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**Compliance &
Enforcement**

7. Compliance and Enforcement

Strategic Intent 4:

Regulated entities comply with regulatory requirements.

What does this look like?

- Regulated entities are at all times fully cognisant of their obligations and comply with them.
- Regulated entities are deterred from contravening their obligations.
- There is an institutionalised culture of compliance in regulated entities.

Overview

7.1 Regulation is only effective when regulated entities comply with their regulatory obligations. In this regard, ComReg's strategic intention relating to compliance and enforcement supports and underpins the effectiveness of the previous three strategic intentions. ComReg's statutory functions in respect of compliance and enforcement can be divided into two categories: to ensure regulated entities comply with their regulatory obligations and to ensure that the radio spectrum is managed in an efficient and effective manner.

7.2 This Chapter sets out ComReg's strategic goals associated with enforcing compliance with regulatory obligations with the high-level objective of ensuring that **regulated entities comply with regulatory requirements**.

7.3 It is useful to think of an enforcement strategy in the following terms:

- **Culture of Compliance:** The first best situation is where regulated entities comply voluntarily with their obligations and have an internal culture of compliance;
- **Active Monitoring:** Using a variety of information and data sources, the monitoring of regulatory obligations ensures markets develop properly;
- **Targeted Enforcement:** Resources are directed toward enforcement activities in a way that maximises the effectiveness of the regime; and,
- **Effective Deterrence:** The effectiveness of the regime depends not only on bringing non-compliant conduct to an end but also on its impact in terms of deterring future non-compliance.

7.4 In principle, the elements of the strategy form a virtuous circle where regulated entities come into compliance with respect to targeted conducts, allowing the regulator to refocus compliance and enforcement activities, and so on.

Figure 10: Optimal Enforcement



Different Enforcement Settings

7.5 In relation to the electronic communications sector, ComReg has three principal areas of responsibility in respect of compliance and enforcement:

- Spectrum management,
- Wholesale (SMP) regulation, and
- Consumer protection.

Compliance and enforcement in the context of spectrum management

7.6 ComReg has a statutory function to manage the radio frequency spectrum in Ireland. This includes:

- Monitoring and supervising compliance with conditions attached to spectrum rights of use (e.g. the general authorisation and licence conditions);
- Monitoring the use of the radio spectrum to detect unauthorised use and taking appropriate enforcement action; and
- Investigating instances of interference reported by licensees and the general public, and taking appropriate enforcement action.

7.7 With respect to unauthorised use of spectrum, typical issues that arise include the unlicensed use of the radio spectrum, non-renewal of licences, and the use of equipment that is not compliant with the relevant legislation for which ComReg is the designated Market Surveillance Authority.^{79 80}

7.8 ComReg also undertakes a proactive series of monitoring activities, including drive testing of mobile networks to assess compliance with coverage obligations as well as conducting surveys to ensure compliance with non-ionising radiation limits.

Compliance and enforcement in the context of wholesale regulation

7.9 ComReg may impose ex-ante obligations on undertakings where they are found to have SMP. These ex-ante obligations are remedies to competition problems identified in the regulated markets. ComReg is responsible for monitoring and enforcing compliance with such SMP obligations.

7.10 It is only when an SMP operator complies with the full suite of ex-ante obligations that the identified competition problems are mitigated.

While partial compliance may be sufficient to encourage market entry, access seekers' confidence to continue to invest may continue to be undermined if, for instance, they discover they have been treated in a discriminatory fashion or that access requests have been unnecessarily delayed. For this reason, every instance of non-compliance has the potential to seriously damage competition.

7.11 In addition to the SMP obligations there are various obligations monitored and enforced by ComReg arising under the EU regulatory framework for electronic communications and under national legislation. ComReg also has a role in relation to disputes between undertakings in the sector⁸¹.

79 The European Union (Radio Equipment) Regulations 2017 S.I 248 of 2017.

80 European Communities (Electromagnetic Compatibility) Regulations 2017, S.I 69 of 2017.

81 Disputes may arise under Regulation 31 of the Framework Regulations, Section 57 of the 2002 Act, and Regulations 4, 5, 6, 7, 8 and 9 of the Broadband Cost Regulations.

Compliance and enforcement in the context of consumer protection

7.12 ComReg is responsible for monitoring and enforcing compliance by ECN / ECS service providers and PRS providers with a variety of consumer protection provisions. The principal consumer protection laws include the end-user provisions of the EECC, the Privacy Regulations, the 2002 Act, the PRS Act⁸², the Consumer Rights Regulations⁸³, the Unfair Contract Terms Regulations⁸⁴ and obligations on undertakings pursuant to their General Authorisation.

7.13 There are several reasons for opening investigations relating to consumer protection. ComReg investigates complaints and emerging trends arising from contacts to the Consumer Line and website and makes an assessment to determine their validity. ComReg may also open own initiative investigations to monitor and assess the general conformance to regulatory obligations. As discussed in Chapter 5, key issues relate to billing issues, contract terms, and informed consent to bill/provide PRS service. In addition to the new provisions of the EECC, ComReg also monitors compliance with the Net Neutrality Regulations, Roaming Regulations⁸⁵ and Intra-EU Calls Regulations.

Culture of Compliance

7.14 ComReg's view is regulated entities should be fully cognisant of their obligations, comply with them and have an internal culture of compliance. It is therefore ComReg's goal that **regulated entities are pro-active in ensuring their own compliance**. ComReg encourages operators to have robust internal controls to prevent and detect non-compliance.

7.15 Regulated entities, particularly those subject to obligations aimed at ensuring non-discrimination, may choose to put in place operational and governance measures with the specific purpose of promoting principles of compliance at all organisational levels. When implemented effectively, such measures can ensure compliance, and reduce the need for regulatory intervention and thereby promote effective and sustainable competition.

7.16 ComReg considers the following industry practices are essential for promoting a culture of compliance:

- Support and commitment from senior management for internal compliance programmes;
- A clear and enforced policy on compliance, including appropriate disciplinary procedures, prohibiting non-compliant behaviours at all levels;
- Oversight of compliance programs by a separate monitoring body such as an internal audit committee, represented at a senior level with adequate resources, independence and authority;
- Risk-based internal controls, designed to ensure compliance that are regularly reviewed and maintained;
- Systematic, effective, and documented monitoring of internal controls; and
- Regular communication, guidance, and training on compliance programs at all levels of an organisation.

⁸² Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010

⁸³ European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013)

⁸⁴ The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 37 of 1995), as amended. Note, in particular amendments by European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336 of 2014).

⁸⁵ ComReg Doc 21/20

- 7.17** ComReg considers that having an effective, proportionate, and dissuasive regulatory enforcement regime will help foster an awareness of the need for an appropriate culture of compliance within industry. A consequence of a poor culture of compliance may be that undertakings adopt internal interpretations of regulatory obligations that diverge from the intended meaning and purpose. Such interpretations may enhance an undertaking's commercial interest to the detriment of other stakeholders or competition and may put the undertaking at risk of non-compliance.
- 7.18** ComReg offers detailed information on applicable regulations (e.g. through public Consultation, Response to Consultation, Decision Instrument or guidance documents and in publication of enforcement decisions). An important purpose of providing guidance on the meaning and effect of regulatory obligations is to facilitate the identification of practices that are likely to be non-compliant. In this context, ComReg will monitor the practices and behaviours of undertakings and take enforcement action, where appropriate.
- 7.19** In addition, where appropriate, ComReg offers guidance on its enforcement powers and practices to ensure industry have a comprehensive understanding of their regulatory obligations and adhere accordingly. ComReg will consider whether it is appropriate to publish further information and guidance on certain aspects of its compliance investigation practices and methodologies, after the EECC has been transposed into Irish law. In addition, ComReg will utilise engagement and dialogue to help foster the desired behaviours within industry, where necessary.
- 7.20** The EECC introduces new regulations and also brings new operators into the scope of ComReg's jurisdiction (e.g. providers of OTT services). On a case-by-case basis it may be necessary to engage directly with undertakings to ensure they are fully aware of the relevant obligations. ComReg will publish any guidelines explicitly required under the EECC.

Eircom's Regulatory Governance Model

- 7.21** In 2018, ComReg entered into a Settlement Agreement ('SA') with Eircom. As part of that SA, the parties agreed to a set of commitments ('RGM undertakings') which, when fully implemented, will result in the establishment and operation of an enhanced Regulatory Governance Model ('RGM') in Eircom.
- 7.22** Since the 2018 Agreement, ComReg has continued to observe and evaluate the functioning and effectiveness of the RGM. ComReg continues to have some concerns around the state of competition and the culture of compliance within Eircom in the presence of the enhanced RGM. Over the coming period ComReg will continue to review the effectiveness of the RGM and Settlement Agreement and consider if more regulatory action is required.

Goal 4.1

Regulated entities are pro-active in ensuring their own compliance.

- 7.23** The Performance Agreement ('PA'), which is an annex to the SA, sets out a number of Milestones relating to key RGM undertakings. ComReg and Eircom had agreed, by way of an amendment to the SA, that the delivery date for Milestone 4 ('M4') would be pushed back from September 30th 2020 to 31st March 2021 after ComReg raised concerns with Eircom's 30th September 2020 M4 submission. ComReg has recently completed its review of the most recent M4 submission and will communicate further in this regard.

Active Monitoring

- 7.24** ComReg actively monitors the markets it regulates to ensure they function in a way that is consistent with the legal and regulatory obligations imposed in those markets. ComReg does this in a number of ways:

- regular and timely collection of relevant market data and information
- direct monitoring of regulatory obligations (e.g. wholesale pricing tariffs)
- the review of price lists and product documentation
- engagement with industry, either directly or through various fora
- the monitoring of queries and complaints to ComReg’s consumer care line
- the monitoring of online fora and social media
- engagement with other public and regulatory bodies (e.g. the CCPC)

7.25 ComReg continuously observes and monitors operator activities in the market. Where an area of potential concern is identified, ComReg will investigate.

Targeted Enforcement

7.26 ComReg’s compliance and enforcement activities in the different enforcement settings are underpinned by internal processes (including evidence gathering, report writing and legal review) and firmly rooted in the legal and regulatory regime. ComReg’s investigations are often complicated or multifaceted and must be conducted in a manner that is impartial and procedurally correct. This combination of complexity and a desire to respect due process means that investigations may take time to complete.

In this context, it is ComReg’s goal that **ComReg’s compliance and enforcement activities are conducted using fair and objective processes and are targeted and prioritised appropriately.**

7.27 In anticipation of ComReg getting the necessary enforcement powers (e.g. powers to impose administrative financial sanctions), ComReg will continue to evolve its enforcement practices and methodologies. In addition, ComReg will

consider whether it is appropriate to publish further information and guidance on certain aspects of its compliance investigation practices and methodologies, after the EECC has been transposed into Irish law.

7.28 The different enforcement settings in which ComReg operates mean that a prioritisation approach needs to be tailored to the relevant circumstances.

7.29 In the spectrum management context, in 2020 ComReg introduced a revised process for radio frequency interference (‘RFI’) complaints⁸⁶. This revised approach endeavours to direct ComReg resources to the cases of harmful interference that have the greatest impact on the complainant’s ability to provide services. ComReg aims to respond to cases which are exceptional in nature immediately and prioritise RFI related complaints accordingly, with clearly defined complaint response times⁸⁷.

Goal 4.2

ComReg’s compliance and enforcement activities are conducted using fair and objective processes and are targeted and prioritised appropriately.

7.30 In wholesale regulation, enforcement is prioritised in cases where an SMP operator’s behaviour has greatest potential to harm competition – both directly and by reducing the confidence of other operators in the effectiveness and predictability of the regulatory regime. Breaches which come to light as a result of a SMP operator’s own internal control system may be of a lower priority if they are transparently reported, proactively and effectively remedied, and the failure of controls which led to the breach is also addressed. However, ComReg will also take into account the severity of the breach when deciding whether to prioritise enforcement action.

⁸⁶ ComReg Doc 19/108 and ComReg Doc 20/62

⁸⁷ Further detail on Radio Interference Investigations can be found on our website here: <https://www.comreg.ie/industry/radio-spectrum/spectrum-compliance/radio-interference/>

7.31 In the consumer protection context, cases may be prioritised using an assessment of the importance of the obligation concerned in ensuring that end-users are able to choose and use communications services with confidence. This assessment may be informed by trends in complaints received from the general public made via ComReg's consumer team and ComReg's website.

There is a focus on ensuring price, choice and quality are protected with a focus on monitoring compliance with contract obligations, billing, switching, net neutrality and seeking redress. ComReg regards with particular severity any breaches of obligations intended to ensure access to ECAS because of the obvious importance of emergency calling. In the context of PRS, ensuring clear informed consent is provided is a key concern.

Effective Deterrence

7.32 ComReg uses its existing enforcement powers to bring criminal and civil actions against non-compliant ECN / ECS and PRS service providers. Regulatory breaches harm consumers, firms, industry, and competition generally. Effective enforcement powers and sanctions ensure that regulatory actions act as a genuine deterrent, both to the party being punished and to other regulated parties in the market. In this context it is **ComReg's goal that ComReg has an effective set of powers to incentivise compliance and effectively monitor and enforce.**

7.33 In February 2021, ComReg published guidance on its approach to the calculation of financial penalties for the purpose of enforcement of breaches of the Access Regulations⁸⁸. Where an SMP operator has failed to comply with an SMP obligation, ComReg will notify the operator of the findings and give the operator an opportunity to respond or to remedy the non-compliance.

If ComReg remains of the opinion that the operator has not complied with its obligations, ComReg may apply to the High Court for orders including that the operator pay a financial penalty. ComReg may make a recommendation to the High Court on the appropriate financial penalty. ComReg's guidance sets out the guidelines on how ComReg will decide on the amount that the penalty should be, and recommend that to the High Court for its consideration. As enforcement practices and methodologies evolve, we will consider whether it is appropriate to publish further guidance relating to breaches of the Access Regulations.

Goal 4.3

ComReg has an effective set of powers to incentivise compliance and effectively monitor and enforce.

7.34 ComReg's current enforcement legislation requires ComReg to apply to court for orders to impose civil financial sanctions. For ComReg to be an effective regulator, it must have proper and sufficient enforcement powers that have the necessary deterrent effect. Improvements to ComReg's enforcement powers (both criminal and civil) would facilitate effective deterrence and, where appropriate, allow ComReg to take effective action.

As the sector evolves, ComReg continues to seek enhanced powers to meet current and future challenges in delivering on its statutory and regulatory remit. ComReg's enforcement regime could be improved in three main areas:

- **Administrative Financial Sanctions:** The ability for ComReg itself to impose Administrative Financial Sanctions in appropriate circumstances would greatly facilitate effective regulation of the sector.

- **Criminal Fines:** ComReg plans to continue to advocate for an increase in the maximum fine that may be imposed for criminal offences, following conviction on indictment. We consider that potential criminal fines that are sufficiently high can act as a strong deterrent.
- **Standardised Powers:** Regulatory powers, and in particular, certain inspection, investigation, and enforcement powers, should be as standardised as possible across all regulatory bodies. This would improve the efficiency and effectiveness of regulation and help promote legal certainty.

7.35 Since 2012, ComReg has made a number of submissions to the Law Reform Commission on the necessity for the enforcement regime to embody effective deterrence mechanisms.

7.36 Over the coming period, ComReg will continue to advocate for the legislative changes that are essential to ensure the enforcement regimes in the ECN / ECS and PRS sectors embodies the effective deterrence mechanisms necessary for ComReg to delivery on its mandate. Government recognise that for ComReg to be an effective and robust regulator it must have greater enforcement powers and be able to impose Administrative Financial Sanctions, in line with enforcement regimes in other EU Member States⁸⁹. This is an issue that continues to be identified as a high priority in the 2020 Programme for Government and by the Oireachtas Joint Committee on Transport and Communications Networks. DECC is committed to ensuring that ComReg has the best, most appropriate and most effective powers available to it. Any final decisions/actions in this regard will, of course, be a matter for the Minister and, ultimately, the Oireachtas.

ComReg has also identified the need to ensure that it has the full tool kit of enforcement powers in addition to seeking improvements in respect of appeals and information gathering powers.

Ex-Post Competition Law

7.37 Following the introduction of the Communications Regulation (Amendment) Act 2007, ComReg was given the additional function of investigating ex-post competition law breaches in the ECS sector⁹⁰, and shares this responsibility with the CCPC. ComReg has the power to carry out an investigation pursuant to a complaint or on ComReg's own initiative. Such investigations must be carried out on an ex-post basis, (i.e. after the fact) where the purported anti-competitive behaviour must either have occurred or be ongoing. The investigation can also occur in markets where ex-ante regulation applies.

7.38 ComReg will be provided with new competition powers resulting from the transposition of the ECN+ Directive by way of the Competition (Amendment) Bill currently undergoing pre legislative scrutiny. The Bill proposes to ensure that competition authorities have independence, sufficient resources, and appropriate power of enforcement, including the ability to issue administrative financial sanctions. These enforcement powers would apply to prohibitions on undertakings from engaging in anti-competitive agreements and practices and the abuse of a dominant position. The Bill also provides for leniency programmes, which Ireland does not currently have.

⁸⁹ As set out in the 2020 Programme for Government, 'Our Shared Future'.

⁹⁰ Further details in relation to ComReg's role under competition law and the investigation of such complaints is set out in its Guidance Notice on Competition Complaints. Guidance on the Submission of Competition Complaints relating to the Electronic Communications Sector, Information Notice, ComReg Document 10/110, December 2010