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COMMUNICATIONS REGULATION (AMENDMENT) ACT 2007 - COMREG'S POWERS ENHANCED AS REGULATORY FRAMEWORK IS COMPLETED

Summary

ComReg's powers of enforcement under the provisions of the 2003 electronic communications regulatory framework have been significantly enhanced with the introduction of the Communications Regulation (Amendment) Act 2007. This Act, which amends existing communications and competition law, increases the regulator's powers of investigation, endows ComReg with a role similar to that of the Competition Authority insofar as the communications sector is concerned and creates the prospect of large financial penalties being imposed on undertakings which fail to comply with their regulatory obligations.

The Communications Regulation (Amendment) Act 2007 (the "2007 Act"), which, with minor exceptions, came into operation on the 15th May 2007, has armed the Commission for Communications Regulation ("ComReg"), the statutory body responsible for the regulation of the electronic communications sector in Ireland, with a plethora of new investigative tools and enforcement powers to assist it in the performance of its functions.

The 2007 Act significantly enhances the regulator's ability to hold undertakings to account in complying with their regulatory obligations, largely through amendments to the existing Communications Regulation Act 2002 (the law under which ComReg was established) and the Competition Act 2002.

The 2007 Act is a direct response to ComReg's long-held claim that a lack of enforcement powers frustrated its ability to promote competition in the sector and implement fully the regulatory regime in Ireland.

The principal changes made to the law by the 2007 Act are outlined below.

Information Gathering and Investigative Powers

ComReg's already broad powers of investigation and information gathering under the Communications Regulation Act 2002 and the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 have been increased under the 2007 Act.

- ComReg now has a general obligation to carry out investigations into matters relating to the supply of and access to electronic communications services, networks and associated facilities under the Communications Regulation Act 2002. Prior to the 2007 Act, ComReg was limited to investigating complaints made by consumers and undertakings; now provision is made for it to carry out investigations on its own initiative. In addition, ComReg is obliged to collect, compile, extract, disseminate and publish information relating to these matters 'for the purpose of contributing to an open and competitive market' and for statistical purposes.
- If ComReg has reasonable grounds to believe that a person may be able to give evidence or produce a document that relates to a matter concerning the performance or exercise of any of ComReg's functions, it may serve on that person a notice requiring the person to appear before it to give such evidence or produce such a document for examination. Persons appearing before ComReg may be required to swear an oath or make an affirmation and may be accompanied by legal representatives. Generally, proceedings will be in private, although there is provision for public hearings to be held also if the person giving evidence seeks this or ComReg determines that this would be in the public interest. (This is analogous to similar powers available to the Competition Authority). It is a summary offence for a person not to attend to give evidence or produce a document having been required to do so, to refuse to swear an oath or make an affirmation, or to refuse to give evidence or answer a question or produce a document when required to do so (unless there is a reasonable reason for the refusal in question - for example, where compliance would incriminate the person or expose him

or her to a penalty). A person appearing before ComReg has the same protections and is subject to the same liabilities as a witness in the High Court.

- Both the Minister for Communications, Energy and Natural Resources and ComReg may require individual undertakings to provide them with written information concerning the technical operation or performance of electronic communications networks, services and infrastructure, where such information is necessary to enable the Minister to formulate policies and plans to deal with emergencies and network security issues. Undertakings which fail to comply with such requirements or which provide false or misleading information commit a summary offence. As an alternative to bringing a prosecution against an undertaking, the Minister or ComReg may apply to the High Court to make a compliance order, requiring the undertaking to comply with its obligations in this regard.

New Powers under the Competition Act 2002

ComReg has also been granted significant new powers under the Competition Act 2002. The regulator has been given the function of investigating and prosecuting, either on its own initiative or in response to a complaint, the existence of anti-competitive agreements or practices of a kind specified under section 4 of the Competition Act or the occurrence of an abuse of a dominant position under section 5 of that Act, where the provision of an electronic communications service or network or associated facilities is involved.

If the Competition Authority suspects a breach of section 4 or 5 of the Competition Act in the provision of an electronic communications service or network or associated facilities, it is required to notify ComReg, and vice versa.

Communications undertakings may be prosecuted for breaches of section 4 or 5 by either ComReg or the Competition Authority, but not by both. The Competition Authority and ComReg are required to reach agreement on which of them shall prosecute these offences where they arise in the communications sector. In the event that they are unable to agree this, the Minister for Enterprise, Trade and Employment shall decide which body is more appropriate.

New Indictable offences

The transposition in Ireland of the EU's 2002 electronic communications package was effected under section 3 of the European Communities Act 1972. As indictable offences cannot be created under this provision, the regulatory regime implemented in Ireland in 2003 created summary offences only, each carrying a maximum fine of €3,000, with an option of civil proceedings for non-compliance.

The Minister for Communications, Energy and Natural Resources has long been of the view that more effective penalties are desirable and should be capable of being brought into law in a timely manner in order to respond effectively to industry developments. Consequently, an enabling provision has been inserted into the Communications Act 2002 by the 2007 Act, permitting the Minister to make regulations amending the secondary legislation which transposes EU electronic communications law in this regard. Specifically, the Minister is now empowered:

- (a) to create indictable offences in this secondary legislation;
- (b) to ensure that penalties imposed for breach of such legislation are effective and proportionate and have a deterrent effect, although the maximum fine that the Minister may provide for in secondary legislation is the greater of €5,000,000 or 10% of annual turnover in the case of corporate bodies convicted on indictment, and €500,000 in the case of any other person convicted of an indictable offence; and
- (c) to provide in secondary legislation for the High Court to issue compliance orders or restraining orders and to impose financial penalties.

The Minister was not slow in making use of these powers following the commencement of the 2007 Act in May of that year. Within a month, new statutory instruments were introduced¹ amending

the Framework Regulations, the Access Regulations, the Authorisation Regulations and the Universal Service and User Rights Regulations². These amendments created a wide range of new indictable offences and raised the penalties for certain summary offences.

A non-exhaustive list of the new indictable offences is set out in the Appendix. All of these indictable offences are punishable with fines up to the maximum levels referred to above. In certain instances, provision is also made for continuing offences to arise on each day that the non-compliance in question continues following initial conviction.

In addition, various other provisions have been added to deal with technical legal matters concerning court proceedings such as the admissibility of expert evidence, the power of the courts to order copies of certain documents to be given to juries in criminal proceedings, the presumptions that are to apply in civil and criminal proceedings and the admissibility of statements contained in certain documents.

Overcharging

One new offence that has been introduced is worthy of particular note. A new summary offence of overcharging for the supply of electronic communications services or products has been created by way of an amendment to the Communications Regulation Act 2002.

This applies where undertakings impose a charge or purport to impose a charge (a) which exceeds any published amount or written statement given to a consumer (being a person to whom an electronic communications service or product is supplied, otherwise than for the purpose of re-supply) in relation to that service or product or (b) which is for a product or service not requested by the consumer or (c) for a product or service requested by the consumer but not supplied. Specific power is granted to ComReg to audit an undertaking's billing systems when investigating whether an offence has been committed in this regard.

¹ The European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007, the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) (Amendment) Regulations 2007, the European Communities (Electronic Communications Networks and Services) (Authorisation) (Amendment) Regulations 2007 and the European Communities (Electronic Communications Networks and Services) (Access) (Amendment) Regulations 2007.

² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 and the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003.

ComReg can apply to the High Court for a restraining order if it believes that an undertaking is contravening these provisions or has contravened these provisions in the past and may contravene them in the future. In these circumstances, the regulator may also apply for an order directing payment by the offending undertaking of a financial penalty (to be proposed by ComReg), having regard to the circumstances of the contraventions committed.

Whistleblowers

An increasingly common feature of Irish regulatory law in recent years has been the inclusion of provisions designed to encourage 'whistleblowers' to report on certain practices and to protect those persons against the bodies of whom they complain taking action against them. This trend, adopted in the Standards in Public Office Act, 2001, the Competition Act, 2002, and the Safety, Health and Welfare at Work Act, 2005, is now reflected in the amended Communications Regulation Act 2002. A person who makes an 'appropriate disclosure of information' about an undertaking or undertakings concerning the provision of an electronic communications network or service or associated facility, believing it to be true or at least worthy of investigation, will incur no civil or criminal liability for having done so. Where an undertaking causes any person a detriment (including any injury, damage, loss, intimidation, harassment, discrimination or threats of reprisal) because that person has made or threatened to disclose information to the authorities about that undertaking's conduct, that person shall have a right of action in tort against the undertaking. It is an offence, punishable summarily or on indictment, for a person to disclose information about the conduct of an undertaking knowing it to be false or misleading.

Infrastructure Sharing

Under section 57 of the Communications Regulation Act 2002, network operators are given the right to negotiate an agreement to share physical infrastructure used to support electronic communications with other infrastructure providers. In these circumstances, ComReg has the power to resolve disputes where agreement is not reached between the parties, including by means of imposing conditions for infrastructure sharing. In recent years, a practice has emerged

whereby property developers and other infrastructure providers who do not hold authorisations from ComReg have entered exclusive arrangements for access to that infrastructure with only one communications operator. In these circumstances, the regulator's power to resolve the dispute has been limited as there is no authorisation to which regulatory conditions may be attached. To counter this practice, a new section 57A now enables ComReg to enforce access to infrastructure against operators and other infrastructure providers by way of an application to the High Court for a compliance order with a decision made by ComReg in any dispute on sharing. ComReg may also apply to the Court for an order directing the infrastructure provider to pay ComReg a financial penalty.

Concluding Remarks

On signing the commencement order for the 2007 Act, the then Minister, Noel Dempsey TD, stated as follows:

"Given the size of the electronic communications market and its importance to the continued development of the Irish economy, it is vital that ComReg is able to effectively enforce communications legislation. This Act provides ComReg with the necessary tough powers to enable them to promote competition in the marketplace ...

This legislation forms an important part of the regulatory framework and is vital to the future of the communications sector. It will provide the regulatory certainty to encourage new investment by existing operators and entice new entrants into the market."

The 2007 Act completes the transposition of the 2002 EU electronic communications regulatory package. Exactly what use ComReg decides to make of its new powers remains to be seen. However, for undertakings active in the sector, the incentive to comply with regulatory obligations has never been greater. The prospect of ComReg summoning individuals to give evidence and documentation to it under oath or affirmation, the protection afforded to 'whistleblowers' and the significant fines that may now be imposed in respect of a broad range of offences is likely to focus the minds of company executives in the sector.

APPENDIX

New Indictable Offences
(non-exhaustive)

- (a) **Number Portability:** failure of an undertaking providing a publicly available telephone service (including a mobile service) to ensure that a subscriber can, upon request, retain his or her fixed or mobile number independently on another fixed or mobile network respectively.
- (b) **Transparency:** failure to comply with an obligation imposed by ComReg to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions of usage and prices or to publish a sufficiently unbundled reference offer.
- (c) **Non-Discrimination:** failure to comply with obligations of non-discrimination in relation to interconnection and/or access.
- (d) **Accounting Separation:** failure to comply with certain obligations regarding accounting separation or (where the operator is vertically integrated) to make transparent wholesale prices and internal transfer prices.
- (e) **Access:** failure to comply with obligations to meet reasonable requests for access to and use of specific network elements and associated facilities or requirements of ComReg to negotiate access with undertakings which request it, not to withdraw access already granted, to provide specified services on a wholesale basis for resale by third parties, to grant open access to technical interfaces, to provide co-location or other forms of facility sharing, to interconnect networks, to provide specified services needed to ensure service interoperability or to provide certain operational support systems.
- (f) **Cost Orientation:** failure to comply with obligations relating to cost orientation and cost accounting systems.
- (g) **No Authorisation:** providing an electronic communications service or network without appropriate authorisation.
- (h) **Non Compliance with General Authorisation:** failure to comply with a condition attached to a General Authorisation.
- (i) **Use of Numbers:** failure to comply with a condition which ComReg has attached to an undertaking's right of use for numbers.
- (j) **Provision of Information:** failure to provide information which ComReg considers necessary for the purpose of ensuring compliance with decisions or determinations under the regulatory framework.
- (k) **Assignment of Numbers:** assigning numbers to locations, terminals, persons or functions on public telecommunications networks from the national numbering scheme which ComReg has not specifically allocated in connection with the provision of publicly available electronic communications services.
- (l) **Non-Compliance with SMP Obligations:** failure by an undertaking designated as having significant market power to comply with obligations imposed on it by ComReg.

■ CONTACT INFORMATION

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February 2008

This memorandum is a general summary of developments and is not a complete statement of the law. Specific legal advice should be obtained before taking action.

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