

market intelligence

Telecoms & Media

Regulators remaining watchful
of consolidation

Global interview panel
covering key economies
led by Laurent Garzaniti

Regulatory developments • Major cases • Big Data • 2016 trends
Europe • North America • Asia-Pacific • Latin America

market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence

Getting the Deal Through
London
September 2016

Publisher: Gideon Robertson
Senior business development manager:
Adam Sargent
adam.sargent@gettingthedealthrough.com
Business Development Manager:
Dan Brennan
dan.brennan@gettingthedealthrough.com
Readership Development Manager:
Rosie Oliver
rose.oliver@gettingthedealthrough.com
Product marketing manager: Kieran Hansen
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Teya Humphris
Subeditor: Tessa Brummitt
Designer/Production editor: Robbie Kelly

Cover: iStock.com/Danil Melekhin

No photocopying. CLA and other agency licensing systems do not apply. For an authorised copy contact Adam Sargent, tel: +44 20 3780 4104

This publication is intended to provide general information on law and policy. The information and opinions which it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910
©2016 Law Business Research Ltd
ISSN: 2056-9025



Strategic Research Sponsor of the
ABA Section of International Law



In this issue

Global Trends.....	2
Austria	8
Belgium	14
Brazil	21
China	26
European Union.....	33
France.....	41
Germany.....	50
Hong Kong.....	57
India	63
Ireland	69
Italy	75
Netherlands	82
Russia	86
Spain	91
United Kingdom.....	98
United States	105

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



TELECOMS & MEDIA IN IRELAND

Helen Kelly is a partner and head of the telecommunications group and the EU, competition and regulatory group at Matheson. She advises on mergers and acquisitions in the telecommunications sector including merger control filings to the Competition and Consumer Protection Commission (CCPC) and the European Commission, as well as multi-jurisdictional filings. She also advises on competition and regulatory issues under the EU Regulatory Framework, including spectrum licensing, rights of access, interconnection, infrastructure sharing, number portability, consultations with the telecommunications regulator in Ireland, the Commission for Communications Regulation (ComReg) and the European Commission, regulatory dispute and complaints, and challenging the regulators' decisions in the courts.

Eoin Kealy is an associate in the EU, competition and regulatory group at Matheson. He specialises in advising on EU and Irish competition law, and on regulatory, public procurement, merger control and state aid law. Eoin joined Matheson from Ryanair, where latterly he was a manager with responsibility for EU and competition law. Eoin also previously worked at two Dublin-based law firms.

Eoin was part of a two-person competition team nominated for the International Law Office European Counsel Awards 2012 'Competition Team of the Year'.

Eoin is a member of the Law Society of Ireland, the Law Society of England and Wales, the Irish Centre for European Law, the Irish Society for European Law, and the UK State Aid Law Association.

GTDT: What were the key developments in communications and media regulation in your jurisdiction last year?

Helen Kelly & Eoin Kealy: A major development affecting Ireland and other EU member states in 2015 was the EU announcement of a new Digital Single Market initiative, which includes plans to reform existing telecoms rules and to negotiate common EU data protection rules. Following on from the 2013 Connected Continent package, which aims to create a single telecoms market, the European Parliament in October 2015 approved the introduction of a ban on roaming charges across the EU. Since 30 April 2016, operators in Ireland have faced a cap on what they may charge customers when roaming in the EU. This interim measure is to remain in place until the introduction of the ban in June 2017, although this deadline may be extended because of issues surrounding wholesale prices and costs to operators.

In Ireland, digital development remains a high priority and the government has placed a heavy focus on the National Broadband Plan, which aims to deliver high-speed broadband to 750,000 postal addresses across rural Ireland. The Plan will involve state aid given by Ireland to the successful bidder, subject to European Commission approval. The Plan was initially to be completed by 2020, but the Department of Communications, Energy and Natural Resources, which is responsible for overseeing the Plan, recently announced that delivery of the Plan could be delayed until 2022. Following the release of details regarding the scope of the Plan, Eir (Ireland's former incumbent telecoms operator) announced in mid-2015 that it would be rolling out broadband to 300,000 homes and businesses in remote areas included in the Plan that are currently without broadband access.

Last year, 2015, was the first full year of the new media merger review regime in Ireland, where media mergers are now notifiable to the Competition and Consumer Protection Commission (CCPC) and the Minister for Communications. The CCPC examines media mergers from a competition law perspective only, with the Minister for Communications applying a media plurality test in assessing whether the merger would be in the public interest.

Compliance continues to be a key priority for the Commission for Communications Regulation (ComReg). In 2015, ComReg opened 61 new compliance investigations and it also secured criminal convictions against Vodafone and Eir for offences related to overcharging customers. Vodafone was fined €10,000 and Eir was fined a total of €21,000. Eircom also paid a penalty of €2.5 million to ComReg in 2015 for failure to meet performance targets for the provision of Universal Service.

GTDT: Does sector-specific regulation – as opposed to the general competition regime – play a significant role in your jurisdiction? Is this expected to change?

HK & EK: Yes. While the CCPC is the statutory body charged with the protection of competition and consumer affairs and sole responsibility for merger approval in non-EU Merger Regulation cases, ComReg is responsible for the regulation of the electronic communications sector. ComReg has co-competition powers with the CCPC that enable it to pursue issues arising in the electronic communications sector under competition law, and to take action in respect of anticompetitive agreements and abuse of dominance.

The main Irish legislative provisions governing the provision of electronic communication services (ECS) and electronic communication networks (ECN) are contained in the Communications Regulation Acts 2002–2011, while secondary regulations transpose the European telecoms regulatory package.

Under the Irish telecoms regulatory regime, there is a general right to provide an ECN or an ECS provided certain conditions are complied with. No distinction is made as to the type of network or service (mobile, fixed or satellite). The notification procedure for obtaining a general authorisation is straightforward and involves the completion of a notification form. Operations can be commenced once a properly and fully completed notification has been received by ComReg. A notifying party is, however, immediately subject to the Irish regulatory regime and the conditions set out in the general authorisation.

The European Commission launched a public consultation on the review of the regulatory framework for ECS and ECN in September 2015, driven by the structural changes to ECS and ECN in the past number of years. The convergence of fixed and mobile networks and the emergence of over-the-top (OTT) providers and retail bundling have challenged the model of traditional providers of ECS and ECN. It remains to be seen if the regulatory regime in Ireland (and across all member states) will change in the short to medium term.

GTDT: What is the attitude to net neutrality in your jurisdiction?

HK & EK: Regulation (EU) 2015/2120 introduced EU rules on net neutrality and the abolition of roaming charges in the EU. The Regulation, which was adopted on 25 November 2015 and became applicable as of 30 April 2016, introduces common rules on open internet access and distribution rights across the EU, and will help to develop consistency in telecoms regulation across Europe. While there has been some criticism of the Regulation, particularly as regards

the number of exceptions to equal treatment of data, the Regulation nonetheless represents a major achievement in the EU's Digital Single Market initiative.

As a result of the Regulation, ComReg is under an obligation to monitor and assess traffic management, commercial practices and agreements to oversee that the quality of the open internet reflects market standards and technological advances. ComReg will also be responsible for the enforcement of net neutrality rules in Ireland. In June 2016, the Body of European Regulators for Electronic Communications released draft Guidelines on practical implementation of the net neutrality rules, which were open to public consultation until 18 July. The Regulation and Guidelines have led to some debate around uncertainty of qualifying 'specialised services' (services that require some form of network optimisation to function properly) and zero rating.

GTDT: What is the regulator's approach to over-the-top services?

HK & EK: ComReg has not developed a formal position in relation to OTT services and, for example, does not report unmanaged voice over broadband services by providers such as Skype. However, OTT services now account for a very high percentage of total fixed and mobile usage and figures from ComReg suggest 'data' remains on an inexorable upward curve in Ireland (with mobile data usage volumes continuing to rise, increasing by 61.5 per cent from Q1 2015 to Q1 2016). This is in sharp contrast to the declining figures in the same period for SMS, which now finds itself in competition with OTT message services such as WhatsApp, Viber and Facebook Messenger.

In our view, the next few years will be shaped by the continued challenge of the internet giants (such as Facebook, Apple and Google) seeking to cross over into the traditional telecoms space. With increasingly dynamic performance and platforms available, the challenge for ComReg and telecoms operators operating in Ireland will be to ensure a smooth and safe delivery of those services by focusing on issues such as data protection, cybersecurity and ease of access.

GTDT: Has there been any recent granting of spectrum? Are any significant grants planned in the near future?

HK & EK: ComReg recently published a spectrum management strategy for the period 2016–2018, setting out its current thinking on the effective management and efficient use of the radio spectrum (including the making available of additional spectrum rights and trading of spectrum rights). The strategy notes that, based on 2014 data, the use of the radio spectrum is

estimated to make a contribution of €4.7 billion (2.5 per cent) to Ireland's GDP.

The strategy notes that the expiry of existing spectrum licences in various bands over the six years from 2015–2021 highlights the need to focus on key factors affecting the reassignment process including end-user demand, harmonisation status, equipment availability and the availability of related spectrum bands.

ComReg is currently engaged in a consultation process regarding a proposed 3.6GHz band spectrum award. ComReg has proposed a combinatorial clock auction format, which it also used in the major 2012 multiband spectrum auction. Existing 3.6GHz licences expire in July 2017 so it is expected that ComReg will wish to ensure certainty on the future of the 3.6GHz band before this date.

GTDT: How has the debate about 'big data' played out in your jurisdiction? What has the debate focused on?

HK & EK: The focus has primarily been on the principle of fair processing of personal data and the applicable requirements set down by data protection legislation, and whether the use of personal data in a big data context can be seen as satisfying those requirements. The debate has encompassed discussion on whether the anonymisation of personal data presents a viable solution to this (the argument being that anonymised data falls outside the scope of data protection rules), though achieving true anonymisation can prove difficult.



Eoin Kealy



“The efforts of the European Commission and the US Department of Commerce to agree the proposed Privacy Shield as a replacement for Safe Harbor are being closely watched.”

iStock.com/guysargent

Another area of focus relates to the means available to legitimately transfer personal data outside the EEA. This was precipitated by the CJEU’s striking down of the EU–US Safe Harbor agreement last year. The CJEU judgment arose from a referral of the *Schrems v Data Protection Commissioner* case from the Irish High Court. The efforts of the European Commission and the US Department of Commerce to agree the proposed Privacy Shield as a replacement for Safe Harbor are being closely watched, in particular by multinationals who had previously relied on the latter to legitimise their transfers of personal data to the United States.

Businesses involved in big data, and indeed all business sectors, are now also turning their attention to the EU General Data Protection Regulation (GDPR), the text of which was finally approved this year. The GDPR will be directly applicable in Ireland and across the EU from 25 May 2018, and seeks to harmonise the data protection laws of member states. The GDPR will operate to enhance the data protection rights of individuals and a core aim is also to facilitate businesses operating in the digital single market. One of the more significant aspects of the GDPR is the substantial increase in fines for non-compliance (which, once the GDPR comes

into effect, can be up to 4 per cent of worldwide turnover or €20 million, whichever is higher).

GTDT: *What about media plurality? How have policymakers and regulators addressed this issue?*

HK & EK: The Competition and Consumer Protection Act 2014 introduced a new regime for media mergers in Ireland, whereby media mergers are now subject to notification to both the CCPC and the Minister for Communications, regardless of turnover. The 2014 Act introduced a statutory test that enables the Minister for Communications to block media mergers that would be contrary to the public interest in protecting media plurality. Additionally, the Broadcasting Authority of Ireland (BAI) now plays a formal role where the Minister for Communications opens a full Phase II investigation into a media merger but this has not yet occurred in practice.

The CCPC continues to adjudicate on media mergers from a competition perspective, while the Minister for Communications will consider certain ‘relevant criteria’ to assess the likely effect of the merger on the plurality of media in the state. The relevant criteria are codified and include, inter alia, the undesirability of allowing one undertaking to hold significant interests

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

In the telecoms and media sectors, clients demand technical expertise, plus an understanding of the regulator's perspective, rigour in analysis – leaving no stone unturned in terms of available options – as well as commerciality and timeliness of advice. It is crucial that legal advisers understand their clients' businesses and take a proactive approach in identifying issues that could be of relevance to a client's future business plans, and working through solutions to these issues with the client in advance of issues materialising. Matheson prides itself on delivering on these skills and qualities.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

Understand the sector – advisers need to be able to understand the key challenges faced by business in the area and the policy drivers and priorities of regulators.

What were the most interesting or challenging cases you have dealt with in the past year?

While the acquisition by Three of O2 was the biggest telecommunications transaction in Ireland of the past few years, the recently announced acquisition by News Corp of Wireless Group plc is an interesting development in the media sector and is indicative of the continued trend towards consolidation. This acquisition is subject to clearance from the CCPC and the Minister for Communications under the media plurality regime introduced by the 2014 Act.

Helen Kelly & Eoin Kealy
Matheson
Dublin
www.matheson.com

within a sector of media business, the promotion of media plurality and the adequacy of the existing state-funded broadcasters to protect the public interest in plurality of the media in the state.

At present, there have been eight media mergers notified to the Minister for Communications under the new regime. The average clearance period is 21 days and the majority of the mergers notified have related to the television sector. The Minister's decisions are made publicly available; however, they have been unsatisfactorily brief and lacking in insight into the Minister's reasoning or assessment of the criteria. So far all media mergers notified have been cleared, but it may be the case that the Minister will offer more detailed analysis in the event that clearance is refused in the future.

On 22 June 2016, the Department of Communications published the Report on Ownership and Control of Media Businesses in Ireland 2012–2014, completed by the BAI. The BAI is obliged under the 2014 Act to prepare a report on the ownership and control arrangements for media businesses in Ireland and the effect of any changes in ownership and control on media plurality. The BAI report concluded that the limited changes to the ownership and control of media businesses in Ireland in the period 2012–2014 led to no material impact on media plurality. Interestingly, the BAI report states that

the increase in the shareholding of Denis O'Brien in Independent News & Media from 22 per cent to 29.9 per cent during the period of review did not affect media plurality as the pre-existing shareholding of 22 per cent was already significant enough to grant Denis O'Brien material influence.

GTDT: Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?

HK & EK: Yes. In 2014 there was a major consolidation in the telecoms sector in Ireland with the merger of Three and O2 Ireland. This was a 'four-to-three' merger scenario that was subject to a lengthy Phase II investigation by the European Commission and received clearance subject to certain conditions, including providing a package for two MVNOs to enter the market. Matheson acted for Three on this deal.

On the media side, there was the launch by UTV Media plc of an Irish TV channel (UTV Ireland) in January 2015 with the subsequent announcement in October 2015 of the purchase of UTV Ltd by ITV plc, which completed in February 2016. The latter half of 2015 also saw UPC Ireland rebrand as Virgin Media, both companies being subsidiaries of Liberty Global. Around the same time, UPC bought the television channel TV3

“ComReg will continue to be aggressive in enforcement, continuing its strong consumer-focused approach to ensuring a ‘fair’ and competitive communications market.”

for €87 million. The deals can be seen as an investment in the continued growth of the Irish media market.

On 30 June 2016 News Corp announced its acquisition of Wireless Group plc, which will be subject to clearance from the CCPC, the Minister for Communications and the BAI. On 11 July 2016, Virgin Media announced its purchase of UTV Ireland from ITV plc. We expect further consolidation in Ireland’s media industry in the coming years.

The BAI report identified in our response to the question on media plurality set out the following three changes of ownership and control of media businesses in Ireland during the period 2012–2014: Mediaforce’s acquisition of the Johnston Press portfolio of local newspapers; Thomas Crosbie Holdings entering receivership and its media holdings being acquired by Landmark Media Investments Limited, a new company controlled by the Crosbie family; and the five Dunfermline Press local newspapers being acquired by Celtic Media.

None of these three transactions were found to have a material effect on media plurality in Ireland.

GTDT: *Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?*

HK & EK: While the CCPC and ComReg are both charged with competition powers, there have been few major antitrust cases in the communications sector in Ireland. In October 2014, the CCPC closed an investigation into the manner in which pricing for An Post’s Zonal Pricing Scheme for its publications service was implemented. The investigation was based on the preliminary view

that An Post was likely to be dominant on the market for the delivery by post of newspapers and periodicals presented in bulk. Following amendment of An Post’s pricing procedures the CCPC closed the investigation without taking further action.

GTDT: *What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?*

HK & EK: The introduction of the 2014 Act has led to the beginnings of a shake-up in the media regulatory landscape, with new powers and new roles for the CCPC, the BAI and the Minister for Communications. We expect that a number of challenging decisions will face regulators over the next few years as media businesses seek to continue the trend towards consolidation. However, it remains to be seen what effect the Brexit referendum result may have on consolidation involving UK purchasers.

In light of the enforcement action taken by ComReg in 2015 against a range of telecoms providers (including Eircom, Vodafone and Meteor), we anticipate that ComReg will continue to be aggressive in enforcement, continuing its strong consumer-focused approach to ensuring a ‘fair’ and competitive communications market through initiating compliance investigations or prosecutions more regularly. Business leaders should ensure that they not only understand their regulatory obligations, but are also able to demonstrate compliance if the need arises.

The next few years are likely to be dominated by continued direction from Brussels regarding implementation of new provisions related to the Digital Single Market and the Connected Continent package, and possible revision of telecoms regulatory rules. The National Broadband Plan will be one of the key focus areas for the telecoms market in Ireland over the next few years, with considerable scrutiny expected regarding the award process and the identity of, and state aid given to, the winning bidders. We expect there will continue to be much debate surrounding the drive towards a single telecoms market across the EU and the trend towards the convergence of telecoms and TV services through increased retail bundling will continue to drive the conversation about ensuring regulators adopt an investor-friendly approach in a rapidly changing market. The effect of Brexit on the Irish communications and media landscape remains to be seen but greater uncertainty may lead to less investment by undertakings with significant UK operations.

Also available online



www.gettingthedealthrough.com



*Official Partner of the Latin American
Corporate Counsel Association*



*Strategic Research Sponsor of the
ABA Section of International Law*