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Telecoms and Media

An overview of regulation in 46 jurisdictions worldwide

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Contributing editors: Laurent Garzaniti and Natasha Good

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Telecoms and Media 2012

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Communications policy

1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure?

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 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).

A number of changes have recently been 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).

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. A new bill amending the current legislation on media mergers is expected to be published in 2012. It is expected that this 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 contract, TV3. These 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 contracts in respect of various television programme services, for example, digital, satellite and cable-MMD content contracts.

A digital terrestrial television (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, suggesting that a more realistic time frame would be at or just before analogue switch off on 24 October 2012. The BAI has so far been unsuccessful in negotiating contracts for commercial DTT, and has stated that it will not be feasible to introduce commercial DTT in advance of the analogue switch-off. However, the BAI has noted that a competition may potentially be held in 2012 with a view to commercial DTT being operational in 2013.

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.

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. 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. A new 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?

In July 2006, Eircom was designated as the universal service provider (USP) for a four-year period ending in June 2010. In June 2010, ComReg confirmed the re-designation of Eircom as the USP for a further two-year period (see below). The universal service obligation (USO) applies only to basic telecoms services and does not apply to Next Generation Access and VoIP.

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).

Following on from Eircom's designation as USP, 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;
- 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.

In 2010, ComReg notified Eircom that it was not satisfied with the quality of service provided by Eircom in the provision of the USO. Eircom has subsequently committed itself to undertake a quality of service performance improvement programme. Implementation of the programme has been underpinned by Eircom by way of establishment of a €10 million performance bond. In the period July 2010 to June 2011 Eircom paid €115,000 to ComReg arising from its failure to achieve the relevant targets. ComReg has confirmed that no further action would be taken against Eircom in respect of that period, but reserved the right to take future action (ComReg Document No. 11/79, dated 2 November 2011). 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, although Eircom has informed ComReg that it intends to submit an application for funding in respect of its USO for 2009/2010. The deadline for its application has now been pushed back to 31 May 2012, and ComReg intends to publish its determination within eight months of the application. Eircom's application for funding for 2010/2011 has also been extended to 31 March 2013.

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 proposes to issue a draft decision on a USO fund in the first quarter of 2012, with a view to publishing a final decision at the end of the second quarter of 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, there are currently only four owners of 3G spectrum in Ireland: Meteor, O2, Vodafone and H3GI (see question 21 on the upcoming spectrum 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, structural separation could potentially be imposed as a remedy in cases entailing an abuse of dominance contrary to section 5 of the Competition Act 2002 (as amended).

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 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 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 & 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.

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 Wire-

less Telegraphy (Interim GSM Mobile Telephony Licence) Regulations 2011. These interim licences will expire on 31 January 2013. 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.

ComReg is proposing to hold an open auction for the entire spectrum in the 800MHz, 900MHz and 1800MHz bands on a liberalised basis at some point in 2012. To accommodate the current pattern of licence assignments, spectrum will be 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 21.

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 of are also payable in respect of radio frequency licences issued in accordance with the Wireless Telegraphy Acts. These fees vary in size.

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.

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 imposed a retail price cap on Eircom on each of the higher and lower-level access services for a period of 12 months from the start date of the proposed price cap, and a Consumer Price Index (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. 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 in October 2011 proposing to revise the net revenue test.

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 ECSs 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 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.

Until recently, 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 have 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 has indicated that it does not propose to take any further enforcement action.

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).

19 Next-Generation Access networks

How are NGA networks regulated?

In July 2007, ComReg released a Position Statement on Regulatory Aspects of Next Generation Networks (NGNs) (ComReg Document No. 07/40) in which it stated that it was keen to ensure that any perceived regulatory uncertainties associated with the roll-out of NGNs did not undermine investment in relation to existing competition on the current suite of wholesale regulated products. ComReg is particularly keen to ensure that recent progress on local loop unbundling (LLU) is not undermined. LLU is one of the access obligations imposed on Eircom following ComReg's finding that it had SMP on the market for wholesale unbundled access to metallic loops and sub-loops (see question 29).

Wholesale Physical Network Infrastructure Access (WPNIA)

As discussed in further detail in question 29, below, following revisions by the European Commission to its 2007 Recommendation on relevant markets, the market for wholesale unbundled access to the metallic loops and sub-loops has been redefined by ComReg as the market for wholesale network physical infrastructure access (WPNIA), including shared and fully unbundled access, at a fixed location. The new market includes WPNIA products provided over next generation fibre network infrastructure and its associated facilities at a fixed location. In May 2010, ComReg designated Eircom as having SMP in the WPNIA market (ComReg D05/10 of 20 May 2010). As a result of the SMP designation, ComReg imposed a number of specific regulatory obligations on Eircom in respect of next-generation WPNIA (fibre and associated facilities).

Next-Generation Broadband

ComReg's Information Notice on Next-Generation Broadband (NGB) in Ireland (ComReg Document No. 09/88) set out a list of principles regarding ComReg's policy on NGB. These include the adoption of a technology-neutral approach in considering NGB regulatory issues; the promotion of effective and sustainable competition at both the network and service levels through the application of appropriate regulatory remedies (where necessary) that take into account collaborative industry or individual approaches that eliminate bottlenecks; and recognition of the uncertainty and risks faced by service providers in making efficient NGB investments.

In its review of the market for WBA (ComReg Document No. 11/49) ComReg noted the access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations were to continue to be imposed on Eircom, both in relation to current-generation and next-generation services. Although ComReg has imposed detailed remedies on current generation services, only high level remedies have been imposed on next generation services. As mentioned above, ComReg launched a consultation on NGA Remedies on Wholesale Markets on 26 May 2011, and intends to finalise regulatory measures for NGA remedies by early 2012.

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 concept 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.

20 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.

Premium Rate Services (PRS)

PRS are goods or services, typically content, that can be bought or accessed by charging the cost to the buyer's fixed or mobile phone bill – for example, traffic and travel information, weather forecasts, sports results and competitions. Section 15 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 requires ComReg to publish a Code of Practice to be followed by providers of PRS with respect to the provision,

content and promotion of PRS. The code of practice prepared and published by RegTel (the previous regulator of PRS) in October 2008 continues as the code of practice to be observed by providers of PRS until a new replacement code is published by ComReg). In July 2011 ComReg published a draft code of practice, with the following proposed provisions:

- a requirement that pricing information is provided as prominent, 'stand-alone' information;
- the setting of an expenditure limit at €60, in addition to separate expenditure limits for children's services; and
- a requirement for consumers to provide positive confirmation before subscribing to a PRS that will impose a recurring charge.

ComReg also noted that it intends to introduce a new set of regulations which will repeal and replace the Communications Regulation (Licensing of Premium Rate Services) Regulations 2010.

In its end-of-year review for 2011, ComReg highlighted the upcoming spectrum auction, the regulation of NGA networks, proposals for the future evolution and financing of Universal Service in telecommunications and developments in PRS legislation as key tasks for ComReg in 2012.

Telecoms regulation – Mobile

21 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.

To date, with the exception of the award of the first mobile telephony licence, the award of all mobile telephony licences has been by way of comparative evaluation processes. The spectrum licence award process will depend on the level of demand for licences and whether this exceeds the number of licences that can be accommodated in the available spectrum. If demand exceeds supply, ComReg may consider an appropriate comparative evaluation process. ComReg has 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. However, ComReg has indicated 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 was limited. ComReg states 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 has decided to hold an open auction for liberalised use of the entire spectrum in the 800MHz, 900MHz and 1800 MHz bands in 2012.

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 below at question 22.

22 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.

The 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 following the commencement of new regulations on 1 July 2011. 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.

Therefore, in the upcoming auction in respect of liberalised spectrum in the 800MHz, 900MHZ and 1800MHz bands ComReg will award all new licences 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.

23 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 under-

takings 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 has yet to set out its procedures for the transfer or lease of spectrum rights of use as specified under Regulation 19 but has stated that it intends to issue a public consultation on this issue during 2012 and that it sees spectrum trading as an important right that spectrum rights holders should have. ComReg has noted on various occasions that any spectrum trading would have to comply not just with electronic communications law but also competition law.

In its Response to Consultation and Draft Decision relating to Multi-Band Spectrum Release (ComReg Document No. 11/60) of 24 August 2011, ComReg noted that it expects spectrum trading to apply in due course to the three bands included in the upcoming auction (ie, 800, 900 and 1800 MHz), and is to set out separately its proposals on this matter in due course. Under Regulation 9(5) of the Authorisation Regulations, ComReg 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. It is expected that ComReg will specify that the allocations arising out of the upcoming spectrum auction are transferable, and lay down conditions for transfer of that spectrum. In its Strategy for Managing the Radio Spectrum 2011 – 2013 (ComReg Document No. 11/89) dated 22 November 2011, ComReg stated that it had initiated a project team tasked with establishing procedures and measures required to implement spectrum trading in Ireland and confirmed that it would issue a consultation on such matters during the time period of the strategy statement, ie, before 2014.

24 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.

25 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. Vodafone, O2, Meteor and H3GI are designated as having SMP in the market for wholesale voice call termination on individual mobile networks. ComReg has imposed access obligations, non-discrimination obligations, price control and transparency obligations on Vodafone, O2, Meteor and H3GI. It has, in addition, imposed accounting separation and cost accounting obligations on Vodafone and O2.

ComReg published an Information Notice in October 2010 noting further reductions in mobile termination charges by Vodafone, O2, Meteor and H3GI (ComReg Document No. 10/82), whereby these operators agreed to reduce their maximum mobile termination rates until the end of 2012.

26 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 European Union 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 provides 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, requires 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) was published in the EU Official Journal on 29 June 2009 and entered into force on 1 July 2009. The Revised Roaming Regulation, inter alia, introduces 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 was transposed into national law by the Communications (Mobile Telephony Roaming) (Amendment) Regulations 2010 (SI No. 156 of 2010).

As discussed above, the EU Roaming Regulation requires that basic personalised tariff information must be sent to an individual's mobile phone once they enter another EU member state. As from 1 July 2009, the message had to also include pricing for SMS and data roaming (to include MMS pricing). Basic personalised tariff information had to be sent to consumers when they initiated a data-roaming session. By 1 March 2010, operators were required to offer customers (free of charge) a facility to opt for financial or volume limitation on data roaming usage (whereby the financial limit must not exceed €50). By 1 July 2010, the €50 limit was required to be set as a default for data roaming usage. From 1 July 2010, operators were no longer allowed to charge customers additional roaming costs for listening to voicemails abroad.

The Revised Roaming Regulation expires on 30 June 2012. On 6 July 2011 the Commission published its report on the functioning of the existing legislation and its proposals for legislative revisions, including the following:

- retention of wholesale price caps to June 2022 and retail price caps to mid-2016;
- introduction of retail price caps for data roaming and glide paths to 2014 on wholesale and retail data roaming prices;
- retention of 'bill shock' measures; and
- structural measures to allow users to contract for roaming services with an alternative provide and to facilitate market entry by introducing a duty to meet all reasonable requests for wholesale access.

These proposals are currently bring considered by the European Parliament and Council.

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 time frames. ComReg's most recent Information Notice (eighth wave of Irish and EU aggregated roaming data, ComReg Document No. 11/103) shows that Irish mobile phone networks were in compliance with EU Roaming Regulations for the period 1 January 2011 to 30 June 2011.

In December 2011 ComReg commenced proceedings in the Commercial Court against Vodafone Ireland Limited over alleged breach of the 'bill shock' measures; specifically, failure to implement a 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.

27 Next-generation mobile services

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

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 21, above, during the course of 2012, ComReg is to hold an open auction for liberalised use of the entire spectrum in the 800MHz, 900MHz and 1800MHz bands. ComReg intends to auction off 28 blocks (2 x 5MHz for each block) of spectrum in these bands and the new licences will 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.

In a Draft Information Memorandum issued in respect of this Multi-Band Spectrum Release in October 2011, ComReg is proposing to set the same coverage requirements for new licensees in the three bands, but with asymmetric roll-out targets to assist new entrants. ComReg is proposing a coverage roll-out target of 70 per cent of the population of Ireland within three years of the licence commencement date for existing MNOs. New entrants will be given extra time to achieve this target (seven years from the commencement date) with an interim coverage obligation of 35 per cent of the population within three years of the commencement date.

Please see question 21 in relation to the upcoming spectrum auction.

Telecoms regulation – fixed infrastructure

28 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).

29 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 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 has imposed a price-control obligation on Eircom to offer cost-oriented 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 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 has been adopted by ComReg in respect of the maximum monthly rental price for SLU, which it has required be reduced by Eircom to €10.53. The revised charges are based on bottom-up long-run average incremental costs.

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 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 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). 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.

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 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 D05/10) in which it concluded that the WPNIA product market is comprised of:

- 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 which 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. Following on from the SMP designation in the WPNIA market, Eircom voluntarily agreed to reductions in its LLU and bitstream ancillary charges (ComReg Document No. 11/20).

Pursuant to the above SMP designation, Eircom is obliged to comply with the following obligations with respect to the provision of next-generation WPNIA products and services:

- an obligation to meet reasonable requests for access to, and use of, specific WPNIA network elements and associated facilities;
- an obligation to negotiate in good faith with OAOs requesting access;
- transparency obligations, including the requirement to make publicly available, on a quarterly basis or such other suitably regular basis as may be specified by ComReg, information regarding the introduction of new infrastructures, technologies, services or facilities which could reasonably be expected to support services or facilities in respect of Next Generation WPNIA;
- non-discrimination obligations;
- price-control and cost-accounting obligations;and
- obligations concerning accounting separation.

In light of the uncertainty surrounding the nature and timing of next-generation WPNIA, ComReg has not specified in its decision how the above obligations are to be implemented by Eircom but intends to consult further on the implementation of next-generation WPNIA remedies.

On 10 October 2011 ComReg published a consultation paper on price control in the retail fixed narrowband access, WPNIA and wholesale broadband access markets (ComReg Document 11/72) in order to ensure that potential anti-competitive behaviour by Eircom, with SMP, is mitigated through ex ante regulation. As noted above, Eircom is currently subject to a regulatory obligation in the WPNIA market not to unreasonably bundle its products and cause a margin/price squeeze. 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 consultation proposes the further specification of this margin/price squeeze obligation by proposing a margin/price squeeze based on a reasonably efficient operator.

In relation to next-generation networks, as mentioned in question 19, ComReg published a preliminary consultation paper on 26 May 2011 (ComReg Document No 11/40) on NGA Remedies in Wholesale Regulated Markets (specifically, the WPNIA and WBA markets), with a view to finalising regulatory proposals in relation to NGA by early 2012.

30 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 four of Ireland's mobile network operators in respect of wholesale termination services (see question 25). 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.

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 29). ComReg has imposed certain access obligations on Eircom under Decision Notice 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 29 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.

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 29 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 29, 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 came into effect on 1 April 2011.

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-oriented. 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.

Pursuant to ComReg Decision D07/61, Eircom has an obligation not to unreasonably bundle retail fixed narrowband access with other retail services. At present, the obligation not to unreasonably bundle services includes that Eircom 'must ensure that any bundle avoids a margin squeeze and passes a net revenue test'. A consultation was launched on 10 October 2011 (ComReg Document 11/72), which proposes to revise the current net revenue test so that the test remains appropriate and can be sufficiently responsive to the underlying competitive conditions that Eircom and OAOs may face over the forthcoming period.

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 and next generation WBA, including obligations to provide access, transparency obligations, non-discrimination obligations, accounting separation obligations and obligations relating to price control and cost accounting. 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 sets out a revised indicative range of the minimum price floor for Eircom's monthly bitstream rental products in the WBA market.

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. This decision was subsequently appealed by Eircom; however, Eircom 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 2007, ComReg designated Eircom as having SMP in the market for wholesale call origination and transit, and in the market for wholesale call termination. Eircom has a number of obligations in those markets. The obligations imposed included an access obligation 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-oriented.

In September 2011 (ComReg Document 11/67) ComReg published a further decision which, among other things, amended the price control obligation to include an obligation not to margin-squeeze and requires Eircom to provide certain pricing information to Eircom.

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 19, 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 19, 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). Provision has been made to allow the Regulator to specify minimum quality of service standards, eg, in relation to connectivity. 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 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 Rural Broadband Scheme 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 scheme will operate in a number of phases, with applications being accepted over an initial three-month period. This will be followed by a process of verification with internet service providers to assess whether any of the applicants can be served by the market without Government intervention. Some applicants may obtain a service during this phase of the scheme and it is expected the process will take about six months.

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), 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.

Prior to the establishment of the BAI, the then-responsible body – the BCI – issued an ownership and control policy statement in which it sets out its policy on cross-ownership, which included objectives to:

- promote plurality of ownership in the communications media, with particular reference to radio and television services;
- promote diversity in viewpoint, outlet and source;
- ensure that broadcasting contracts are held by persons who have available to them the necessary character, expertise, experience and financial resources; and
- ensure that the ethos of a broadcasting service is such that it will best serve the needs of the audience it is licensed to service.

Under its ownership and control policy, the BCI interpreted an undue amount of communications media as 'more than a reasonable share of the range of communications media available to audiences in the franchise area'. The BCI's interpretation of an undue number of sound broadcasting services was that more than 25 per cent of

total services licensed would be unacceptable. Less than 15 per cent would be acceptable and the range in between requires careful consideration. As stated in question 3, the BAI is now responsible for the functions previously carried out by the BCI and the BCC. The BAI has stated on its website that all policies and publications previously developed by the BCI remain valid.

In addition, the media merger rules of the Competition Act 2002 (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) makes a series of recommendations as to how the existing rules relating to media mergers under section 23 of the Competition Act, 2002 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 recommends 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 recommends 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 are 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'. The Broadcasting Act (see question 3) sets out the objectives of the proposed BAI and these objectives include the promotion of diversity in the control of the more influential commercial and community broadcasting services.

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 BCAI. There is no timescale provided for in the Broadcasting Act 2001 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 to RTE a licence 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 BCI (now 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, a more realistic time frame would be at or just before analogue switch-off in 24 October 2012. The BAI has so far been unsuccessful in negotiating contracts for commercial DTT, and has stated that it will not be feasible to introduce commercial DTT in advance of the analogue switch off. However, the BAI has noted that a competition may potentially be held in 2012 with a view to commercial DTT being operational in 2013.

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 BCI (now 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 BCI (now 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.

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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 (eg, online, mobile content) 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).

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 times 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.

Prior to 2009 and the establishment of the BAI, the then-responsible body (the BCI) previously issued codes under the Broadcasting Act 2001 in relation to children's advertising (Children's Advertising Code, January 2005) and general advertising (General Advertising Code, April 2007). These Codes remain in force following the repeal of the 2001 Act by the Broadcasting Act 2009; however, in 2009 the BAI issued a consultation document (Draft Codes on Audiovisual Commercial Communications) in relation to the revision of the 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). On 10 June 2010, the BAI published a General Commercial Communications Code (advertising, teleshopping, sponsorship, product placement and other forms of commercial promotion).

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 European 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.

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 thus a form 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, (ie, 'must-carry obligations')? 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 to 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.

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, 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 internet 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 audiovisual industry that extends to all audio-visual media services. The scope of the Directive has been widened and the definition of 'audiovisual 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 ads 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?

As mentioned in question 3, the digital switchover will take place on 24 October 2012. The DCENR completed a DTT pilot programme in August 2008 to identify issues associated with the national roll-out of DTT in preparation for analogue switch-off. Following completion of the trial, Ireland (like France, Sweden and Norway) will adopt the latest digital television technology, MPEG4, which offers high-definition services and more space for content.

The 800MHz band is currently used for analogue terrestrial television services. The Broadcasting Act makes provision for the potential to use the surplus spectrum that will be freed up as a result of analogue switch-off and ComReg launched a public consultation

in March 2009 to consider and consult on the possible uses for Ireland's digital dividend spectrum. As discussed in question 21, the 800MHz band is to be included in the upcoming auction (along with 900MHz and 1800MHz) for use in electronic communications services, although it will not be available for use by successful bidders until after the analogue switch-off on 24 October 2012.

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.

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. 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 or 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.

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 jus-

tice 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 (eg, by e-mail, SMS)? 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 2002. Sections 4 and 5 of the Competition Act 2002 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 2002, ComReg and the BAI are 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 2002. 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 2002 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 EC Merger Regulation may be examined pursuant to part 3 of the Competition Act 2002 (as amended). 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 who '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 2002. 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 minister for communications announced that he is working with the Department of Job, Innovation and Enterprise with a view to introducing changes to the 2002 Act in order to, inter alia, amend provisions dealing with media mergers. It is expected that the amendments to the 2002 Act will involve adopting many of the recommendations in the Report. The most significant recommendations are:

- A new notification system for media mergers, whereby a separate notification would be made to the minister 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 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).

The minister for communications stated in early February 2012 that it is expected that draft legislation will be published in the first half of 2012.

No media merger has been blocked by the Competition Authority or the minister under the 2002 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 a 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.

Update and trends

The hot topic in Irish telecoms at the moment is the upcoming spectrum auction for liberalised spectrum in the 800, 900 and 1800MHz bands which should encourage investment from operators and result in a new era of advanced wireless services including fast, high capacity mobile broadband, with the 800MHz and 900MHz spectrum bands in particular being highly suitable for advanced mobile services and roll out for 4G/LTE services.

Other key areas of interest for 2012 are:

- the proposed new legislation on media mergers, which is expected to be implemented at some point in 2012;
- development of regulation for next generation networks;
- proposals for the future evolution and financing of universal service obligations; and
- developments in premium-rate services legislation.

Other

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?

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

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

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 one would last until 30 days after the date of notification to the minister 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.

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