

Telecoms Regulatory Law: Irish Law Civil Enforcement Powers

The enforcement powers of Ireland's telecoms regulator are set out in the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023, signed into law on 2 March 2023 (the "**Act**"), which, together with the European Union (Electronic Communications Code) Regulations 2022, transposes the European Electronic Communications Code (the "**EECC**") into Irish law.

Previously, the Commission for Communications Regulation ("**ComReg**") could only exercise its enforcement powers through criminal and occasional High Court proceedings, as well as settlement agreements. The introduction of new civil enforcement options under the Act, provides ComReg with greater direct control than what was previously possible. The new enforcement regime may lead to a marked increase in the number of investigations carried out each year, the imposition of more sanctions and subsequent appeals challenging the decisions of ComReg and its independent adjudicators.

Civil Enforcement

As expected, the Act armours ComReg with an enhanced enforcement toolbox including:

New power to subject businesses to interim measures: The Act introduces a new power for ComReg to impose interim measures where it has evidence of a breach of a regulatory provision, or a breach of conditions, or of a substantial risk that either such breach will take place. Interim measures can be imposed by ComReg for up to three months (six months in circumstances where enforcement procedures have not been completed). This period can be extended by the High Court on application. This new power is widely drawn which could give rise to significant adverse business interruption and cost consequences for providers of electronic communication services.

New power to subject businesses to multi-stage civil enforcement investigations: In line with the [Competition \(Amendment\) Act 2022](#) (see our previous update [here](#)), the Act proposes a new multi-stage civil enforcement process. The Act provides ComReg's authorised officers with the power to carry out investigations on foot of (i) complaints, or (ii) on ComReg's own initiative. Following investigation, the matter may be settled pursuant to a legally binding agreement (which may involve payment of a fine) or referred to the new independent panel of adjudicators (see below). Where a referral is made this may be for the purposes of seeking either an order on consent in respect of a settlement agreement that ComReg has entered into or a decision by the adjudicator in relation to the existence (or not) of a regulatory breach and the imposition (or not) of any civil sanctions or directions. The Act anticipates that 'fair process' will be followed and in particular that the party / parties under investigation will be consulted and given a fair opportunity to make submissions before the matter is referred to an adjudicator (as set out below). How this will work in practice remains to

be seen, and in particular there is a risk that investigations will become very long and resource-intensive for all parties due to the potential for dispute regarding fair process requirements during a long and multi-stage investigation process.

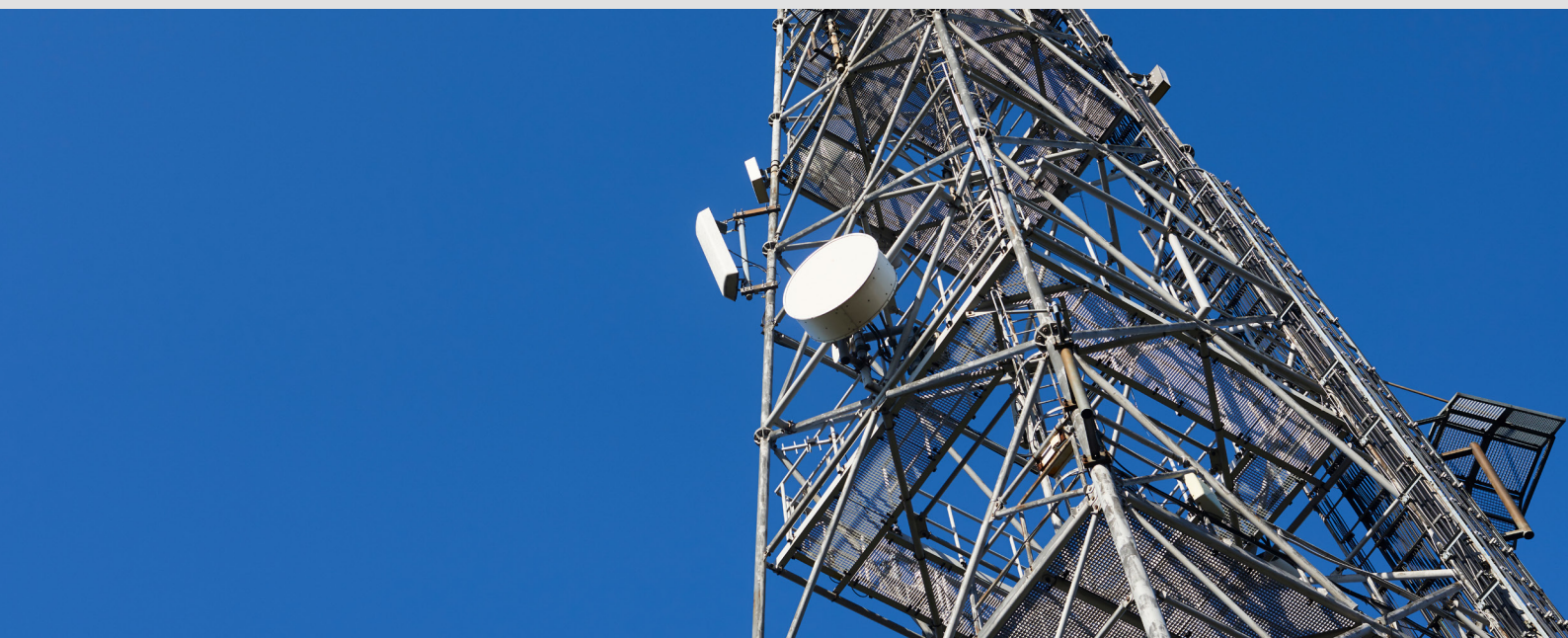
New power for regulatory breaches to be determined and fines be set by independent adjudicators rather than Irish Courts: The Act provides for the appointment of a panel of adjudicators to adjudicate matters referred to it including the imposition of a financial penalty or the requirement to pay compensation for a regulatory breach. Adjudicators are nominated by ComReg and appointed by the Minister for Communications (the “Minister”). Ensuring that the independent adjudicators are truly independent, while also holding the requisite expertise, will be a very important task as otherwise the entire process would be vulnerable to legal challenge.

Powers of independent adjudicators: The Act equips the adjudicators with the following quasi-judicial powers: (i) directing ComReg or one or more of the parties to answer questions, adduce evidence, produce books and documents or clarify an issue of fact, (ii) conducting an oral hearing, and (iii) summoning a witness to appear to give evidence or attend an oral hearing (including on oath). Non-compliance with the adjudicator’s directions or a witness summons will be deemed to be an offence. In case of regulatory breaches, adjudicators will be able to impose a range of remedies such as (i) an administrative financial sanction, (ii) the payment of compensation, (iii) the payment of a refund, or (iv) the suspension or withdrawal of an authorisation. Adjudicators decisions can be appealed to the High Court. It is clear from this list of powers that the independent adjudicator stage of a multi-stage investigation has the potential to be lengthy, intensive, costly and intrusive for all affected parties.

Settlements and commitments: During the adjudication proceedings (as well as at any earlier investigation stage as noted above), ComReg can enter into settlement agreements with the other party / parties to the investigation and accept legally binding commitments to address the suspected regulatory breach. The terms of the settlement agreement can include financial sanctions or other appropriate remedies.

Court Supervision: While the Act proposes new powers for ComReg to impose administrative financial sanctions (see below), critically, these sanctions will need to be confirmed by the High Court (to ensure compliance with constitutional requirements and similar to the case of fines imposed by other Irish regulators including the Central Bank of Ireland and the Data Protection Commission). Decisions of adjudicators may be appealed to the High Court within 28 days. Upon expiry of this period, and subject to any extension that may be granted by the High Court, ComReg can make an application to the High Court for the confirmation of the adjudication. The High Court’s determination is final and cannot be appealed except where the High Court grants leave to appeal to the Court of Appeal on a point of law of exceptional public importance.

The end of the ‘loser pays’ rule in disputes with ComReg?: No order as to costs can be made in proceedings before an adjudicator or the Court (unless a person or ComReg, as the case may be, has engaged in improper, irregular, unfair, or unsatisfactory conduct), effectively giving ComReg immunity from the ‘loser pays’ rule. The Act also invites any Court to follow this departure from the normal principles in deciding on who pays the costs of any Court appeal.





New civil sanctions and increased criminal sanctions: The Act provides for new civil sanctions and higher criminal sanction with maximum fines for companies of the greater of €5 million or up to 10% of turnover and for natural persons of €500,000 or up to 10% of the annual income. As set out above, civil sanctions need to be confirmed by the High Court.

ComReg's New High Court civil enforcement route: Following the enactment of the Act, ComReg may apply to the High Court for an order to restrain certain repeated or apprehended contraventions of the following provisions:

1. Section 45(1) or (2) of the 2002 Act.
2. Regulation 89 or 90 of the EECC.
3. Section 13(1) of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010.



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