a financial security mechanism of up to €10 million per annum.

Pursuant to the Universal Service Regulations, a USP may apply to ComReg to receive funding for the net cost of meeting the USOs concerned where, on the basis of a calculation in respect of the

net cost of its provision, ComReg determines that the undertaking in question is subject to an unfair burden. There is currently no universal service fund in Ireland and the USO is self-financed by Eircom. However, in June 2012 Eircom submitted an application for funding in respect of its USO for 2009–2010, claiming a net cost of €6.22m (including the intangible benefit it receives for its provision of the USO). ComReg is currently assessing the application. Eircom's deadline for application for funding for 2010–2011 has also been extended to 31 March 2013.

ComReg published a decision on 29 June 2012 relating to the future of the USO, noting that Eircom's position as the USO provider is without prejudice to any other operator who may express an interest in providing all or part of the USO in all or part of the state (ComReg Document No. 12/71). ComReg recognised that in order to decide whether it would provide such services, operators would require certain information (eg, information about uneconomic customers or areas), which is not currently available. However, ComReg noted that this information would become available following Eircom's funding application, and so although ComReg considered that there is a continued need for a USO, it limited Eircom's designation to a further two years only in advance of a further review.

On 28 October 2011, ComReg published a consultation on a sharing mechanism for any USO fund, Principles and Methodologies (ComReg Document No. 11/77), inviting the views of interested parties on an appropriate sharing mechanism for a USO fund between providers of ECNs and ECSs. ComReg has not yet published a response to this consultation.

In March 2012 Eircom sought court protection from its creditors in a process known as examinership, pursuant to which it was required to propose a plan to return the company to viability. It received court approval on 22 May 2012 for a debt-restructuring deal to cut the group's gross debt and a five-year business plan which was endorsed by most of Eircom's creditors. Eircom exited the examinership process in June 2012.

## 10 Operator exclusivity and limits on licence numbers

Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

Currently, there are no special or exclusive rights reserved for any operator. Article 4 of European Commission Directive 2002/77/EC 'on competition in the markets for electronic communications networks and services' prohibits member states from granting exclusive or special rights of use for the operation of an ECN or the provision of ECS.

Regulation 11 of the Authorisation Regulations sets out the procedures to be followed by ComReg when it considers that the number of licences to be issued under the Wireless Telegraphy Acts ought to be limited. Regulation 11 of the Authorisation Regulations also requires ComReg to give due weight to the need to maximise benefits for users and to facilitate the development of competition, in circumstances where it proposes to issue licences for a particular class or description of apparatus for wireless telegraphy for the provision of an electronic communications network or service pursuant to its powers under the Wireless Telegraphy Acts, and considers that the number of such licences ought to be limited. Where ComReg decides to limit the number of rights of use to be granted, it is required to ensure that any rights granted will be on the basis of objective, transparent, proportionate and non-discriminatory selection criteria. ComReg must also publish any decision to limit the granting of rights of use, along with reasons for that decision. There are no limits on licence numbers except where resources are scarce, eg, radio frequencies. For example, following the spectrum auction held in autumn 2012, there are currently only four owners of the liberalised use spectrum in the 800MHz, 900MHz and 1,800MHz bands in Ireland: Meteor, O2, Vodafone and H3GI (see question 20 on the recent auction in Ireland).

## 11 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Structural separation has not been provided for in the Irish regulatory framework. However, under section 14 of the Competition Act 2002–2012 (Competition Act), structural separation could potentially be imposed as a remedy in cases entailing an abuse of dominance contrary to section 5 of the Competition Act

Following the significant reform of the EU Regulatory Framework in 2009 and, in particular, the amendment of the Access Directive by the Better Regulation Directive, a new exceptional remedy of functional separation has been provided for pursuant to Regulation 14 of the Access Regulations. In the case of operators found to have significant market power (SMP), a remedy of functional separation can be imposed as a last resort by ComReg where other remedies have failed to achieve effective competition. Where ComReg concludes that Regulations 9 to 13 of the Access Regulations (ie, transparency, non-discrimination, accounting separation, access and price control obligations) have failed to achieve effective competition, and where it has identified important and persisting competition problems or market failures in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. That independently operating business must supply access products and services to all undertakings on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

Any proposal which ComReg wishes to make in terms of a functional separation must be submitted to the European Commission. The Access Regulations also provide that ComReg must be notified of any voluntary separation in a vertically integrated undertaking with SMP.

## 12 Number portability

Is number portability across networks possible? If so, is it obligatory?

All undertakings providing a publicly available telephone service, including a mobile service, have a regulatory obligation to provide number portability as a customer right under Regulation 25(1) of the Universal Service Regulations.

There are three different types of number portability: geographic, non-geographic and mobile. Geographic number portability (GNP) enables any fixed-line customer to move or port their telephone number(s) to any other available operator. Non-geographic number portability enables customers to transfer their non-geographic number service (eg, freephone, lo-call, VoIP numbers between host providers). Mobile number portability (MNP) enables mobile customers to retain their mobile number when moving between mobile telephony operators. The Universal Service Regulations do not cover the porting of numbers between fixed and mobile networks.

In November 2007, ComReg published a Response to Consultation and Specification on Number Portability in the Fixed and Mobile Sectors (ComReg Decision No. 05/07), which specified that there shall be no direct charges to subscribers for number portability.

Regulation 25 of the Universal Service Regulations provides that undertakings must ensure that the porting of numbers and their subsequent activation are carried out within the shortest possible time. In the case where a subscriber has concluded an agreement to port a number to a new undertaking, that number must be activated within one working day, and loss of service during the porting process may not exceed one working day. ComReg may specify requirements to be complied with by undertakings in relation to this obligation including, but not limited to, arrangements for the payment of compensation to subscribers relating to delay in porting.

In January 2009, ComReg published a Response to Consultation and Final Specification: Setting a Maximum Fixed and Mobile Number Porting Charge (ComReg Decision No. D01/09) specifying the maximum charges that fixed and mobile operators are permitted to charge for wholesale number porting charges going forward. The maximum charges set out in that decision will remain in place for a period of two to three years; however, ComReg has reserved its powers to review the maximum number porting charges within this time frame if exceptional circumstances arise. No review of the charges has been undertaken at the date of publication.

In May 2012 ComReg launched a preliminary consultation calling for input from telecommunications operators on a range of topics related to inter-operator switching processes (ComReg Document No. 12/40). ComReg noted that a number of issues had arisen at a series of meetings on GNP, and the consultation is intended to provide industry with an opportunity to submit formal views on issues identified for discussion at those meetings and more generally, and in particular any views on possible technical and procedural improvements which could be made to inter-operator switching processes. Topics to be considered as part of the consultation include: coordination of switching between service bundles; switching processes in the context of new technologies, particularly the emergence of next-generation networks and fixed mobile convergence; the role of customer authorisation forms in inter-operator processes and central database arrangements for fixed and mobile services including their future functionality, management structures and access arrangements.

### 13 Authorisation timescale

Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

Once an operator notifies ComReg of its intention to provide an ECN or ECS (or both), it is deemed to be authorised under the Authorisation Regulations and must comply with all applicable conditions of the general authorisation.

In respect of a wireless telegraphy licence granted under the Wireless Telegraphy Acts, ComReg must make a decision on the granting of a licence as soon as possible after the receipt of a complete application.

In the case of radio frequencies that have been allocated for specific purposes within the national frequency plan, ComReg must make a decision within six weeks of receipt of a complete application. Where ComReg decides to use a competitive or comparative selection procedure for the purposes of granting a licence, it may extend this six-week period for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months. These time limits are without prejudice to any applicable international agreements relating to the use of radio frequencies, or orbital positions or satellite coordination.

For numbers that have been allocated for a specific purpose within the NNS, ComReg must make a decision within three weeks of receipt of a complete application. Where ComReg decides, after public consultation, that rights of use for numbers of exceptional economic value are to be granted through competitive or comparative selection procedures, it may extend the three-week period by a further three weeks.

### 14 Licence duration

What is the normal duration of licences?

The general authorisation is not limited in duration. The duration of wireless telegraphy licences varies for radio frequencies depending on the type of licence but they are generally renewed on an annual basis.

Spectrum in the 900MHz band is currently assigned under 2G mobile licences to Vodafone, O2 and Meteor. Vodafone and O2's

previous 15-year licences expired in May 2011, and after a consultation process, ComReg granted interim 2G licences for this spectrum to Vodafone and O2 on 13 May 2011 under the Wireless Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011. These interim licences were due to expire on 31 January 2013. Following completion of the spectrum auction in November 2012 ComReg considered that it was unlikely that the relevant transition activities (ie, relocation) in the 900MHz band would be completed by 1 February 2013. Following a consultation (ComReg Document No.12/127), ComReg issued a decision on 15 January 2013 which will result in an extension to those licences of no more than three months, with two further possible extension of no more than two months each. ComReg believes this will enable the existing GSM licensees to complete their respective transition activities in the 900MHz band (Decision D13/05).

Meteor's 15-year 2G licence will expire in June 2015. The current 3G mobile licences were granted for a term of 20 years to O2, Vodafone, H3GI and Meteor and are also renewed on an annual basis.

To accommodate the current pattern of licence assignments, the 800MHz, 900MHz and 1,800MHz spectrum auctioned off as part of the spectrum auction in November 2012 was auctioned across two time periods; from 1 February 2012 until 12 July 2015, and from 13 July 2015 to 12 July 2030.

The auction is discussed further in question 20.

### 15 Fees

What fees are payable for each type of authorisation?

Annual levies are payable under section 30 of the Communications Regulation Act 2002 and the Authorisation Regulations and pursuant to the Levy Order SI No. 346/2003 in respect of ECNs and ECS excluding broadcasting transmission networks. The amount of the annual levy payable is 0.2 per cent of relevant turnover in the relevant financial year of the authorised service provider, unless the relevant turnover is less than €500,000, in which case no levy is payable. The 'relevant turnover' is the gross revenue of the authorised service provider excluding VAT paid to it in respect of the provision of ECN or ECS (or both).

Under section 19 of the Authorisation Regulation, ComReg may impose fees for rights of use of radio frequencies or rights of use for numbers which reflect the need to ensure the optimal use of the radio frequency spectrum and the NNS. These fees must be objectively justified, transparent, non-discriminatory and proportionate.

There is currently no fee imposed for the use of numbers. Licence fees are also payable in respect of radio frequency licences issued in accordance with the Wireless Telegraphy Acts.

As mentioned in question 14, the winning bidders (H3GI, Vodafone, O2 and Eircom (which owns Meteor)) in the recent spectrum auction paid €481.7 million in upfront fees for the spectrum rights on offer and will pay a further €373 million in spectrum usage fees in the period 2013 to 2030. The annual spectrum usage fee for each spectrum block in the 800MHz and 900MHz bands is €1.08 million (subject to Consumer Price Index (CPI) adjustment) and €0.54 million (subject to CPI adjustment) for each spectrum block in the 1,800MHz band.

### 16 Modification and assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

Regulation 15(1) of the Authorisation Regulations provides that ComReg may amend the rights, conditions and procedures concerning the general authorisation, rights of use for radio frequencies and rights for use of numbers provided that any such amendments are objectively justified and proportionate. Before making any amendment under Regulation 15(1), ComReg must publicly consult on its

intended proposal to modify a licence for a period, other than in exceptional circumstances, of not less than 28 days and invite all interested parties to make representations on the amendment, except where the proposed amendment is minor in nature and has been agreed with the holder of a general authorisation/licence.

Wireless telegraphy legislation and licences may contain additional amendment provisions.

A general authorisation is not transferable. An authorisation is personal to an authorised person. An authorised person may not sub-authorise or grant or otherwise transfer any right, interest or entitlement in a general authorisation.

The holder of a wireless telegraphy licence may not assign a licence without the consent of ComReg, although this consent may not be unreasonably withheld.

Article 9(3)(b) of the Framework Directive provides that member states shall ensure that undertakings may transfer or lease individual rights to use radio frequencies. Regulation 19 of Framework Regulations transposes this provision into Irish law and provides that ComReg shall ensure that undertakings may transfer or lease to other undertakings, in accordance with conditions attached to the rights of use for radio frequencies and any procedures specified by ComReg, individual rights to use radio frequencies in the bands for which this is provided, in accordance with article 9(3)(b) of the Framework Directive. Under Regulation 19(4) where an undertaking intends to transfer the right to use a radio frequency it shall notify ComReg of its intention to do so, in a manner specified by ComReg. ComReg must ensure that this notification is made public. Regulation 9(5) of the Authorisation Regulations requires that ComReg, when granting rights of use for radio frequencies, must specify whether such rights may be transferred by the holder of the rights and under what conditions such a transfer may take place, having regard to Regulation 19 and Regulation 17 (which governs the management of radio frequency for ECSS) of the Framework Regulations.

The Wireless Telegraphy (Liberalised Use and Preparatory Licences in the 800MHz, 900MHz and 1,800MHz bands) Regulations 2012 (Liberalised Use Licence Regulations) were introduced in July 2012 and are to apply in respect of the liberalised use licences issued following the auction. The Regulations provide that ComReg may amend the liberalised use licences from time to time in accordance with the Authorisation Regulations, and a licensee can request that a liberalised use licence is amended by adding to, deleting or altering the radio frequencies specified in the licence.

### 17 Retail tariffs

Are national retail tariffs regulated? If so, which operators' tariffs are regulated and how?

Eircom's retail tariffs for fixed retail calls are no longer subject to ex-ante regulation. In December 2008, ComReg removed its finding that Eircom had SMP on the retail market for the minimum set of leased lines (up to 2MBs). ComReg's decision to remove regulation in this market followed the European Commission's review of the product and service markets that may be susceptible to ex-ante regulation and the Commission's proposal that the minimum set of retail leased lines should be removed from the list of relevant markets, since wholesale regulation should ensure that there is competitive supply at the retail level.

However, retail tariffs for fixed narrowband access (ie, retail line rental) services in Ireland are regulated. In September 2007 ComReg reviewed the fixed voice access (FVA) market and imposed a retail price cap on Eircom on each of the higher-level fixed voice access (HLVA) and lower-level voice access (LLVA) services for a period of 12 months from the start date of the proposed price cap, and a CPI zero per cent cap in subsequent years. In addition, pursuant to ComReg's 2007 decision, Eircom has an obligation not to unreasonably bundle fixed narrowband access with other retail services.

In October 2012 ComReg launched a market review on retail access to the public telephone network at a fixed location for residential and non-residential customers (ComReg Document 12/117), noting when ComReg last reviewed the FVA markets in 2007 it considered the state of competition in relation to analogue (PSTN) and digital (ISTN) telephone lines for consumers (lower-level access or LLVA) and businesses (higher-level access or HLVA), ie, fixed narrowband access. ComReg proposed new market definitions to include copper PSTN and ISTN BRA access and broadband using managed VoIP over cable, fibre, FWA and DSL. ComReg's preliminary view is that Eircom has SMP in both the LLVA and HLVA markets, and that it is appropriate to impose retail obligations on Eircom in the LLVA market including price control via a retail price cap measure, an obligation not to bundle services, transparency, cost accounting obligations and an obligation not to show undue preference to specific end-users. In view of developments in the HVLVA market, ComReg is of the view that it is appropriate to rely on wholesale SMP obligations alone and that it will not impose any SMP obligations at retail level for HVLVA.

Currently, Eircom's obligation not to unreasonably bundle services requires that Eircom, as SMP operator, 'must ensure that any bundle avoids a margin squeeze and passes a net revenue test'. ComReg issued a consultation and draft decision on 10 October 2011 (ComReg Document No. 11/72) to consider whether ComReg should further specify the existing regulatory controls on Eircom bundles that include retail fixed narrowband access and in particular whether the current net revenue test and margin/price squeeze test should be revised. ComReg published a supplementary consultation on 15 June 2012 (ComReg Document No. 12/63). No response to these consultations had been published at the time of writing.

### 18 Customer terms and conditions

Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

There is no obligation on undertakings to have contract terms and conditions filed with or approved in advance by ComReg. Under Regulation 14 of the Universal Service Regulations, an undertaking who provides a public ECN or publicly available ECS must provide to end-users and consumers certain standard contract conditions. The minimum terms and conditions are set out in Regulation 14(2) and must be specified in a clear, comprehensive and easily accessible form. For example, consumer contracts must specify information on the minimum service quality levels, details of prices and tariffs, the duration of the contract and the conditions for renewal and termination of services and of the contract.

Regulation 14(4) provides that operators must notify customers one month in advance of any proposed changes to their terms and conditions and of their right to withdraw if they do not accept the changes. This obligation applies in respect of not only changes which are detrimental to the customer, but those changes which improve the customer's terms and conditions. Failure to provide the relevant notification is an offence. It is a defence to establish that reasonable steps were taken to comply, or that it was not possible to comply, with the requirement. A subscriber may withdraw from his/her contract without penalty if he/she does not accept a proposed contract modification.

Previously, the general practice of operators was to notify customers of proposed changes via the national press or customer notifications on the operator's own website, or both. However, in 2010 ComReg intervened on behalf of consumers to assert the right to individual notification (eg, via SMS, e-mail) in the case of contract changes and the consumers' right of assent to changes in billing medium (eg, switching to e-billing). ComReg has been particularly vigilant regarding enforcement of these provisions, and in January 2011, ComReg notified O2 and UPC respectively of a finding of non-compliance in respect of failure to furnish subscribers with

proper individual and prior notification of a proposed change to their contract terms and conditions, and the customers' statutory right to withdraw from the contract without penalty in the event that the customer does not agree to the proposed change. Both O2 and UPC proposed to ComReg a proactive programme of individual customer communications covering all of the customers affected, so as to properly advise customers of the changes in question and allow them to exercise their right to withdraw from their contracts. Accordingly, ComReg indicated that it does not propose to take any further enforcement action.

Regulation 14(5) of the Universal Service Regulations provides that ComReg can specify the format of any notification to subscribers. In August 2012 ComReg launched a consultation (ComReg Document No. 12/85) on contract change notification, noting the considerable variation in the approaches and media being used by ECS providers when giving notifications to subscribers. As a result of this consultation, new requirements were introduced, effective from 1 March 2013. ComReg did not specify a medium to be used, but provided that notifications must be presented to customers clearly, unambiguously and transparently and in accordance with Decision D13/12 (ComReg Document No. 12/128). The decision requires that certain minimum information must be included in the notification, that 'full' information be given and sets down specific rules relating to SMS, print and telephone / meeting notifications.

On 28 October 2011 ComReg issued a consultation on proposed consumer protection measures in respect of consumer bills and billing mediums (ComReg Document No. 11/78). ComReg noted that, in the absence of uniform and specified obligations applicable to all operators and service providers, various approaches are being used for billing mediums, and in some cases charges were being placed on subscribers for paper bills. ComReg advocated, inter alia, the use of itemised bills provided free of charge as a hard copy (unless the service provider can be reasonably assured that the subscriber can access and use an alternative billing system). No response to consultation had been published at the time of writing. On 25 October 2011 ComReg notified Vodafone of non-compliance with respect to e-billing, noting that any move to e-billing should take full account of, and safeguard the legitimate preferences and interests of consumers. ComReg stated in May 2012 that Vodafone had proposed a comprehensive and proactive programme of customer communications, covering all of the customers affected so as to verify customer preferences and agreement regarding the type of billing they wish to receive. As ComReg considered these proposals addressed its concerns, it stated that it would not take further action against Vodafone.

## 19 Changes to telecoms law

Are any major changes planned to the telecoms laws?

As indicated in question 1, many changes were made to the Irish regulatory framework in July 2011 following the adoption of the EU electronic communications reform package. The new European regulatory framework has now been implemented into Irish law.

## Telecoms regulation – mobile

### 20 Radio frequency (RF) requirements

For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

For wireless services such as mobile and fixed wireless, a licence must be obtained under the Wireless Telegraphy Acts in connection with the use of wireless telegraphy apparatus. ComReg may limit the number of wireless telegraphy licences issued under section 5 of the Wireless Telegraphy Act 1926-2009 (as amended), to the extent required to ensure the efficient use of radio frequencies. Some classes

of spectrum use have been exempted from the requirement to obtain a radio frequency licence, eg, short-range devices.

Prior to the 2012 auction, and with the exception of the award of the first mobile telephony licence, the award of all mobile telephony licences had been made by way of comparative evaluation processes. ComReg indicated in its Spectrum Management Strategy Statement 2011–2013 (ComReg Document No. 11/89) that it does not favour any specific approach for awarding spectrum rights, but that it has found it beneficial to use auctions as an award mechanism for certain spectrum bands where demand exceeds supply and the number of licences to be awarded is limited. ComReg stated that auctions have proved a quick, fair and transparent method for assigning frequencies and are, as a result, the preferred assignment method where the demand for spectrum exceeds supply.

As noted above, after carrying out six consultations on the future of spectrum allocation, ComReg held an open auction for liberalised use of the entire spectrum in the 800MHz, 900MHz and 1,800MHz bands in 2012. Meteor, O2 and Vodafone were awarded lots in the 800MHz band, while all four operators (Meteor, O2, Vodafone and H3GI) were awarded lots in both the 900MHz and 1,800MHz bands. All four operators stated that they will be in a position to roll out 4G services in 2013, giving customers connection speeds roughly four times faster than existing 3G services. The auction raised almost €482 million in upfront fees with a further €373 million due in ongoing spectrum usage fees between 2013 and 2030.

In relation to spectrum allocations after the commencement of the new regulations (1 July 2011), under Regulation 17(2) of the Framework Regulations, ComReg must ensure that all types of technology used for ECS may be used in the radio frequency bands that are declared available for ECS in the radio frequency plan. This is subject to section 17(3), which provides that ComReg can provide for proportionate and non-discriminatory restrictions on use of the type of radio network or wireless access technology in certain circumstances, which is described further in question 21.

### 21 Radio spectrum

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

Under Regulation 17 of the Framework Regulations ComReg has responsibility for the effective management of radio frequencies for ECN and ECSs, and allocations of spectrum must be based on objective, transparent, non-discriminatory and proportionate criteria.

Recent changes to the Irish regulatory framework which allow for spectrum refarming or liberalisation have been largely informed by the European Commission's Wireless Access Policy for Electronic Communication Services (WAPECS), which is an EU-level framework for the provision of electronic communications services within a set of frequency bands to be identified and agreed between EU member states. In these bands, it is proposed that a range of electronic communications networks and services could be offered on a technology and service-neutral basis, provided that certain technical requirements are met. The WAPECS approach is designed to move away from narrowly specifying particular uses for different spectrum.

Reflecting that recommendation, Regulation 17(5) of the Framework Regulations provides that ComReg shall ensure that all types of technology used for ECSs may be used in the radio frequency bands that are declared available for ECS in the Radio Frequency Plan. However, ComReg may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for ECS where this is necessary to:

- avoid harmful interference;
- protect public health against electromagnetic fields;

- ensure technical quality of service;
- ensure maximisation of radio-frequency sharing;
- safeguard the efficient use of spectrum; or
- ensure the fulfilment of a general-interest objective as defined by or on behalf of the government or a minister of the government in accordance with Regulation 17(6) (which gives examples of general-interest objectives such as safety of life; promotion of social, regional or territorial cohesion; the avoidance of inefficient use of radio frequencies; or the promotion of cultural and linguistic diversity and media pluralism, for example, by the provision of radio and television broadcasting services.

As mentioned above, ComReg held an auction in respect of liberalised spectrum in the 800MHz, 900MHz and 1,800MHz bands in 2012. Licences were awarded on a liberalised, technology-neutral basis. In relation to spectrum allocations which occurred prior to 1 July 2011 and which remain valid for a period of over five years after that date, Regulation 18 of the Framework Regulations provides that holders of these rights can submit an application to ComReg for reassessment of their rights under Regulation 17.

Regulation 17(10) provides that ComReg may lay down rules to prevent 'spectrum hoarding', in particular by setting out strict deadlines for the effective exploitation of the rights of use by the holder of rights and by withdrawing the rights of use in cases of non-compliance with the deadlines. The Liberalised Use Licence Regulations provide that operators must comply with any rules to prevent spectrum hoarding laid down by ComReg under the Framework Regulations as a condition of their licence.

## 22 Spectrum trading

Is licensed RF spectrum tradable?

Article 9(3)(b) of the Framework Directive (as amended) provides that national regulatory authorities shall ensure that undertakings may transfer or lease individual rights to use radio frequencies. Regulation 19 of the Framework Regulations transposes this provision into Irish law and provides that ComReg shall ensure that undertakings may transfer or lease individual rights to use radio frequencies to other undertakings in accordance with article 9(3)(b) of the Framework Directive. Under Regulation 19(4) where an undertaking intends to transfer the right to use a radio frequencies it must notify ComReg of its intention to do so and ComReg must ensure that this notification is made public.

ComReg issued a consultation on spectrum trading on 11 December 2012, setting out a draft framework and guidelines for spectrum transfers (ComReg Document No. 12/76). A final decision on consultation and guidelines is likely to be published in early 2013.

The Liberalised Use Licence Regulations provide that the rights of use under the liberalised use licences are capable of being traded. Operators must notify ComReg of their intention to transfer rights of use, and may only effect transfers in accordance with procedures specified by ComReg. In advance of such procedures being put in place (ie, before the final decision on consultation), operators must not transfer rights of use without the prior consent of ComReg, which may not be unreasonably withheld.

## 23 Mobile virtual network operator (MVNO) and national roaming traffic

Are any mobile network operators expressly obliged to carry MVNO or national roaming traffic?

Only H3GI's 3G licence contains a condition in respect of MVNO access that requires H3GI, for so long as it holds its 3G licence, to negotiate an agreement with an MVNO within a reasonable period, if that MVNO requires H3GI to provide it with such access as may be reasonable to H3GI's 3G network. The first MVNO in the Irish market was Tesco Mobile, which launched in 2007 using O2's

network. Other MVNOs currently operating in the Irish market at the time of publication are: postfone (using Vodafone's network), eMobile (using Eircom's/Meteor's network), 48 (using O2's network) and Blueface (using H3GI's network).

There are no express obligations on mobile network operators (MNOs) to carry national roaming traffic. It is up to individual operators to negotiate and agree the commercial terms for roaming.

On 14 February 2012 ComReg notified O2 and Lycamobile that it had opened an own-initiative investigation arising out of potential concerns it had in respect of a particular clause in a roaming agreement between the two parties that appeared to suggest an agreement between competitors not to compete or to share customers at a retail level, contrary to section 4 of the Competition Act and/or article 101 of the Treaty on the Functioning of the European Union (TFEU). Correspondence ensued between the parties and ComReg over the period March to August 2012 which ultimately resulted in the parties providing ComReg with a number of contractual and operational commitments, following which ComReg closed its investigation.

## 24 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

In Ireland, the originating calling party is responsible for charges to terminate a call on mobile networks. Previously, ComReg imposed access obligations, non-discrimination obligations, price control and transparency obligations on Vodafone, O2, Meteor and H3GI, the four MNOs in Ireland, with additional accounting separation and cost accounting obligations on Vodafone and O2.

On 21 November 2012 ComReg published Decision D11/12 which designated six operators with SMP in the market for wholesale voice call termination on individual mobile networks, namely H3GI, Vodafone, Meteor, O2, Tesco Mobile and Lycamobile. ComReg imposed access obligations, non-discrimination obligations, price control and transparency obligations on all six operators.

ComReg also published Decision D12/12 on the same date, which further specified the cost-orientation obligation imposed under ComReg Decision No. D11/12. The decision specified that call termination rates should be set in accordance with pure long-run incremental cost (LRIC) methodology by July 2014, and that prior to this rates would be benchmarked against other jurisdictions where the use of pure LRIC had been notified to the Commission. On 18 December 2012 Vodafone launched an appeal in the High Court against Decision D11/12 (insofar as it imposed a cost obligation) and against Decision D12/12 arguing, inter alia, that ComReg had failed to consider more proportionate cost-orientation obligations less intrusive of the interests of operators. Proceedings are ongoing at the time of writing.

## 25 International mobile roaming

Are wholesale and retail charges for international mobile roaming regulated?

Yes, EU Regulation No. 717/2007 on Roaming on Public Telephone Networks within the Community (EU Roaming Regulation) came into effect at the end of June 2007 and relevant provisions were implemented in Ireland by the Communications (Mobile Telephone Roaming) Regulations 2007 (SI No. 792 of 2007). The EU Roaming Regulation placed a price cap on wholesale voice calls while roaming in the EU via the establishment of a 'Eurotariff' that sets a maximum limit for calls made and received when abroad in another EU country. The EU Roaming Regulation also provided for greater transparency of roaming charges. The EU Roaming Regulation required mobile service providers to offer all customers the Eurotariff with a price ceiling by the end of August 2007. This requirement was implemented

in Ireland by SI No. 792 of 2007. The EU Roaming Regulation also introduced provisions to improve transparency for consumers regarding mobile roaming prices and, in particular, required that basic personalised tariff information be sent to a consumer's mobile phone when they enter a member state, including pricing for voice calls made and received.

The revised EU Roaming Regulation (EC) No. 544 of 2009 (the Revised Roaming Regulation) came into force on 1 July 2009. The Revised Roaming Regulation, inter alia, introduced a euro SMS tariff at both wholesale and retail levels, a wholesale data cap and further reduced the price caps for mobile roaming calls (ie, the Eurotariff). The Revised Roaming Regulation also provided that operators were required to set a €50 limit as a default for data roaming usage for customers travelling within the EU ie, 'bill shock' measures. The Revised Roaming Regulation was transposed into national law by the Communications (Mobile Telephony Roaming) (Amendment) Regulations 2010 (SI No. 156 of 2010).

The Revised Roaming Regulation expired on 30 June 2012. Following a review by the Commission, the new EU Roaming Regulation (EC) No. 531 of 2012 came into effect on 1 July 2012 (Roaming Regulation III). The main provisions of Roaming Regulation III are as follows:

- further reductions in the price caps for mobile roaming calls, SMS and data use;
- prices that operators charge each other (wholesale charges) are capped;
- more transparency of roaming charges for consumers: customers should receive an SMS, pop-up window, etc when they are crossing borders both within and outside the EU to inform them of the price they are expected to pay for making and receiving calls or for using mobile internet; and
- Roaming Regulation III provides that from 1 July 2012 the €50 data roaming limit will also apply when customers travel outside the EU (unless they have chosen another limit – higher or lower). Customers will be advised when they reach 80 per cent of the cap, and at 100 per cent, when the customer must consent in order to continue to be allowed to data-ream.

The collection of data by NRAs for monitoring purposes is a requirement of the EU Roaming Regulation and, in accordance with this requirement, ComReg publishes an information notice regarding Irish roaming data on its website every six months in line with the European Regulators Group (ERG) data collection timeframes. ComReg's most recent information notice (ninth wave of Irish and EU aggregated roaming data, ComReg Document No. 12/83) shows that Irish mobile phone networks were in compliance with EU Roaming Regulations for the period 1 July 2011 to 31 December 2011.

In December 2011 ComReg commenced proceedings in the Commercial Court against Vodafone over alleged breach of the 'bill shock' measures; specifically, failure to implement the data roaming spend cap to all data roaming customers who had not chosen to opt out of the spend cap. The proceedings were settled on 13 February 2012, with Vodafone agreeing to pay a €400,000 penalty. Vodafone also agreed to amend the terms and conditions of its contracts purporting to restrict the rights of its customers on data roaming plans to move from one financial limit to another, and to insert a term to the effect that, when a customer requests to opt for or remove a financial or volume limit facility, they can do so within one working day, free of charge, without any conditions or restrictions.

## 26 Next-generation mobile services

Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

Four 3G mobile telecoms licences have been awarded to operators in Ireland. In October 2002, H3GI was awarded an A-licence and Vodafone and O2 were awarded B-licences. The fourth 3G B-licence

was offered to and accepted by Eircom in March 2007. All of these licences contain coverage and roll-out requirements, which vary depending on the operator.

As discussed in question 20 above, ComReg announced the result of the auction in November 2012 in relation to liberalised use of the entire spectrum in the 800MHz, 900MHz and 1,800MHz bands. ComReg auctioned off 28 blocks (2 x 5MHz for each block) of spectrum in these bands to be issued on a technology and service-neutral basis. The large amount of spectrum available in these bands, and the particular propagation characteristics of spectrum in the 800MHz and 900MHz bands (which make this spectrum particularly suitable for 4G/LTE services) will allow for 4G/LTE roll-out in Ireland. All four operators (Vodafone, O2, Meteor and H3GI) have stated that they will roll out their 4G networks during 2013.

The Liberalised Use Licence Regulations contain a coverage roll-out target of 70 per cent of the population of Ireland within three years of the licence commencement date. The regulations also provide for quality of service standards, including a minimum 'availability of the network' standard which provides that no network can be offline for more than 35 minutes within a six-month period and a minimum 'voice call' standards relating to transmission quality, maximum level of dropped calls and maximum level of blocked calls in a defined period (which does not include VoIP). Licensees are obliged to ensure that all relevant services provided using their spectrum comply with the quality of service conditions, including any services provided by a third party, including MVNOs.

Please see question 20 for further detail on the spectrum auction.

## Telecoms regulation – fixed infrastructure

### 27 Cable networks

Is ownership of cable networks, in particular by telecoms operators, restricted?

Directive 2002/77/EC repealed Directive 1999/64/EC of 23 June 1999; however, it maintained the obligation imposed by Directive 1999/64/EC that dominant providers of ECNs and PATS operate their public electronic communications network and cable TV network (when owned by a single operator) as separate legal entities.

Any acquisition of a cable network by a third party, including a telecoms operator, would be subject to the usual merger control provisions (see question 52).

### 28 Local loop

Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

Since 2004, Ireland's fixed-line incumbent, Eircom, has been designated by ComReg as having SMP in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops (ComReg Decision No. D8/04).

ComReg has imposed certain obligations on Eircom under the above decision. These obligations include a requirement to meet reasonable requests for access to the local loop and associated (or ancillary) facilities, including co-location and an obligation to negotiate in good faith with undertakings requesting access. Provision of access to a number of local exchanges has now been made.

Pursuant to Regulation 14 of the Access Regulations, ComReg imposed a price-control obligation on Eircom to offer cost-orientated prices for local loop unbundling (LLU) (both fully unbundled and shared lines) services, co-location and associated facilities. The charges related to LLU and ancillary services are contained in Eircom's access reference offer (ARO) price list, published on the Eircom wholesale website.

LLU is a service that telecoms operators can use to provide narrowband and broadband services. LLU involves such operators

renting the local loop (ie, the connection between a customer's home and the Eircom exchange) from Eircom and installing their own equipment in the local exchange in order to provide services.

There are two types of LLU: full unbundling (where an other authorised operator (OAO) rents the entire loop and takes control of the entire capability of the local loop) and line share (where the broadband capability of the line (high capacity frequencies) is separated from the narrowband and is used by an OAO to provide broadband services, via shared access to the unbundled local loop). The line share product allows Eircom's services and the OAO's digital subscriber line service to be integrated over the same two-wire metallic path. Sub-loop unbundling (SLU) involves an OAO renting only the portion of the local loop that runs from a street-side cabinet to a customer's home or premises from Eircom, and installing its own equipment beside, or if possible inside, the Eircom street-side cabinet.

In February 2010, following a review of Eircom's LLU and SLU rental charges, ComReg issued a decision (ComReg Decision No. D01/10) requiring Eircom to reduce the maximum monthly rental price for LLU (also known as unbundled local metallic path) from €16.43 (at that stage the highest charge in Europe for LLU) to €12.41. Taking account of the fact that there are a large number of exchanges in Ireland that may be too small to be viably unbundled by entrants, ComReg's view was that OAOs should pay only for the lines that they are likely to unbundle so that the revised maximum LLU rental charge would allow Eircom to recover the costs associated with exchanges that are likely to be considered as economically and commercially feasible for unbundling during the price-control period (ie, from the date of the decision to 30 November 2012). A similar approach was adopted by ComReg in respect of the maximum monthly rental price for SLU, which was required to be reduced by Eircom to €10.53. The revised charges are based on bottom-up long-run average incremental costs. On 11 January 2013, ComReg announced that Eircom must further reduce the monthly rental price for LLU from €12.41 to €9.91, and reduce the monthly rental price for SLU from €10.53 to €9.03, representing reductions of 20 per cent and 14 per cent respectively. The reductions are effective from 1 February 2013.

LLU line share, or shared access to the local loop, is a product that Eircom is legally obliged to offer competing operators to allow them to avail themselves of access to the higher bandwidth part of the fixed line, to enable those operators to provide their own broadband product without having to resell Eircom's broadband and without having to provide a conventional voice telephony service, and leaving Eircom free to provide narrowband services (mainly voice services) on a retail or wholesale basis. In August 2009, ComReg published its decision that the monthly rental charge of €8.41 be reduced to a maximum monthly cost-orientated rental charge of €0.77 going forward (ComReg Decision No. D04/09). ComReg's decision also sets out that only the costs that are incremental to the provision of line share should be recovered in the price of line share, since the common costs of the local loop are already reflected in narrowband prices. On 24 September 2009, Eircom issued a statutory appeal against ComReg's decision. On 25 January 2010, ComReg issued an information notice confirming that the legal proceedings between ComReg and Eircom had been settled. It was agreed that the price for LLU line share, as amended (ie, €0.77 per month) would remain in place (ComReg Document No. 10/06).

ComReg has carried out a second market review of the market for wholesale unbundled access (including shared and fully unbundled access) to the metallic loops and sub-loops. The European Commission recently updated its 2007 recommendation on relevant markets and proposed a new definition of the wholesale unbundled access market. The market is now defined as the market for wholesale physical network infrastructure access (WPNIA), including shared and fully unbundled access, at a fixed location. This definition is a technology-neutral definition, in contrast to the previous definition

of the wholesale unbundled access market, which referred specifically to metallic loops and sub-loops.

On 20 May 2010, ComReg issued a decision (ComReg Decision No. D05/10) in which it concluded that the WPNIA product market comprises:

- WPNIA products provided over current-generation copper network infrastructure and its associated facilities at a fixed location;
- WPNIA products provided over next-generation fibre network infrastructure and its associated facilities at a fixed location; and
- self-supplied physical network infrastructure access, included in the WPNIA market only if certain conditions are satisfied.

In the above decision ComReg found that Eircom had SMP in the WPNIA market (it being the only operator providing WPNIA, with a market share of 100 per cent and with no alternative WPNIA suppliers in the market) and proposed certain wholesale remedies. ComReg distinguished between those remedies that would apply to the current generation of services (eg, offered over copper) and those that would apply to services in a next-generation WPNIA (fibre infrastructure and associated facilities).

Among the remedies that apply to the current generation of WPNIA products and services is an access obligation which requires Eircom to meet reasonable requests for access to current-generation WPNIA, including associated facilities such as backhaul and migrations. Eircom also has an obligation to negotiate in good faith with undertakings requiring access and, where access is provided, it must be in a fair, reasonable and timely manner. In the event that Eircom refuses, or only partly meets, a request for access, Eircom must provide the objective criteria for the refusal to the OAO which made the request.

ComReg has also imposed obligations on Eircom in respect of transparency (requirement to publish an access reference offer (ARO) for WPNIA offerings, setting out prices, etc), non-discrimination, accounting separation and price control. In terms of price control, the prices charged by Eircom to any other undertaking for access to or use of WPNIA products, services or facilities are subject to a cost-orientation obligation and Eircom is also required not to cause a margin/price squeeze. In early 2011, following on from its SMP designations in the WPNIA market and wholesale broadband access market ('bitstream market') Eircom voluntarily agreed with ComReg to reduce its LLU and bitstream ancillary charges with reductions ranging from 18 per cent to 75 per cent (ComReg Document No. 11/20, dated 10 March 2011). The reductions took effect from 1 April 2011.

#### **Next-generation access (NGA)**

Pursuant to the SMP designation (ComReg Decision No. D05/10) Eircom was also obliged to comply with certain high-level obligations with respect to the provision of next-generation WPNIA products and services. Following consultation, ComReg published Decision D03/13 on 31 January 2013 on NGA remedies, further specifying Eircom's NGA obligations. Further details of these obligations are provided in question 30.

#### **Bundling**

Pursuant to decision D07/61 Eircom was under an obligation in the WPNIA market not to unreasonably bundle its products and cause a margin/price squeeze. This obligation is intended to ensure that Eircom bundles that include retail line rental (retail fixed narrowband access) are not priced in such a way as to force OAOs that use Eircom's network to sell their retail bundles at a loss.

ComReg published its Response to Consultation and Decision on Price Regulation of bundled offers on 8 February 2013 (Bundling Decision). The Bundling Decision further specified the obligation not to unreasonably bundle fixed narrowband access with other retail

services by amending the net revenue test. The controls are intended to ensure that Eircom bundles that include retail line rental (retail fixed narrowband access) are not priced in such a way as to force OAOs which use Eircom's network to sell their retail bundles at a loss. The decision also further specifies the obligation not to cause a margin/price squeeze in the WPNIA market.

## 29 Interconnection and access

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? Are wholesale access services regulated, and, if so, how?

### Interconnection

Interconnection is regulated by the Access Regulations and the Universal Service Regulations, and is also dealt with in the general authorisation. Under the Access Regulations an operator has a right to negotiate interconnection with another operator, and where such a request for negotiation has been addressed to an operator, that operator must negotiate. In situations where market analysis indicates that a lack of effective competition exists, the Access Regulations empower ComReg to impose access obligations.

SMP conditions are imposed on Eircom and it is obliged to publish reference offers for interconnection. Eircom's basic interconnect tariffs are available on Eircom's wholesale operations webpage. SMP obligations, including price controls, have also been imposed on fixed operators and six of Ireland's mobile network operators in respect of wholesale termination services (see question 24). Under the Framework Regulations, in the event of a dispute between undertakings in relation to interconnection, subject to certain exceptions ComReg must, at the request of either party, initiate an investigation of the dispute and make a determination to resolve the dispute within four months of the request being made. ComReg is also entitled to intervene on its own initiative.

Section 57 of the Communications Act 2002 (as amended) provides a mechanism whereby ComReg can intervene in and resolve disputes involving a network operator and a physical infrastructure provider. In October 2012, ComReg published an information notice describing the resolution procedures where a network operator serves written notice on ComReg in this regard, detailing how ComReg will intervene in and resolve disputes regarding negotiations on physical infrastructure sharing (ComReg Document No. 12/108).

### Wholesale access services – LLU, SLU and line share

Eircom has been designated as having SMP in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops and the WPNIA market (see question 28). ComReg has imposed certain access obligations on Eircom under Decision D08/04, including a requirement to meet reasonable requests for access to the local loop or associated (or ancillary facilities), or both. As noted in question 28 above, pursuant to ComReg's decision designating Eircom with SMP on the WPNIA market in 2010, Eircom also has an obligation to meet reasonable requests for access to specific WPNIA network elements and associated facilities (Decision D05/10).

Pursuant to Regulation 14 of the Access Regulations, ComReg has imposed a price-control obligation on Eircom to offer cost orientated prices for LLU (both fully unbundled and line share). LLU is the wholesale access product that Eircom is obliged to make available at regulated prices to its competitors – ie, OAOs (see question 28 for an explanation of LLU and SLU and the regulated maximum monthly rental prices imposed by ComReg). Eircom is required to publish the charges related to LLU and ancillary services in its ARO price list published on the Eircom wholesale website. As indicated in question 28, following on from the SMP designation in the WPNIA market, Eircom voluntarily agreed reductions in its LLU and bitstream ancillary charges (ComReg Document No. 11/20). The reductions range from between 18 per cent to 75 per cent and came into effect on

1 April 2011. ComReg has recently published a decision on NGA remedies in respect of the WPNIA market, further details of which are provided in question 30.

### Access to the public telephone network provided at a fixed location (ie, fixed narrowband access markets)

In August 2007, ComReg designated Eircom as having SMP in the market for fixed narrowband access. The obligations imposed include certain access obligations that require Eircom to enable its subscribers to access the services of any interconnected providers of PATS on a carrier selection (CS), carrier preselection (CPS) and carrier access (CA) basis.

The wholesale price-control obligations require Eircom to ensure that its pricing for access and interconnection related to the provision of services on a CS, CPS and CA basis is cost-orientated. Wholesale prices are determined on a retail minus basis and wholesale prices must be at least 10 per cent less than the retail price charged by Eircom to its end-users for retail access to the public telephone network at a fixed location or as amended, which is the retail equivalent of such services and facilities.

As mentioned in question 28, ComReg Decision No. D07/61 imposed an obligation on Eircom not to unreasonably bundle fixed narrowband access with other retail services, providing that Eircom must ensure that any bundle avoids a margin squeeze and passes a net revenue test. The obligation was further specified by ComReg in its Bundling Decision of 8 February 2013, which provided that a two-part net revenue test will apply for bundles sold/offered within the local area exchange (LEA): in the bundle-by-bundle assessment a LRIC cost standard will be allowable for retail calls, while in the portfolio assessment the aggregate of all bundles in the LEA must pass their average total cost (ATC). The wholesale network input (WNI) of these bundles will be calculated based on an 'efficient' hypothetical operator weighted by the use of Eircom wholesale inputs within the LEA (and guided by OAOs actual usage within the LEA). There will be a separate WNI for legacy bundles and NGA bundles.

For bundles sold/offered outside the LEA a single net revenue test will apply – based on a bundle-by-bundle assessment where each bundle must pass its own ATC. In order for an exchange to be included in the LEA, it must meet one of the criteria specified in the decision and be approved for inclusion by ComReg. Further, Eircom must obtain prior approval from ComReg for bundles that include retail fixed narrowband access at least five working days before launch.

### Wholesale broadband access (WBA)

In February 2005, ComReg designated Eircom as having SMP in the market for WBA (also known as the bitstream market). WBA enables OAOs to deliver a broadband offering to individual customers, under their own brand, via the Eircom network. 'Bitstream' is the Eircom-provided WBA product. The obligations imposed include an access obligation that requires Eircom to meet reasonable requests for access to and use of the wholesale bitstream access product's features or additional associated facilities. Retail-minus price controls are applied to each of the connection and rental charges for Eircom's wholesale bitstream products. Eircom is also required to apply the principle of retail-minus to any new retail products introduced.

In its Response to Consultation and Decision in relation to WBA dated 8 July 2011 (ComReg Document No. 11/49) ComReg imposed further remedies on Eircom in relation to current generation WBA, including obligations to provide access, transparency obligations, non-discrimination obligations, accounting separation obligations and obligations relating to price control and cost accounting (Decision D06/11) Although detailed remedies were imposed on current generation services, only high level remedies were imposed on next generation services in advance of a further consultation.

On 13 February 2012 ComReg notified the European Commission, in accordance with Regulation 13(3) of the Framework Regulations, of

proposed further specifications to existing price controls and proposed further specification and amendment of the transparency obligations in the WBA market to be imposed on Eircom. The notification set out a revised indicative range of the minimum price floor for Eircom's monthly bitstream rental products in the WBA market.

On 5 April 2012 ComReg issued a decision (Decision 06/12) which further specified the price control obligation for WBA to include setting minimum price floors for bitstream to ensure that an appropriate economic space is maintained between Eircom's relative pricing of bitstream and LLU line share. The minimum price floors for WBA will be set by reference to a reasonably efficient operator (REO), which in this instance will be a hypothetical new entrant, availing itself of LLU line share and with a lower retail market share than the incumbent.

A further wholesale service that OAOs can purchase from Eircom to offer retail broadband services is resale or end-to-end WBA. Resale or end-to-end WBA is a wholesale service (known as 'white label'), which allows OAOs to avail themselves of broadband products without the need for investment in network backhaul infrastructure. Resale or end-to-end WBA contains regulated components from the WBA market. ComReg directs that Eircom is not to cause a margin squeeze between the price for the component part(s) of an end-to-end product and the price of the corresponding wholesale WBA product(s) as set out in the WBA component part(s) margin squeeze test in Decision 06/12. ComReg also amended the existing transparency obligation to no longer require minimum price floors for the WBA components offered by Eircom in resale or end-to-end WBA to be published. Instead the minimum price floors for the WBA components are to be submitted to ComReg – in order to demonstrate compliance with the obligation not to margin/price squeeze.

ComReg recently published Decision D03/13 on 31 January 2013 on NGA remedies, further specifying Eircom's NGA obligations in the WBA markets. Further detail of these obligations are provided in question 30.

#### **Terminating segments of leased lines**

In December 2008, ComReg found Eircom to have SMP on the market for wholesale terminating segments of leased lines. Pursuant to this SMP designation, ComReg imposed certain obligations on Eircom including access and price-control obligations. Eircom launched an appeal of that decision but withdrew its appeal in April 2009. On 22 March 2011, ComReg issued a Response to Consultation and Final Decision regarding the amendment of the transparency obligation and access obligation on Eircom in the market for wholesale terminating segments of leased lines (ComReg Document No. 11/22). Pursuant to the decision, Eircom will no longer be required to publish pricing information for wholesale leased line (WLL) circuits of greater than 10Mb/s generally, or for WLLs of less than 155Mb/s between certain urban centres. The decision also requires Eircom to amend the frequency of its billing to OAOs from a quarterly basis to a monthly basis, one month in advance of the provision of services in the market for wholesale terminating segments of leased lines.

Price control obligations in this market apply to both rental products and ancillary products/services. On 2 February 2012, ComReg published its final decision further specifying price control obligations in the market for wholesale terminating segments of leased lines (ComReg Document No. 12/03).

#### **Wholesale call origination, transit and call termination**

In October 2007, ComReg designated Eircom as having SMP in the market for wholesale call origination and transit (Decision D04/07) and imposed a number of obligations in those markets including access, non-discrimination, transparency, accounting separation, price control and cost accounting. The access obligation was designed to ensure that alternative operators can readily access the wholesale inputs needed for them to compete effectively in the retail calls market. So, for example, the wholesale access obligation requires Eircom to

ensure that it meets reasonable requests for access to, and use of, the wholesale access products, features or additional associated facilities. A price-control obligation requires prices charged by Eircom to be cost-orientated.

In December 2007, ComReg designated Eircom and six other fixed service providers (FSPs) with SMP in the market for call termination on each of their individual fixed networks (Decision D06/07). Although ComReg imposed access, transparency, non-discrimination obligations on all seven FSPs, only Eircom was made subject to a cost-orientation obligation (requiring the use of a pricing model based on forward-looking long-run incremental costs (FL-LRIC)). The other FSPs received a derogation from the obligation until such time as their share of total direct access paths reached 5 per cent, and where the FSP did not reach a 5 per cent share within a five-year timeline, it was provided that ComReg could impose price control regulation following consultation.

In September 2011 (ComReg Document 11/67) ComReg published a further decision following the introduction to the market by Eircom of a wholesale switchless voice (SV) product, a service which allows OAOs to purchase end-to-end wholesale call services from Eircom without the need to have its own interconnection infrastructure. That decision, relating to wholesale products in call origination and call termination, amended the price control obligation to include an obligation not to margin-squeeze and required Eircom to provide ComReg with certain pricing information.

In September 2012 ComReg launched a market review relating to wholesale voice call termination services provided at a fixed location (ComReg Document No. 12/96). ComReg considered that there are now 18 separate FSP markets (including Eircom), and proposed to designate each of the FSPs operating within their individual FSP market with SMP. ComReg proposed to impose access, transparency and cost-orientation obligations on all 18 FSPs, while Eircom would be subject to further price control obligations, cost accounting and accounting separation obligations.

As mentioned in question 24, ComReg issued a decision on mobile and fixed call termination rates (Decision D12/12) on 21 November 2012. This decision provides that the cost-orientation obligation imposed on Eircom from 2007 will continue to apply, and will now also apply to the six other FSPs identified as having SMP pursuant to Decision D06/07 (but not all 18 FSPs identified in the September 2012 consultation as having SMP in their individual markets), utilising a pure LRIC approach to cost-orientation. The effect of this decision is that wholesale fixed termination prices will fall to a level which is equivalent to 0.098 cents per minute.

### **30 Next-generation access (NGA) networks**

How are NGA networks regulated?

#### **WPNIA and WBA**

Eircom has been found to have SMP in the WPNIA market and WBA market. In ComReg Decision No. D05/10 (WPNIA Decision) and ComReg Decision No. 06/11 (WBA Decision) ComReg imposed SMP obligations for current and next-generation WPNIA and WBA services and facilities. Details of the current-generation obligations are provided in questions 28 and 29.

Although both decisions imposed obligations that applied to Eircom in respect of NGA, ComReg stated it would further specify these obligations following consultation, which was published in April 2012 (ComReg Consultation 12/27 dated 4 April 2012). A Response to Consultation and Decision on remedies for NGA markets was published on 31 January 2013 (ComReg Document 13/11, Decision No. D03/13) (NGA Decision).

The NGA Decision was made against the background of a number of developments, in particular during a transition to fibre and in the context of the European Digital Agenda (EDA), which set targets for achieving increased penetration of super-fast broadband in Europe by 2020. On 31 August 2012 the Irish government

announced a National Broadband Scheme (NBS) which sets out to meet the EDA targets, with the potential for a state subsidy scheme for fibre deployment where a commercial case for investment is unlikely. ComReg also took into account the statements of commissioner Neelie Kroes in July 2012, and the Commission's draft recommendation on its approach to NGA remedies, sent to BEREC for opinion in December 2012.

ComReg's stated objective is to stimulate competition and investment in NGA technology to enable choice and higher broadband speeds for retail consumers. This will be done on a technology-neutral basis, recognising the role for the constraining effect of current-generation copper-based competition, particularly while NGA services are still evolving.

ComReg believes that, while the market is not ready for complete deregulation in terms of NGA pricing, there are sufficient pricing constraints from cable and prospectively from LLU-based retail and wholesale services to warrant granting a mechanism for pricing flexibility, as long as appropriate regulatory protections are in place. The decision seeks to achieve this by allowing Eircom flexibility in wholesale NGA pricing in the WBA market subject to a margin squeeze test against retail prices, while ensuring no foreclosure of LLU-based retail or wholesale services. With regard to non-discrimination measures Eircom will have, inter alia, an obligation of equivalence of input (EoI) for systems and certain processes for NGA services.

In summary, the approach to NGA pricing is as follows:

- a ceiling for NGA prices in WBA will be calculated by reference to a margin squeeze test against retail prices;
- copper and fibre-based services will be priced consistently relative to their cost of provision; and
- a test to ensure replicability of retail services, providing an economic space between the various wholesale modes of provision of NGA (for example between NGA bitstream and VUA).

Ancillary charges including connection fees, migrations and other related charges in both the WPNIA and WBA markets will be subject to cost orientation. As regards access obligations, the NGA Decision mandates access (as appropriate) to NGA bitstream services, virtual unbundling with or without multicast (which allows efficient delivery of video over IP networks) and civil engineering access. ComReg noted that it was essential that the multicast feature formed part of any NGA WBA service or facility as it is a non-replicable feature and capability, which will form an important dimension to the retail product offering of Eircom and others, particularly where triple-play is available.

Further, SLU will be available on a reasonable-request basis outside areas which have been deemed susceptible to a state subsidy scheme, due to Eircom's intention to use vectoring, which is currently incompatible with co-location in the cabinet and therefore SLU. Where a FTTC is deployed and vectoring is in place, imminent or credibly scheduled, the obligation to provide SLU on a mandatory basis would be removed to ensure that any investment in vectoring can be facilitated to ensure higher speeds services.

#### Next-generation voice services

Previously, next-generation voice (NGV) services were subject to a different level of regulation than PSTNs. ComReg's position regarding access to emergency services from VoIP operators was set out in 2005 in its Guidelines for VoIP Service Providers (ComReg Document No. 05/50), which stated that all PATS operators must provide access free of charge to the emergency services while ECS operators were encouraged (though not obliged) to provide access on a 'best endeavours' basis.

However, the 2009 European regulatory framework introduced formal requirements in areas where the guidelines have hitherto encouraged a 'best-efforts' approach. This is particularly the case in respect of emergency access requirements, where a change in the con-

cept of what constitutes a 'PATS' will cause most NGV providers that use telephone numbers to be designated as PATS. This means that most NGV providers will be required to provide the same emergency access obligations as PSTN providers. Therefore, the Guidelines for VoIP Service Providers have been withdrawn.

On 18 November 2010, ComReg published an Information Notice on Future Regulatory Framework for Next-Generation Voice Services including VoIP – Review 2010 (ComReg Document No. 10/91). This document discussed issues surrounding provision of access to 112/999 emergency services, provision of user location information, network integrity and security issues, 'nomadicity' of NGV services and geographic/non-geographic numbers, quality of NGV (including transparency), mobile NGV services and number portability.

ComReg recognised that notwithstanding the change to the PATS definition, NGV providers may have difficulties in complying with these obligations. It suggested in the Information Notice that certain exceptions or relaxation of the rules, or both, may apply where providers can provide sufficient evidence to ComReg of their difficulty or inability to guarantee access, in which case the provider(s) will only be required to use 'best efforts' to meet the requisite obligations. Submissions to this information notice were published on 11 January 2011. ComReg's Strategy Statement 2012–2014 states that ComReg will continue to monitor evolving technical standards and international policy for all VoIP services, in particular those that seek to improve the user experience, the safety of users and the security and integrity of services.

---

### Telecoms regulation – internet services

---

#### 31 Internet services

How are internet services, including voice over the internet, regulated?

Regulation is technology-neutral. Internet service providers (ISPs) are providers of ECN or ECS depending on whether or not they operate their own transmission system and will therefore require authorisation and be entitled to offer their services subject to compliance with the conditions of the general authorisation. As mentioned above, ComReg has designated Eircom as having SMP in respect of the market for wholesale broadband access.

As mentioned in question 30, the 2009 European Regulatory Framework reform package introduced formal requirements in respect of VoIP in areas where previously a 'best-efforts' approach was encouraged. ComReg has published an Information Notice on 'Regulatory Framework for Next Generation Voice Services, including VoIP – Review 2010' (ComReg Document No. 10/91), which contained guidance on the 2009 European Regulatory Framework in advance of its implementation in Ireland. As mentioned in question 30, most NGV services (including VoIP) will now fall within the amended definition of PATS, and so will be subject to the same level of regulation as public switched telephone networks (PSTNs). However, in recognising that certain obligations will be difficult for VoIP providers to meet, the new regulations have been drafted so as to provide some leeway for VoIP providers where it is not possible for them to meet obligations, ie, it is a defence to the requirement to provide access to emergency calls on a free-of-charge basis and provide location information services if the operator can show that reasonable steps have been taken to comply with that requirement, or it was not possible to comply with the requirement.

---

#### 32 Internet service provision

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

No. To date, no legislation or guidelines have been introduced in Ireland in relation to network neutrality (ie, the principle that internet

users should have the freedom to be able to access whatever web content and internet applications they choose without restrictions or limitations being imposed by their internet service provider). ComReg's Strategy Statement 2012–2014 stated that its approach to network neutrality will be informed by ongoing BEREC work, the EU consultation results and the revised 2009 European framework for electronic communications.

ComReg refer to the recent BEREC report ('A framework for Quality of Services in the scope of Net Neutrality', dated 8 December 2011) which presents a general procedure for NRAs to carry out their functions in relation to quality of service in net neutrality, and notes that this procedure will provide a useful tool for ComReg to address net neutrality issues should they arise.

The DCENR has noted that internet service providers have powerful tools at their disposal to allow them to differentiate between various data transmission on the Internet, such as voice or 'peer to peer' communication and even though such traffic management may allow premium high-quality services to develop and can help ensure secure communications, the same techniques may also be used to degrade the quality of other services to unacceptably low levels or to strengthen dominant positions on the market.

### 33 Financing of basic broadband and NGA networks

Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are a number of state-funded broadband schemes currently in operation in Ireland, including the Metropolitan Area Networks (MANS) Scheme, which aims to create open-access MANs (fibre networks) in over 120 Irish towns at a cost of €170 million, with support from EU structural funds.

The National Broadband Scheme (the NBS) was launched in December 2008. H3GI, a Hutchison Whampoa company, was awarded 68-month contract to implement and operate the NBS, which is designed to ensure the provision of broadband services in locations where no broadband services are currently provided or are likely to be provided by the market in future. H3GI is obliged under the NBS contract to provide mobile broadband wireless services to all premises (ie, any fixed residential or business customer) located in the NBS coverage area seeking a service, and will be required to provide wholesale access to any other operator who wishes to provide services to premises in the NBS coverage area. H3GI was required to meet 100 per cent broadband availability to be attained throughout the NBS coverage area by the end of September 2010. On 9 December 2010, the communications minister announced that H3GI had delivered the €223 million NBS on time and within budget.

The Rural Broadband Scheme (RBS) was announced by the minister for communications in May 2011 to provide broadband to areas of the country where it is not available commercially, identifying and providing service to the last 1 per cent of the population not covered by any service. The RBS is designed to identify those premises through a public application process and, ultimately, to bring a broadband service to them either through existing private sector service providers or through a service provider procured by government.

The National Broadband Scheme (NBS) was announced by the minister for communications in August 2012 and aims to facilitate the provision of high-speed broadband to every home and business in the state over the next few years. It aims to facilitate broadband download speeds with a minimum of 40Mbps generally available and 30Mbps in harder-to-reach rural areas.

## Media regulation

### 34 Ownership restrictions

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

Non-EU applicants for broadcasting contracts are required to have their place of residence or registered office within the EU or as otherwise required by EU law.

### 35 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers? Is there any suggestion of change to regulation of such cross-ownership given the emergence of 'new media' platforms?

The framework for the ownership and control policy of the BAI is set out in the Broadcasting Act, which requires the BAI, in awarding a sound broadcasting contract or television programme service contract (or consenting to a change of control of the holder of a broadcasting contract), to have regard, inter alia, to the desirability of allowing any person or group of persons to have control of or substantial interests in an 'undue number' of sound broadcasting services, or an 'undue amount' of communications media in a specified area.

The BAI published a revised Ownership and Control Policy (2012) (the Policy) on 26 April 2012, replacing the previous policy which was published in 2010. The Policy was updated to reflect the legislative provisions contained in the Broadcasting Act and the contents of the BAI Strategy Statement 2011–2013. The Policy sets out the regulatory approach that the BAI will take and the rules that will be enforced regarding ownership and control of broadcasting services, and will be used by the BAI to assess applications for broadcasting contracts and requests for variations to ownership and control structures of contract holders.

The BAI's interpretation of an 'undue number' of sound broadcasting services is that ownership of more than 25 per cent of total services would be unacceptable. Less than 15 per cent would be acceptable and the range in between requires careful consideration. An 'undue amount' of communications media in a specified area means 'more than a reasonable share of the range of communications media available in the area covered by the relevant contract', which will be considered on a case-by-case basis.

In addition, the media merger rules of the Competition Act (discussed below) require the minister for enterprise to have regard to the spread of ownership and control of media businesses in the state in deciding whether to permit a media merger. In 2008, the minister for enterprise established an advisory group to review the current legislative framework relating to the public interest aspects of media mergers in Ireland, including diversity, plurality of views in Irish society, the strength and competitiveness of media business indigenous to the state and the spread of media ownership among individuals and other undertakings. The Report of the Advisory Group on Media Mergers (the Report) made a series of recommendations as to how the existing rules relating to media mergers under section 23 of the Competition Act, should be amended and is discussed in more detail in question 52.

One of the most significant changes proposed by the Report is the introduction of a new statutory test to be applied by the minister in his or her review of media mergers, namely 'whether the result of the media merger is likely to be contrary to the public interest in protecting plurality in media business in the state'. Plurality of the media is defined in the Report as including 'both diversity of ownership and diversity of content'.

In February 2012 the minister for communications made a statement noting the importance of plurality in the media, and stressed that diversity of ownership and diversity of content are separate concepts. Diversity of ownership is given a purely quantitative

definition in the Report: ‘the spread of ownership and control of media businesses among individuals and undertakings, linked to the market share of those media businesses as measured by listenership, readership or other appropriate methods’. Diversity of content is more qualitative in nature: ‘the extent to which the broad diversity of views and cultural interests prevalent in Irish society is reflected through the activities of media businesses in this State including their cultural ethos, content and sources’.

The advisory group also recommended the adoption of a revised set of ‘relevant criteria’ to be considered in applying the above test, including the likely effect of the media merger on plurality; the undesirability of allowing any one individual or undertaking to hold significant interests within a single sector or across different sectors of media business in the state; the consequences for the promotion of media plurality of the minister intervening to prevent the merger; and the adequacy of other mechanisms to protect the public interest.

The Report recommended that these criteria should be supplemented by more detailed statutory guidelines, to be issued by the minister for enterprise in consultation with the minister for communications. Such guidelines would be intended to assist the undertakings involved in knowing how the minister will apply the ‘relevant criteria’. It is proposed that the guidelines would contain indicative guidance on levels of media ownership, and in particular cross-media ownership, that would generally be regarded as unacceptable. They would also provide for concrete indicators of diversity and plurality that might operate as a sort of checklist that the parties to a media merger would be invited to address in their notification. Examples given include demographic audience information and market share data, shareholder information, compliance by the parties with industry codes of good practice and whether the parties have a ‘record of truthful, accurate and fair reporting’. As discussed further below, it is expected that the Consumer and Competition Bill will implement the recommendations in the Report. The bill is expected to be published in early 2013.

There is no suggestion of change to the current regulation of cross-ownership given the emergence of new media platforms.

### 36 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Section 9 of the Broadcasting Act provides that the BAI shall not authorise a broadcasting contractor to operate a broadcasting transmitter and provide a broadcasting service under a broadcasting contract, unless ComReg has granted to the BAI a broadcasting licence under section 5 of the Wireless Telegraphy Act 1926 in respect of the sound or television-broadcasting transmitter to which the contract relates. A broadcasting licence is valid only for the duration of the broadcasting contract between the BAI and the broadcasting contractor. Fees for wireless telegraphy licences vary.

#### Sound broadcasting

Under the Broadcasting Act, the BAI is empowered to grant sound broadcasting contracts on the recommendation of the Contract Awards Committee. In determining the most suitable applicant for the award of a sound-broadcasting contract, the Contract Awards Committee is obliged to have regard to:

- the character, expertise and experience of the applicant;
- the adequacy of the financial resources of the applicant;
- the quality, range and type of programmes proposed to be provided, including programmes in the Irish language;
- the extent to which the applicant will create new opportunities for Irish talent in music, drama and entertainment;
- the desirability of having a diversity of services catering for a wide range of tastes, including those of minority interests; and
- the desirability of allowing any person or group to have control or substantial interests in an undue amount of the communications media.

For the purpose of awarding sound broadcasting contracts, Ireland is divided into various regions and, therefore, the applicable requirements vary depending on the region in question. There is no timescale provided for in legislation and a final contract is signed close to the date for commencement of broadcasting. Fees payable in respect of sound broadcasting contracts vary depending on the region. Section 69 of the Broadcasting Act provides that the BAI may specify in a broadcasting contract certain terms and conditions, including the duration of the contract, whether the contract may be renewed, a condition prohibiting the assignment of the contract or of any interest in it and a condition requiring the sound broadcasting contractor to pay to the BAI the amount which the contractor specified in his or her application.

#### TV broadcasting

Under section 70 of the Broadcasting Act, the BAI was also given the authority to award a television programme service contract. The criteria set out above in relation to sound-broadcasting contracts are also applied in relation to this award. In addition, the BAI is charged with ensuring that the television programme service:

- is responsive to the interests and concerns of the whole community, mindful of the need for understanding and peace within the whole of Ireland, reflects the varied elements that make up the culture of the people of the whole island of Ireland and has special regard for the elements that distinguish that culture and in particular the Irish language;
- upholds the democratic values enshrined in the written Irish Constitution, especially those relating to the rightful liberty of expression;
- has regard to the need for the formation of public awareness and understanding of the values and traditions of countries other than the state, including in particular those of such countries that are member states of the EU; and
- includes a reasonable proportion of news and current affairs programmes.

A reasonable proportion of such television programme services must be produced in the state or in another member state and be devoted to original programme material produced therein by persons other than the contractor, its subsidiary, its parent or existing broadcasting organisations.

TV3 was awarded a television programme service contract under the Radio and Television Act 1988 (subsequently repealed) that continues in force under the Broadcasting Act.

The Broadcasting Act also provides for the award of content provision contracts including digital content contracts, satellite content provision contracts, local content contracts, community content contracts, and cable-MMD content contracts by the BAI. There is no timescale provided for in the Broadcasting Act in respect of the award of such contracts. The Broadcasting Act provides that the BAI, before it enters into a content provision contract with a person, may require that person to pay a fee to the BAI of such an amount as it considers appropriate; the BAI may also specify different fees for particular classes of content provision contracts.

The Broadcasting Act further provides that MMD system operators must comply with certain specified conditions to transmit a broadcasting service.

#### Digital terrestrial television

Pursuant to section 132 of the Broadcasting Act, ComReg has issued a licence to RTE in respect of the establishment, maintenance and operation of a single television multiplex. In November 2007, ComReg published ComReg Document No. 07/90a – Licence for Digital Terrestrial Television and ComReg Document No. 07/90b – Technical conditions for Digital Terrestrial Television, which give ComReg the means to license DTT multiplexes to RTÉ and the BAI. According to these documents, the licence duration shall be 12 years. Initial annual licence fees of €57,000 shall be payable in the period

from the award of the DTT licences to 1 July 2012, following which an annual licence fee of €114,000, indexed to inflation using the Consumer Price Index (CPI), applies for the remainder of the licence period, with the first indexation to take place with effect from 1 July 2013 based on the increase, if any, in CPI in the period 1 July 2012 to 30 June 2013. These terms and conditions are set out in the Wireless Telegraphy (Digital Terrestrial Television Licence) Regulations 2008.

The DTT multiplex operated by RTÉ was launched on 27 May 2011, known as Saorview, to ensure the continued availability of the existing free-to-air services in Ireland, namely RTÉ 1, RTÉ 2, TV3 and TG4. In February 2011 the minister for communications made an order under the Broadcasting Act conferring a number of additional functions on the BAI to consult with RTÉ and other parties in relation to the provision of services on the RTÉ DTT multiplex. The BAI has made recommendations that a number of new services merit consideration for inclusion on the RTÉ multiplex but has stated that none of these services are in a position to be included in the near future. The BAI has so far been unsuccessful in negotiating contracts for commercial DTT.

### Digital sound broadcasting

Digital sound broadcasting multiplex licences will be issued by ComReg at the request of the RTÉ Authority and the BAI pursuant to section 133 of the Broadcasting Act, under the Wireless Telegraphy Acts 1926–2009. In response to a request from RTÉ for a digital sound broadcasting multiplex licence, ComReg published a consultation in September 2008 (ComReg Document No. 08/79) on the proposed licence conditions for digital terrestrial sound broadcasting multiplex licences to be issued to RTE and the BAI. ComReg published its response to the consultation in December 2008 (ComReg Document No. 08/100) setting out the licence conditions applying to digital sound broadcasting multiplex licences in Ireland. Conditions include a licence duration of 10 years; other standard conditions relating to public safety and interference, a provision requiring 80 per cent of the multiplex capacity of each licensed multiplex to be used for sound-broadcasting content, associated technical services or text and graphics associated with the sound-broadcasting content; and technical conditions appropriate to the particular frequency band and technical standard to be used by the licensee.

In 2009, ComReg published the Digital Sound Broadcasting Licence Fees Regulations 2009, which prescribe the fees to be applied to digital sound-broadcasting multiplexes. The 2009 Regulations provide that the annual licence fee payable to the BAI shall be €20,000 per annum per multiplex, with a 50 per cent discount per year for the first three years. The licence fee will be indexed to reflect the annual rate of inflation, using CPI, with the first indexation to occur after the third anniversary of the date on which the licence was granted and annually thereafter. The licence fee will be subject to a review on the fifth anniversary of the commencement date of the licence.

### ComReg

Authorisation may be required under the Authorisation Regulations. An annual levy may be payable in respect of 'broadcast transmission networks'. The annual levy payable and timescale for authorisation are discussed above.

### 37 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media are outside of this regime?

The BAI must ensure, under the Broadcasting Act, that a reasonable proportion of the programme service is produced in the state or in another member state and is devoted to original programme material produced therein by persons other than the contractor, its subsidiary, its parent or existing broadcasting organisations.

The Television Without Frontiers Directive 89/552/EEC (as amended) (TVWF Directive) is implemented in Ireland by the European Communities (Television Broadcasting) Regulations 1999 (the Regulations), which provide that a television broadcaster, where practicable and by appropriate means, must progressively reserve for European works a majority proportion of its transmission time (excluding the time appointed to news, sporting events, games, advertising and teletext services) having regard to its various public responsibilities. At a minimum, the proportion of transmission time cannot be lower than the average proportion of transmission time devoted to European works, if any, in 1988.

The Regulations further provide that a broadcaster, where practicable and by appropriate means, shall progressively reserve at least 10 per cent of its transmission time (excluding the time applied to news, sports events, games, advertising and teletext services) for European works created by producers who are independent of broadcasters, or reserve 10 per cent of its programming budget for European works that are created by producers who are independent of broadcasters, having regard to its various public responsibilities. An adequate proportion of works must comprise recent works, namely works that are transmitted within five years of their production. See question 36 for minimum local content requirements.

The Audiovisual Media Services Directive 2007/65/EC (AVMS Directive) came into force on 19 December 2007 and amends the TVWF Directive. The AVMS Directive extends the scope of a number of the rules set down in the TVWF Directive beyond the traditional broadcasting arena into all audio-visual media services, including 'non-linear' audio-visual media services (on-demand content). The AVMS Directive was implemented in response to the significant technological and market developments of recent years and its stated aim is to create a level playing field for audio-visual media services in the EU. The AVMS Directive also provides that each broadcasting service must comply only with the national rules of the country in which its provider is established regardless of whether its service is targeted at audiences in other member states. While the AVMS Directive requires member states to ensure that on-demand audio-visual media services also promote European works, quotas for European works are not imposed on non-linear/on-demand audio-visual services.

The AVMS Directive has been transposed into Irish law by the Broadcasting Act and the European Communities (Audiovisual Media Services) Regulations 2010 (SI 258 of 2010). Section 13 (1) of the SI states that media service providers of on-demand audio-visual media services shall, in cooperation with the BAI, and other relevant bodies develop codes of conduct. In order to develop a code of conduct further to the requirements of the SI, the On-Demand Audiovisual Services Group (ODAS) was established. Members of the group include representative bodies of the advertising industry, broadcasters, telecommunications companies and other on-demand service providers. ODAS submitted a copy of the draft code of conduct to the BAI which was considered and approved. The code of conduct was launched on 4 May 2011, and sets out the minimum standards required of service providers, provides a complaints mechanism for consumers and complies with EU directives.

### 38 Advertising

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

The BAI is the statutory body tasked with consideration of and adjudication upon complaints concerning material that is broadcast, including programmes and advertisements.

Section 41 of the Broadcasting Act 2009 provides that the total daily time for broadcasting advertisements in a sound broadcasting service must not exceed a maximum of 15 per cent of the total daily broadcasting time and the maximum time to be given to advertisements in any hour shall not exceed a maximum of 10 minutes. The Broadcasting Act also provides that a broadcaster shall not broadcast

an advertisement that is directed towards a political end or that has any relation to an industrial dispute, or that addresses the issue of the merits or otherwise of adhering to any religious faith or belief or becoming a member of any religion or religious organisation. However, the broadcasting of a party political broadcast is not prevented provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party.

The BAI is responsible for the development, review and revision of codes and rules in relation to programming and advertising standards to be observed by broadcasters. Broadcasters in Ireland are required to comply with any broadcasting codes issued by the BAI under the Broadcasting Act 2009. In particular, section 42 of the Broadcasting Act provides that broadcasting codes shall provide that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service shall protect the interests of the audience and, in particular, advertising that relates to matters likely to be of direct or indirect interest to children, must protect the interests of children having particular regard to the general public health interests of children. Section 43 of the Act provides for the preparation by the BAI of revised broadcasting rules with respect to the total daily times allowed, and the maximum period that shall be allowed in any given hour, for the transmission of advertisements and teleshopping material on a broadcasting service.

In 2009, the BAI issued a consultation document (Draft Codes on Audiovisual Commercial Communications) in relation to the revision of the former BCI's General Advertising Code and its Children's Advertising Code. Revision of these codes was necessary to give effect to the legal requirement to transpose into Irish law and regulation the Audiovisual Media Services Directive (the AVMS Directive), and the revised codes were published in 2011. The BAI also published a General Commercial Communications Code (advertising, teleshopping, sponsorship, product placement and other forms of commercial promotion) on 10 June 2010.

The BAI launched a public consultation relating to advertising of high-fat, salt and sugar (HFSS) foods in September 2011, and announced in October 2012 that the new rules relating to the advertising of HFSS foods will come into effect on 1 July 2013. The BAI has decided to adopt the rules proposed in the Draft Children's Commercial Communications Code in respect to HFSS foods, which state that commercial communications for HFSS food and drink shall not be permitted in children's programmes, and where they are broadcast outside of children's programming but are directed at children, they must comply with content rules. The BAI has also decided to adopt the rule proposed in the Draft General Commercial Communications Code in respect of HFSS foods, whereby no more than 25 per cent of advertising sold by a broadcaster can be for HFSS food and drink, and no more than one in four advertisements included in any advertising break can be for HFSS food and drink.

A voluntary self-regulatory code is also in operation and is administered by the Advertising Standards Authority of Ireland (ASAI). As well as broadcasting legislation, there are numerous other relevant national and EU rules on advertising of specific types of products and services, such as tobacco, pharmaceutical products, health foods, air fares, package holidays, solicitors' services and financial services. There are also numerous national rules on the type of advertising practices permitted – for example, consumer information requirements, misleading advertising rules, unsolicited commercial communications and rules on merchandise marks, gaming and lotteries.

In November 2012 TV3 admitted that it had failed to properly notify viewers of a motoring show that car makers had been asked to pay up to €5,000 to have their products featured.

The Broadcasting Act does not apply to broadcasting services that are provided by means of the internet. The voluntary self-regulatory code administered by the ASAI is applicable to online advertising. Therefore, any online adverts should adhere to the standards as set out in this code. The code sets out guidelines for advertising in relation to a range of topics that include food, non-alcoholic beverages, financial

services and business products. Online advertising is also subject to the requirements of the Electronic Commerce Regulations 2003 and the Privacy Regulations in relation to unsolicited e-mails offering direct marketing (see question 49).

The AVMS Directive 2007/65/EC also caters for advertising in the form of internet protocol television (IPTV) and covers forms of online advertising. The broadcasting elements of the AVMS Directive have been transposed into Irish law by the Broadcasting Act and the European Communities (Audiovisual Media Services) Regulations 2010.

### 39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Section 77(4) of the Broadcasting Act provides for must-carry obligations and requires an 'appropriate network provider' to ensure, if requested, the retransmission by or through his or her appropriate network of each free-to-air television service provided for the time being by RTÉ, TG4 and the free-to-air service provided under section 70 of the Broadcasting Act. An appropriate network is defined as an electronic communications network provided by a person (appropriate network provider) that is used for the distribution or transmission of broadcasting services to the public. No provision is made for a financing mechanism.

### 40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

There are currently no specific regulations that apply to broadcasting to mobile devices, given that this is an emerging technology. In December 2006, ComReg published a Briefing Note on Mobile Television (ComReg Document No. 06/62). ComReg stated that the definition of mobile TV in the Briefing Note covered both advanced forms of traditional broadcast TV to mobile users as well as video download-type services targeted at mobile users. In 2008, ComReg commenced a consultation process proposing to make available the single 8MHz channel for mobile TV, for which a single multiplex licence would be issued, using the limited spectrum that had been identified between 470MHz and 750MHz in each of the urban areas of Cork, Dublin, Galway, Limerick and Waterford. As the consultation process progressed, it became apparent that use of the identified spectrum to provide a mobile TV service in Ireland was not the subject of strong interest to potential operators and on 7 January 2011, ComReg issued an Information Notice (ComReg Document No. 11/01) confirming that ComReg would not be proceeding with a licence award for mobile TV.

However, ComReg stated that it will keep under review the potential for the identification of spectrum which would enable the award of dedicated licences for mobile TV. In addition, it is noted that any future awards by ComReg of UHF spectrum on a service and technology neutral basis could facilitate deployment of Mobile TV services, subject to the appropriate technical conditions.

The broadcasting elements of the AVMS Directive have been transposed into Irish law by the Broadcasting Act and the European Communities (Audiovisual Media Services) Regulations 2010 (discussed in question 41).

There has been some discussion in the political arena regarding the merging of ComReg and the BAI, but no action has been taken in this regard at the time of publication. ComReg noted in its Strategy Statement 2012–2014 that a strategic review of the BAI and ComReg will be carried out by the government, but stated that implications for are unknown at this point.

In July 2012 ComReg launched a consultation reviewing the relevant Irish broadcasting transmission markets to determine whether they still require ex-ante regulation. In its 2007 recommendation, the European Commission concluded that, on an EU-wide basis, broadcasting transmission services are no longer considered to have characteristics that warrant ex-ante regulation. ComReg previously reviewed these services in Ireland between 2003 and 2004, and designated RTE Transmission Network Limited (RTENL) as having SMP in two wholesale markets, namely the wholesale market for radio broadcasting services on national analogue terrestrial networks and the wholesale market for television broadcasting transmission services on analogue terrestrial networks. By Decision D04/122 dated 22 December 2004 ComReg imposed SMP obligations on RTENL related to transparency and non-discrimination.

In light of developments in DTT in Ireland and the European Commission's revised position, ComReg is now undertaking a full market review of broadcasting transmission services in Ireland to establish whether ex-ante regulation remains appropriate and, if so, what form it should take. ComReg identified two markets in its market review namely the market for wholesale access to national terrestrial broadcast transmission services (Market A) and the market for wholesale access to DTT multiplexing services (Market B). ComReg's preliminary view is that RTENL should be designated as having SMP on Market A and RTE should be designated as having SMP in Market B, and that both markets warrant ex-ante regulation. ComReg proposes that in Market A, access to the terrestrial transmission network should be provided by the SMP operator to national analogue radio broadcasters and multiplex operators (both terrestrial radio and television). Market B includes the provision of multiplex services over all potential DTT multiplex platforms. Given the current market structure where RTE is the sole provider, ComReg proposes measures which allow access to RTE's DTT multiplexing services by DTT broadcasters who are designated under section 130 of the Broadcasting Act.

#### 41 Regulation of new media content

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

The Internet Services Providers Association of Ireland (ISPAI) has responsibility for supervising the ongoing evolution of self-regulation of the internet in Ireland and has set out guidelines in its Code of Practice and Ethics (the Code) that ISPAI members should take into account when operating. In its Statement of Policy, the ISPAI acknowledges that its members must observe their legal obligation to remove illegal content when informed by organs of the state or as otherwise required by law. The general requirements of the Code issued by the ISPAI include a requirement on all members to use best endeavours to ensure that services (excluding third-party content) and promotional material do not contain anything that is illegal and is not of a kind that is likely to mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise. They must also ensure that services and promotional material are not used to promote or facilitate any practices that are contrary to Irish law, nor must any services contain material that incite violence, cruelty, racial hatred or prejudice and discrimination of any kind. Members' ISPs are also required to register with [www.hotline.ie](http://www.hotline.ie), which is a notification service to facilitate the reporting of suspected breaches under the Child Trafficking and Pornography Act 1998 (as amended by the Child Trafficking and Pornography (Amendment) Act 2004) and the removal of illegal material from websites.

The liability of an internet service provider (ISP) is provided for in the European Communities (Directive 2001/31/EC) Regulations, 2003 (the Electronic Commerce Regulations). The Electronic Commerce Regulations provide that where an ISP acts only as a passive transmitter or mere conduit of information, then the ISP shall not be liable for the information that it transmits as part of its service. An ISP

will be deemed to be a 'mere conduit' where it did not initiate a transmission, it did not select the receiver of a transmission and where it did not select or modify the information contained in the transmission.

'Caching' is described as the automatic, intermediate and temporary storage of information by ISPs for the sole purpose of making onward transmission more efficient. ISPs shall not be liable for the caching of information provided that they adhere to certain conditions; for example, if the ISP becomes aware that access to information, which is the subject of the caching, has been disabled or removed from the network at the initial source or by order of a court or an administrative authority, then it is incumbent on the ISP to act expeditiously and remove or disable access to the information also. The Regulations also provide limited liability to ISPs that host information on behalf of third parties – for example, hosting of websites or web content on behalf of third parties. However, if the ISP has actual knowledge that the information being hosted by it concerns unlawful activities, the exemption will not apply if the ISP fails to act expeditiously to remove or block the information.

Content that may lawfully be placed on the internet may be restricted by the laws relating to defamation and intellectual property rights in Ireland. Section 23 of the Electronic Commerce Act 2000 provides that 'all provisions of existing defamation law shall apply to all electronic communications within the state including the retention of information electronically'. Accordingly, under the Electronic Commerce Regulations the liability of an ISP for defamation or infringement of copyright law may be excluded where the ISP is a 'mere conduit' or is caching or hosting the information.

The Audiovisual Media Services Directive 2007/65/EC (AVMS Directive) (see question 37) provides a set of rules for Europe's audio-visual industry that extends to all audio-visual media services. The scope of the directive has been widened and the definition of 'audio-visual media service' now includes both linear services that push content to viewers (eg, scheduled broadcasting via traditional television or over the internet as IPTV) and non-linear services (eg, on-demand films, catch-up TV).

The AVMS Directive distinguishes between linear television broadcasting and non-linear on-demand services and applies lighter regulation to on-demand services, recognising that users have greater degrees of choice and control over on-demand audio-visual media services. The rules applicable to on-demand services are limited to rules safeguarding essential public interests – for example, protection of minors, encouraging cultural diversity, ensuring essential consumer protection and preventing incitement to hatred. The rules on advertising and protecting children are stricter for television broadcasting as it is a linear service provided for simultaneous viewing of programmes by many users.

The AVMS Directive takes account of new services and technologies, including the creation of IPTV (digital television delivered by an internet network) and new advertising methods such as search-related advertisements on the internet. It aims to promote industry self and co-regulation and provides modernised rules on television advertising, which includes advertising via IPTV. The Directive also sets out transparency obligations for service providers that ensure they can be held responsible for their actions.

As discussed in question 37, the AVMS Directive retains the country-of-origin principle provided for in the TWF Directive. The country-of-origin principle provides that only one member state should have jurisdiction over an audio-visual media service provider and requires that each member state shall ensure that all audio-visual media services transmitted by media service providers under its jurisdiction comply with the national law applicable to audio-visual media services intended for the public in that member state.

The broadcasting elements of the AVMS Directive have been transposed into Irish law by the Broadcasting Act and the European Communities (Audiovisual Media Services) Regulations 2010.

---

#### 42 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Digital switchover took place on 24 October 2012.

The 800MHz band had been used for analogue terrestrial television services. This digital dividend spectrum was auctioned off (along with 900MHz and 1,800MHz) in the spectrum auction held in autumn 2012 for use in electronic communications services.

---

#### 43 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multichannelling, high definition, data services)?

The licences required for broadcasting are explained in question 36. Licences do not tend to restrict how broadcasters can use their spectrum.

---

### Regulatory agencies

---

#### 44 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

ComReg is responsible for the regulation of the electronic communications sector in Ireland. It is responsible for ensuring compliance by undertakings in the sector with their statutory obligations, managing the RF spectrum and national numbering resources and ensuring compliance by persons in relation to the placing on the market of communications equipment and the placing on the market and putting into service of radio equipment. ComReg is also responsible for specific aspects of data protection and privacy rules as they relate to electronic communications. The Communications Regulation (Amendment) Act 2007 also transfers responsibility to ComReg for the oversight and management of the '.ie' domain registry and gives ComReg competition powers in the electronic communications sector.

A new broadcasting and audio-visual content regulator in respect of both public and private broadcasters, the BAI, was established on 1 October 2009 following the enactment of the Broadcasting Act. The BAI incorporates work previously undertaken by the BCI and the BCC. All policies and publications previously developed by the BCI remain valid. The BAI is responsible for a number of areas of activity with regard to broadcasting in Ireland. These include licensing, development of codes and rules in relation to programming and advertising standards, monitoring compliance by licence holders with statutory obligations and development and research in relation to broadcasting policy in Ireland.

ComReg issues licences in the broadcasting area in accordance with the Wireless Telegraphy Acts (equipment) and the Broadcasting Act in respect of analogue and digital broadcasting (including DTT multiplex licences and digital terrestrial sound-broadcasting multiplexes).

As mentioned in question 40, there has been some discussion in the political arena about the possibility of merging ComReg and the BAI, although no steps have been taken in this regard. ComReg noted in its Strategy Statement 2012–2014 that a strategic review of the BAI and ComReg will be carried out by the government, but stated that implications are unknown at this point.

---

#### 45 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

ComReg was established pursuant to the Communications Regulation Act 2002. ComReg is independent in the exercise of its functions.

Section 13(1) of the Communications Regulation Act 2002 provides that the minister for communications may give policy directions to ComReg. Such policy directions must be followed by ComReg in exercising its functions. Policy directions were issued by the minister for communications in 2003 and 2004.

The BAI was established on 1 October 2009 following the enactment of the Broadcasting Act 2009. The BAI incorporates work previously undertaken by the BCI and the BCC. All policies and publications previously developed by the BCI remain valid. The BAI comprises a board and two statutory committees dealing with compliance and contract awards. The BAI consists of nine members, five of whom are appointed by the government on the nomination of the minister for communications, energy and natural resources and four of whom are appointed by the government on the nomination of the minister for communications, energy and natural resources in consultation with the Joint Oireachtas Committee.

Section 24 of the Broadcasting Act provides for the independence of the BAI and each statutory committee in the performance of their functions; however, the BAI is required to submit a report to the minister on an annual basis on the performance of its functions and its activities during the preceding year. The minister shall enable copies of each annual report to be laid before each House of the Oireachtas.

---

#### 46 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

A decision of ComReg may either be challenged by way of judicial review or appealed in accordance with the Framework Regulations. A number of ComReg decisions were appealed to the Electronic Communications Appeal Panel (ECAP) established under the Framework Regulations, but this mechanism was withdrawn and replaced with an appeal to the High Court. The appeal must be brought by a user or undertaking that is 'affected' by the decision, and must be taken within 28 calendar days of the date after the user/undertaking has been notified of the decision. An appeal can be made on the basis of law or errors of fact. Where the appeal is made to the High Court either party may seek for the matter to be transferred to the commercial court, which is a specialist part of the High Court that generally hears appeals within six months of the date the appeal is lodged. Lodgement of an appeal against a decision of ComReg does not automatically 'stay' that decision, unless an application for a stay or for interim relief has been made.

A decision of the BAI may be challenged by way of judicial review in the High Court. In addition, a decision by the BAI to terminate or suspend a contract made under part 6 or part 8 of the Broadcasting Act may be appealed by the holder of the contract to the High Court pursuant to section 51 of the Broadcasting Act.

---

### Data retention, interception and use

---

#### 47 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages? Explain the interaction between interception and data protection and privacy laws.

The Data Protection Acts 1988 and 2003 (the Acts) do not specifically address the issue of interception of telecommunications messages. However, the Acts impose certain restrictions on the processing of personal data unless one of the exceptions provided in the Acts applies. For example, the restrictions do not apply if the consent of the data subject to the disclosure of the data is obtained or if the processing of the data is required by or under any enactment or by a rule of law or order of the court. The interception of telecommunications messages pursuant to the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and the processing of

any personal data in that regard may fall within this exception. It should be borne in mind that the European Commission has proposed a new Data Protection Regulation which is intended to harmonise data protection laws across the EU and to establish a directly applicable regime that will replace the diverse national member state laws that have been transposed pursuant to the Data Protection Directive 95/46. The draft regulation is currently under consideration and it is anticipated that the rules would not be in force earlier than 2014.

The listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited under Regulation 5 of the Privacy Regulations, subject to the following exceptions:

- Under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 authorised operators are required to comply with directions given by the minister for justice to intercept telecommunications messages for the purpose of criminal investigation or in the interests of security of the Irish state.
- Under the Interception of Postal and Telecommunications Services Act 1983, where there is an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act 1951 (which refers to telecommunications messages of an obscene, menacing or similar character) on the complaint of a person claiming to have received such a message, interception of communications is permissible.
- Where the interception is legally authorised under a provision adopted in accordance with article 15 (1) of Directive 2002/58 on Privacy and Electronic Communications (which provides for a public interest derogation from the rights contained therein).

The provision in Regulation 5 does not prevent the technical storage of communications and the related traffic data which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality, and does not affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

The right to privacy is protected under the Irish Constitution as a 'personal right' of every individual. The law in relation to privacy has evolved with the incorporation of the European Convention on Human Rights (the Convention) into domestic law. Article 8 of the Convention protects the right to respect for private life. The Irish courts are obliged to interpret statute and common law in a manner that is compatible with the Convention insofar as is possible.

#### 48 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations? Will they be compensated for their efforts?

The Communications (Retention of Data) Act 2011 (the Act) came into effect on 26 January 2011. The Act implements Directive 2006/24/EC on the retention of data generated or processed by or in connection with the provision of publicly available electronic communications services or of public communications networks and repeals part 7 of the Criminal Justice (Terrorist Offences) Act 2005 (the CJA 2005), Ireland's pre-existing data retention legislation. The Act requires service providers (persons engaged in the provision of a publicly available electronic communications service or a public communications network by means of a fixed line, mobile telephones or the internet) to retain specified data for specified periods and to make it available to the Irish police, Irish army and Irish taxation authorities in specified circumstances, by way of a disclosure request.

Service providers must retain information concerning internet access, internet e-mail and internet telephony for a period of one

year and retain telecommunications data in respect of fixed-network telephony and mobile telephony for a period of two years (a reduction from the previous requirement of three years). In addition, the Act has provisions dealing with the obligation to retain data; security measures to be applied to the data; disclosure requests; reports and statistics to be prepared by members of the Irish police, army and taxation authorities; the complaints procedure; and a review of the Act by a High Court judge.

#### 49 Unsolicited communications

Does regulation prohibit unsolicited communications? Are there exceptions to the prohibition?

Regulation 13 of the Privacy Regulations contains new rules governing unsolicited communications, covering phone, fax, e-mail and text messages sent for the purpose of direct marketing.

It is now an offence for an undertaking to call a person on their mobile phone for the purpose of direct marketing without the prior consent of that subscriber (previously the user had to opt out by indicating that he did not consent to such calls). Calls to fixed lines for the purpose of direct marketing are prohibited where the subscriber has notified the party making the call that they do not consent to the receipt of such a call, or where the preference not to receive such calls is noted in the NDD.

It is an offence for an undertaking to contact an individual for direct marketing purposes by automated calling machine messages, faxes and electronic mail (which includes SMS and MMS messaging) unless the individual's express prior consent has been obtained. An exception to this is where the e-mail address reasonably appears to the sender to be an e-mail address used mainly by the subscriber in the context of their commercial or official activity and the unsolicited communication relates solely to that commercial or official activity, the undertaking need not obtain express prior consent. It is an offence for an undertaking to contact a business for direct marketing purposes by automated calling machine messages, faxes and e-mail where the business has notified the caller that they do not consent to the receipt of such communication, or where the business' preference not to receive such communications is noted in the NDD.

Regulation 13(11) provides a 'soft opt-in' whereby a person who obtains a customer's contact details for e-mail in the context of the sale of a product or service, may not use those details for direct marketing unless:

- the product or service being marketed is the person's own product or service;
- the product or service being marketed is of a kind similar to that supplied to the customer in the context of the sale by the person;
- the customer is clearly and distinctly given the opportunity to object, in an easy manner and without charge, to the use of those details at the time the details are collected, and if the customer has not initially refused that use, each time the person sends a message to the customer; and
- the sale of the product or service occurred not more than 12 months prior to the sending of the direct marketing communication or, where applicable, the contact details were used for the sending of e-mails for the purpose of direct marketing within that 12-month period.

A person who contravenes the requirements of Regulation 13 commits an offence, and the sending of each unsolicited communication or e-mail or the making of each unsolicited call constitutes a separate offence. The Data Protection Commissioner and ComReg are the relevant bodies in respect of the enforcement of compliance with Regulation 13.

## Competition and merger control

### 50 Competition and telecoms and broadcasting regulation

What is the scope of the general competition authority and the sectoral regulators in the telecoms, broadcasting and new media sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation? Are there special rules for this sector and how do competition regulators handle the interaction of old and new media?

The Competition Authority is responsible for administering and enforcing the Competition Act. Sections 4 and 5 of the Competition Act contain provisions that are closely modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union.

ComReg is responsible for the regulation of the electronic communications sector in Ireland and the BAI is responsible for the regulation of the broadcasting and audio-visual content sector. The Communications Regulation (Amendment) Act 2007 gives ComReg co-competition powers with the Irish Competition Authority that enable it to pursue issues arising in the electronic communications sector under competition law and include the power to investigate and take action in respect of anti-competitive agreements and abuse of dominance.

Regulation 13 of the Framework Regulations provides that ComReg must cooperate with national regulatory agencies (NRAs), BEREC and the EU Commission to ensure consistent application of the provisions of the regulations. Regulation 13 provides certain limits on ComReg's actions, and Regulation 14 provides a procedure for the consistent application of remedies. Regulation 26 sets out a procedure for the identification and definition of markets by ComReg, pursuant to which ComReg must take utmost account of the EC Recommendation and guidelines on 'relevant markets'. The same applies to the procedure for market analysis under Regulation 27.

Pursuant to the Competition Act, ComReg and the BAI is each party to a cooperation agreement with the Competition Authority to facilitate cooperation, avoid duplication and ensure consistency between the parties insofar as their activities consist of, or relate to, the determination of a competition issue. The agreements provide for the exchange of information between the parties, forbearance to act when one party is already considering a particular issue and consultation between the parties prior to determination of a competition issue of interest to both parties.

The current rules do not distinguish between old and new media.

### 51 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

Anti-competitive practices in the telecoms sector are capable of being reviewed by ComReg and the Competition Authority, and in the broadcasting sector by the BAI and the Competition Authority, depending on the nature of the practice and whether it gives rise to a breach of the regulatory provisions alone or also a breach of the Competition Act. As explained above, there are cooperation agreements between each of ComReg and the BAI and the Competition Authority governing situations where both parties have an interest in a particular issue. In addition, the enactment of the Communications Regulation (Amendment) Act 2007 increased ComReg's competition powers by amending the Competition Act to enable ComReg to investigate and take action in relation to breaches of competition law in the electronic communications sector. The Act grants ComReg powers similar to those currently held by the Competition Authority, including the power to investigate anti-competitive practices and abuse of dominance arising in the electronic communications sector.

### 52 Jurisdictional thresholds for review

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting and new media sector?

#### Non-media mergers

Mergers, joint ventures and acquisitions that do not fall within the scope of the EU Merger Regulation may be examined pursuant to part 3 of the Competition Act. Part 3 gives primary responsibility for decisions on merger review to the Competition Authority, although special additional rules apply to 'media mergers' (defined below).

Non-media mergers or acquisitions must be notified to the Competition Authority if:

- the worldwide turnover of each of at least two of the undertakings concerned in the transaction is not less than €40 million;
- each of at least two of the undertakings concerned in the transaction carries on business in any part of the island of Ireland (Ireland and Northern Ireland); and
- the turnover in the state (Ireland) of any one of the undertakings concerned is not less than €40 million.

The Competition Authority takes the view as set out in Notice N/02/003 that an undertaking that 'carries on business in Ireland' includes an undertaking that either:

- has a physical presence in the island of Ireland and makes sales or supplies services to customers in the island of Ireland; or
- without having a physical presence in the island of Ireland, has made sales into the island of Ireland of at least €2 million in the most recent financial year.

The substantive test for merger assessment applied by the Competition Authority is whether a merger would 'substantially lessen competition' in the state (the SLC test). The Competition Authority interprets the SLC test in terms of consumer welfare and, in particular, whether it would be likely to result in a price rise to consumers. Mergers that do not satisfy the financial thresholds above can be notified voluntarily where there are concerns that the merger would give rise to a restriction of competition.

#### Media mergers

A 'media merger' means a merger or acquisition in which two or more of the undertakings involved carry on a media business in the state, or alternatively that one or more of the undertakings involved carries on a media business in the state and one or more of the undertakings involved carries on a media business elsewhere.

A 'media business' means:

- a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs;
- a business of providing a broadcasting service (ie, supplying a compilation of programme material or transmitting or relaying programme material, except over the internet); or
- a business of providing a broadcasting services platform.

The turnover thresholds identified above are disapplied for media mergers, so that all media mergers are automatically notifiable regardless of the turnover of the undertakings concerned. Media mergers are subject to an additional substantive review by the minister for enterprise, trade and innovation (the minister), who must have regard to public interest criteria set out in part 3 of the Competition Act. The public interest criteria are:

- the strength and competitiveness of media businesses indigenous to the state;
- the extent to which ownership or control of media businesses in the state is spread among individuals and other undertakings;

- the extent to which ownership and control of particular types of media businesses in the state is spread among individuals and other undertakings;
- the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the state; and
- the share in the market of the state of the type of business activity falling within the definition of 'media business' that is held by any of the undertakings concerned in the media merger concerned, or by any individual or other undertaking that has an interest in such an undertaking.

As mentioned in question 35, the Consumer and Competition Bill will amend the provisions of the Competition Act that deal with media mergers. It is expected that the amendments to the Competition Act will involve adopting many of the recommendations in the Report of the Advisory Group on Media Mergers (the Report). The most significant recommendations are likely to be:

- A new notification system for media mergers, whereby a separate notification would be made to the minister for communications on a specific notification form and attracting a separate fee, in addition to any notification to the Competition Authority or the European Commission, etc.
- While the Competition Authority would continue to review the competition aspects of media mergers under the SLC test, it is recommended that the minister for communications and not the minister for jobs, enterprise and innovation would apply a statutory test to ensure that the merger is not contrary to the public interest in protecting plurality in media business in the state. Plurality of the media is defined in the Report as including 'both diversity of ownership and diversity of content'. The Report recommends the adoption of a revised set of 'relevant criteria' to be considered in applying the statutory test, and guidelines will be published to assist undertakings in ascertaining how the minister will apply that test.
- The definition of what constitutes a media merger should be expanded. Currently, publication of content over the internet is specifically excluded from the definition of 'media business'. The Report suggested amending this definition to include undertakings involved in providing print or certain audio-visual content over the internet.
- A reduced role for the Competition Authority in the assessment of the public interest aspects of media mergers (the Competition Authority has publicly stated its view that this requirement obliges it to do something 'outside its area of expertise' and should therefore be abolished).

As mentioned above, the Consumer and Competition Bill is expected to be published early in 2013.

No media merger has been blocked by the Competition Authority or the minister under the Competition Act, although four mergers – Scottish Radio Holdings/FM104 (M/03/033), UGC (Chorus)/NTL (M/05/024), Communicorp/SRH (M/07/040) and Metro/Herald AM (M/09/013) – were cleared subject to conditions.

#### **ComReg**

In relation to the transfer of licences issued under the Wireless Telegraphy Act 1926 (as amended), many licences may only be assigned with the consent of ComReg, although consent may not be unreasonably withheld. ComReg's concern is with the proposed acquirer's financial and technical ability to ensure the continued provision of licensed services.

#### **Broadcasting Authority of Ireland**

Section 69 of the Broadcasting Act 2009 addresses the assignment of a broadcasting contract awarded by the BAI or any interest therein, and section 138 addresses the assignment of a multiplex

contract or any interest therein. In both cases, the BAI may prohibit assignment of the contract or any material change in the ownership of a company, either by specifying a condition in the contract itself or by making the assignment subject to the previous consent in writing of the BAI, in which case the BAI shall have regard to the same criteria as considered when awarding the original contract. When considering applications for assignment or change of control, the BAI will consider the tests set out in its Ownership and Control Policy Statement 2010 (see question 35).

The government announced, in its Statement on Transforming Public Services on 27 November 2008, that the minister for finance was establishing a Special Group on Public Service Numbers and Expenditure Programmes. On 16 July 2009, the group published the Report of the Special Group on Public Service Numbers and Expenditure Programmes. One of the recommendations of the report was that the BAI should be merged with ComReg, although no further action has been taken in this regard.

#### **53 Merger control authorities**

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms, broadcasting and new media sectors?

The following authorities are currently responsible:

- the Competition Authority;
- the minister for jobs, enterprise and innovation;
- ComReg; and
- the BAI.

When the Consumer and Competition Bill is published it is expected that the minister for communications will take over the current role of the department for jobs, enterprise and innovation in relation to mergers.

#### **54 Procedure and timescale**

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

##### **Competition Authority**

Mergers, joint ventures and acquisitions which meet the notification thresholds outlined above must be notified to the Competition Authority on a standard notification form within one month of the conclusion of the agreement or the making of a public bid. All the undertakings concerned in the transaction are obliged to notify, although in practice joint notification is encouraged by the Competition Authority. To be valid, all notifications must be accompanied by the prescribed filing fee, which is currently €8,000.

The Competition Authority publishes a note of receipt of notification within seven days of receipt, inviting third-party comment. At any time during the review process the Competition Authority may enter into discussions with the undertakings involved with a view to identifying measures to ameliorate the effects of the transaction on competition.

There is a two-stage review process for mergers:

- Phase I – the Competition Authority has an initial period of one month in which to decide whether to allow the notified merger to be put into effect or to carry out a more detailed investigation. This may be extended by an additional 15 days if the parties wish to negotiate proposals that might ameliorate any adverse effects the transaction may have on competition. The Competition Authority can make a formal information request at any stage in Phase I. The effect of such a request is that the one-month period restarts on the date the information requested is submitted.
- Phase II – a full investigation gives the Competition Authority four months from notification (ie, broadly, an additional three months) in which to determine whether to permit the merger,

permit the merger subject to specified conditions or prohibit the merger.

### Media mergers

In addition to the procedures set out above, the following procedures apply to media mergers. The Competition Authority will forward a copy of the notification of a media merger to the minister for enterprise, trade and innovation within five days of receipt. The minister reviews the merger in accordance with the public interest criteria and effectively has a veto right over media mergers (see question 52).

If the Competition Authority proposes to approve the merger at the end of Phase I, it must immediately inform the minister of that fact and the minister may, within 10 days, direct the authority to carry out a Phase II investigation. If the Competition Authority proposes to permit the merger or permit the merger subject to specified conditions at the end of Phase II, it must inform the minister of its determination and the minister may, within 30 days, decide that the merger may be put into effect subject to specified conditions being complied with, or that the merger may not be put into effect.

The minister may not, however, permit a media merger that the Competition Authority has blocked on SLC grounds.

### ComReg and BAI

There is no set form or procedure for notifying ComReg of a proposed merger or acquisition. In the case of the BAI, an application for consent to a change of control may be made at any time that allows the BAI's monthly board meeting to consider and make its decision in advance of implementation. As discussed in question 52, the minister is considering the recommendations of the Report of the Advisory Group on Media Mergers in the context of new legislation. The advisory group proposes the introduction of a new notification system, whereby a separate notification would be made to the minister in respect of media mergers, in addition to any notification to the Competition Authority, the European Commission and (in the case of mergers involving broadcasters) the BAI.

Should the minister implement the proposals contained in the report, parties will require a separate approval from the minister for communications prior to implementation of a media merger. The report suggests a two-phase system for review, in which Phase I would last until 30 days after the date of notification to the minister

### Update and trends

ComReg identified the following topics in its strategy statement 2012–2014 as important for 2013:

- promotion of high-speed broadband;
- consumer protection and awareness: ComReg intends to focus on ensuring that consumers understand product offerings in the market such as bundles, the terms and conditions attached to service subscriptions and the process for switching between providers and/or service packages;
- implementing the regulatory framework for NGA: ComReg has noted the importance of ensuring that the correct incentives are available to stimulate the evolution of demand and migration from legacy wholesale access to next-generation access, as appropriate. ComReg notes that this migration needs to be carefully managed, given the risk that current investments may not receive sufficient remuneration over the asset lifetime.

for communications or after the decision of the authority, European Commission or BAI, whichever is the later (ie, effectively a two-month period for mergers notified to the authority). At the end of this period, the minister for communications may decide to approve the media merger on the basis that it does not contravene the public interest test, approve the media merger with conditions or proceed to a Phase II examination.

It is proposed that Phase II should last no more than four months from the date of the Phase I decision. In addition, at any stage in the process (Phase I or II), the minister for communications would be entitled to look for further information and extend time limits by the time required to respond. In the event of a Phase II review, the report calls for the establishment of a five-person consultative panel, including experts in law, journalism, media, business or economics, to advise the minister for communications on the application of 'relevant criteria' (and to replace the existing role of the authority in this regard). At the end of Phase II, unless concluded in the intervening period by a ministerial decision, the minister for communications shall decide whether to approve, approve with conditions or block a media merger.



**Helen Kelly**  
**Claire Morgan**

**helen.kelly@matheson.com**  
**claire.morgan@matheson.com**

70 Sir John Rogerson's Quay  
Dublin 2  
Ireland

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

**GETTING THE DEAL THROUGH**



**Freshfields Bruckhaus Deringer**

**Annual volumes published on:**

- |                                   |                              |
|-----------------------------------|------------------------------|
| Air Transport                     | Licensing                    |
| Anti-Corruption Regulation        | Life Sciences                |
| Anti-Money Laundering             | Mediation                    |
| Arbitration                       | Merger Control               |
| Asset Recovery                    | Mergers & Acquisitions       |
| Banking Regulation                | Mining                       |
| Cartel Regulation                 | Oil Regulation               |
| Climate Regulation                | Patents                      |
| Construction                      | Pharmaceutical Antitrust     |
| Copyright                         | Private Antitrust Litigation |
| Corporate Governance              | Private Equity               |
| Corporate Immigration             | Product Liability            |
| Data Protection & Privacy         | Product Recall               |
| Dispute Resolution                | Project Finance              |
| Dominance                         | Public Procurement           |
| e-Commerce                        | Real Estate                  |
| Electricity Regulation            | Restructuring & Insolvency   |
| Enforcement of Foreign Judgments  | Right of Publicity           |
| Environment                       | Securities Finance           |
| Foreign Investment Review         | Shipbuilding                 |
| Franchise                         | Shipping                     |
| Gas Regulation                    | Tax on Inbound Investment    |
| Insurance & Reinsurance           | Telecoms and Media           |
| Intellectual Property & Antitrust | Trade & Customs              |
| Labour & Employment               | Trademarks                   |
|                                   | Vertical Agreements          |



**For more information or to purchase books, please visit:**

[www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com)



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



The Official Research Partner of the International Bar Association