



**Electronic Communications (Miscellaneous Provisions)
Bill, 2005.**

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Part 1 - Preliminary and Primary

Head 1 - Short Title

This Bill shall be cited as the Electronic Communications (Miscellaneous Provisions) Bill 2005.

Head 2 - Interpretation

In this Act, except where the context otherwise requires:

“Act of 2002”, means the Communications Regulation Act, 2002 (No.20 of 2002);

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Act of 2002 (No.20 of 2002);

“Data Protection Commissioner” means the Data Protection Commissioner established under the Data Protection Act, of 1988 (No. 25 of 1988);

“European Electronic Communications Regulatory Package” refers to the following five SI’s, which transposed (via the European Communities Regulation Act, 1972) a set of five European Directives in 2003 (and a Decision on Radio Spectrum which did not require transposition):

- European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 S.I. 305 of 2003 transposing Directive 2002/19/EC
- European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 S.I. 306 of 2003 transposing Directive 2002/20/EC
- European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003 S.I. 307 of 2003 transposing Directive 2002/21/EC
- European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations 2003 S.I. 308 of 2003 transposing Directive 2002/22/EC
- European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations 2003 S.I 535 of 2003 transposing Directive 2002/58/EC;

“Minister” means the Minister for Communications, Marine & Natural Resources;

“undertaking” means a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities.

Part 2 - New Provisions

Head 3 – ComReg Budget and Work Programme

3. Provide that:

The Commission for Communications Regulation shall present an annual budget and work programme to the Minister. The Commission shall also make the budget and work programme publicly available, in advance of the financial year in question.

The budget and work programme shall set out clearly the principal planned activities of the organisation for the forth-coming year, together with an associated budget statement in respect of those activities. It shall also distinguish between the Commission's functions for the regulation of the electronic communications sector, the management of the radio frequency spectrum and the regulation of the postal market.

It shall also have regard to the statement of strategy published by the Commission every two years in accordance with section 31 of the Communications Regulation Act of 2002.

Notes 3

In accordance with corporate governance requirements, the Minister has agreed to the inclusion of a provision in the Bill making it a statutory requirement for ComReg to produce a publicly available annual budget and work programme in advance of the financial year in question. The purpose is to provide for increased transparency in relation to ComReg's expenditure and activities. In particular, it is reasonable that those organisations in the telecoms and postal business, which fund ComReg, should have more information as to how the levies paid to ComReg are spent.

*It is not proposed that the ComReg budget or work programme would be subject to the approval of the Minister or the industry but it is proposed that they would be submitted or presented to the Minister. The word **presented** is perhaps the most accurate description of what is required.*

This provision may require amendments to Sections 30 and 32(3)(b) of the Communications Regulation Act, 2002 as amended by Regulation 19 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003, SI No 306 of 2003.

Head 4 – ComReg’s powers in relation to Overcharging

4.1 Provide that:

Where an undertaking charges in excess of published tariffs they are guilty of an offence and are liable on summary conviction to a fine not exceeding €5,000.

Notes 4.1

This provision makes overcharging by undertakings, i.e., charging in excess of published tariffs, an offence under telecommunications law.

The summary offences included in this Bill carry the penalty of a fine not exceeding €5,000. The option of imprisonment has not been provided for in this Bill.

4.2 Provide that:

where ComReg suspects on reasonable grounds that an undertaking is overcharging consumers, they may hold an investigation to determine if this is so.

Notes 4.2

The main objective here is to empower ComReg to investigate incidents of suspected overcharging i.e., charging in excess of published tariffs by undertakings.

The current regulatory framework provides ComReg with powers in relation to consumer protection but does not specifically allow ComReg to investigate overcharging. The Director of Consumer Affairs has a role in consumer protection, but given ComReg’s overarching telecoms remit, it is considered appropriate to extend ComReg’s consumer protection role to include powers to specifically allow the investigation of overcharging.

Incidents of overcharging in 2004 by operators (Eircom, Vodafone & O2) highlighted ComReg’s absence of powers to intervene in such matters.

4.3 Provide that:

where ComReg considers it necessary, an investigation under this Head may include an audit of the undertaking's Billing system;

and

ComReg may decide to carry out such an audit itself or have it carried out by a third party.

Notes 4.3

Any investigation of suspected overcharging under this Head may, if ComReg consider it necessary, include an audit of an undertaking's Billing system to ensure its accuracy and determine whether the overcharging arises from a system failure or from once-off or other factors. ComReg may choose whether to carry out the audit itself or to have it carried out by a third party.

4.4 Provide that:

ComReg shall notify an undertaking in writing before commencing any investigation provided for in 4.2,

and

the undertaking may in response, submit documents for consideration in such an investigation (within seven days).

Notes 4.4

This Head obliges ComReg to notify an undertaking that it is suspected of overcharging and that the suspected overcharging is to be investigated.

Any undertaking so notified, has the opportunity to submit documents for consideration in an investigation. A timeline for the submission of documents of seven days after the receipt of the notice has been specified, as the nature of what is at issue here requires quick action.

4.5 Provide that:

- Where ComReg concludes an investigation held under 4.2, and makes a finding as to whether overcharging has occurred or not, ComReg
 - Shall notify the undertaking of its decision, outlining its finding and the grounds for the finding;
 - May publish its findings in such a manner as may be decided by ComReg.
- This Notice may include:
 - a caution or reprimand,
 - a direction to cease overcharging if it is found to persist.
- An undertaking that fails to comply with a direction to cease overcharging under 4.5(b) is guilty of an offence and liable on summary conviction to a fine of up to but not exceeding €5,000.

Notes 4.5

This Head requires ComReg to notify an undertaking of its findings from an investigation. ComReg may also publish its findings as it sees fit. The possibility of this naming and shaming regime may encourage undertakings to avoid investigation of overcharging. This Head also makes non-compliance with a Direction from ComReg to cease overcharging an offence.

The option of imprisonment has not been provided for in this Bill.

4.6 Provide that:

The regime provided for in the “Compliance with Obligations” provisions in the following legal instruments:

- Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, SI No 305 of 2003
- Regulation 16 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003, SI No 306 of 2003
- Regulation 35 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, SI No 307 of 2003
- Regulation 32 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users’ Rights) Regulations, SI No 308 of 2003

and in the “Application to High Court “ provision in Regulation 20 of the European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations, SI No 535 of 2003;

shall apply to an offence under this Head.

Notes 4.6

In summary, the provisions, which are detailed in the Regulations listed, provide for a civil administrative fines regime whereby ComReg, after due process, could find that a person is guilty of an offence, and apply to the High Court for confirmation of the finding and the penalty to be imposed. There is no limit to the financial penalty to be imposed, but the amount of the fine must be confirmed by the Court, which ensures the appropriate administration of justice.

This Head will provide for a similar regime for offences related to overcharging.

This Civil Enforcement regime provides ComReg with a relatively fast and effective enforcement tool with the lesser civil burden or proof.



4.6 Provide that:

Determinations, decisions or findings made by ComReg in relation to suspected instances or findings of overcharging may be appealed to the Electronic Communications Appeals Panel as established under SI 307 of 2003, European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003;

and

Determinations, decisions or findings by ComReg in relation to suspected instances or findings of overcharging stand pending the determination by the ECAP.

Notes 4.6

The scope of what may be appealed to the Electronic Communications Appeals Panel as established under SI 307 of 2003, European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 is set out in Regulation 3. This Head will provide that determinations, decisions or findings made by ComReg in relation to suspected instances or findings of overcharging may also be appealed to the ECAP.

Regulation 16 of SI 307 of 2003 provides that a decision of the Regulator stands pending the outcome of an appeal. Regulation 16 also provides for an appellant to apply to the ECAP to suspend a decision pending a determination. It is intended that the principle of Regulation 16 of SI 307 will apply here also.

Head 5 – Summons powers for ComReg & Court Proceedings

5.1 - Summons Powers

5.1(1) Provide that:

ComReg may for the purposes of enforcing obligations under this Act, the 2002 Act and the European Electronic Communications Regulatory Package, summon people to make statements on oath and/or to produce documents.

Notes 5.1(1)

This Head will, when drafted, provide similar powers for ComReg as the Competition Authority has under Section 31 of the Competition Act, 2002. It will provide ComReg with the power to summon and examine witnesses and require such witnesses to produce documents under their control and answer questions. The aim is to enhance ComReg's information gathering powers, which is important in the context of proper enforcement.

5.1(2) Provide that:

Where a person

- fails to comply with the provisions of Head 5.1(1),
- or,**
- being in attendance before ComReg does anything, which if ComReg were a court of law having power to commit for contempt of court, would be contempt of court,

that person shall be guilty of an offence and liable on summary conviction to a fine not exceeding €5,000.

Note 5.1(2)

Head 5.1(2) provides for a summary offence for non-compliance with the provisions of Head 5.1(1). This Head also applies a summary offence for behaviour deemed to be contempt, if ComReg were a court of law with power to commit for contempt. The offence and contempt provisions are similar to Section 31 of the Competition Act, 2002 and Regulation 11(3)(c) of the European Communities (Electronic Communications) (Framework) Regulations, SI 307 of 2003 which relates to powers of an Electronic Communications Appeals Panel.

The summary offences included in this Bill carry the penalty of a fine not exceeding, €5,000. The option of imprisonment has not been provided for in this Bill.

5.1(3) Provide that:

A person to whom 5.1(1) applies has the same privileges and immunities as if he/she were a witness in the High Court,

and,

information provided under 5.1(1) is not admissible as evidence against the person in criminal proceedings, other than proceedings for perjury.

Notes 5.1(3)

The purpose of this provision is to provide the same privileges and immunities to a person to whom Head 5.1(1) applies as if he/she were a witness in the High Court. Again, this is similar to Section 31 of the Competition Act, 2002.

There is also provision to protect information that is given by a person to ComReg, from being used against that person in subsequent criminal proceedings, i.e., the principle of self-incrimination. See Section 57CE of the Central Bank Act, 1942 as inserted by Section 10 of the Central Bank and Financial Services Authority of Ireland Act, 2004 as a precedent.

Head 5.2 – Admissibility of Expert Evidence in Court Proceedings

5.2(1) Provide that:

Expert evidence (explaining commercial, technical, economic, engineering, regulatory and financial principles in the telecoms sector) shall be admissible in all court proceedings under this Act, the 2002 Act or the European Electronic Communications Regulatory Package of 2003, where the Court is satisfied as to the appropriate qualifications or experience of the expert witness with regard to the matter to which his evidence relates.

Notes 5.2(1)

The objective of this provision and the following provisions (relating to the provision of Information to Juries; Admissibility of documents into Evidence; and Presumptions as to Admissions in Documents admitted into Evidence) is to facilitate more effective prosecution procedures by ComReg and speedier court proceedings, as both inadvertent delays as a result of procedure and/or delaying tactics by one operator have the potential to have economic consequences for another market player.

The electronic communications legal framework, and matters relating to it, can be technical, specialised and complex. Arguably, proceedings in this sector might be among the category of areas where the court might conceivably need assistance from a person conceived as expert.

The purpose of providing for this measure under statute is to avoid difficulties that may arise in respect of the admissibility of expert evidence and minimise the opportunity for an undertaking to raise legal argument surrounding these issues as a delaying mechanism.

When drafted, it is intended that this provision will be similar to Section 9 of the Competition Act, 2002.

5.2(2) Provide that:

A court may in the interest of justice, decide that the evidence referred to above may not be admissible or may be admissible for specified purposes only.

Notes 5.2(2)

Similar protections and balances are included here, to that of Section 9 of the Competition Act of 2002. Firstly the consideration of expert evidence is at the discretion of the court, and in this regard, the court must be satisfied that certain criteria (e.g. qualifications of expert) are met before such expert opinion is admissible. Secondly, the court is also given a wide discretion to exclude such evidence or to allow it for specified purposes only, in the interests of justice.

Head 5.3 – Provision of information to Juries

5.3 Provide that:

In all court proceedings for indictable offences under this Act, the judge may order that copies of any the following documents be made available to the jury:

- any document admitted in evidence at the trial
- the transcript of the opening speeches of counsel
- any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial
- the transcript of the whole or any part of the evidence given at the trial
- the transcript of the closing speeches of counsel
- the transcript of the trial judge's charge to the jury

Notes 5.3

It is proposed that there be a statutory provision so that in a trial on indictment, the judge may order the provision of certain information to juries.

This is a practical provision to facilitate the understanding of complex evidence by a jury as it could be argued that certain regulatory cases may be difficult to follow because of the large factual, commercial and technical evidence involved. This provision would counter any risk of juries having difficulty with the economic and regulatory rationale behind certain obligations or offences (e.g. why cheaper prices are bad for consumers, etc.).

This provision has a precedent in a number of pieces of legislation including Section 10 of the Competition Act, 2002.

Head 5.4 – Admissibility of documents into Evidence

5.4 Provide that:

Presumptions regarding the author, recipient or owner of documents or statements, similar to those applicable in proceedings taken by the Competition Authority under section 12 and section 13 of the Competition Act, 2002, shall apply in court proceedings, both civil and criminal, under this Act, the 2002 Act and the Regulatory Package of 2003, with a similar provision for rebuttal of these presumptions.

Notes 5.4

This Head provides for a number of statutory presumptions (including those in relation to authorship, ownership and receipt of documents, together with a presumption regarding documents retrieved from an electronic storage system), allowing the court to make reasonable inferences from established evidence without further proof. Where these presumptions are invoked during proceedings and are not duly rebutted, such evidence will be admissible in Court. Successful prosecutions are an essential part of an effective enforcement regime.

In a criminal trial the onus of proof is on the prosecutor and in a civil enforcement the onus of proof is on the person making the assertion. Thus, in the context of enforcement, the onus of proof will always be on ComReg (or the DPP). This means that ComReg must prove each of the elements of the legal offence for a successful prosecution. However, ComReg may encounter difficulties when trying to admit documentary evidence in proceedings because of the inadmissibility of out of court statements (i.e. the rule against hearsay).

In order to get around such difficulties, sections 12 & 13 of the Competition Act, 2002 introduced a number of statutory presumptions allowing the court to make reasonable inferences from established evidence. In summary, these presumptions are designed to allow a paper trail to be admitted in respect of authors or recipients who may be defendants in actions.

Head 5.5 – Presumptions as to Admissions in Documents admitted into Evidence

5.5 Provide that:

A statement from a person asserting that another person has failed to comply with obligations under this Act, the Regulatory Package of 2003 or the 2002 Act will be admissible as evidence in criminal court proceedings, provided that, inter alia:

- the statement or document containing the statement predate the commencement of the proceedings to which it is intended to be admitted in evidence, and
- the statement or document had been prepared other than in response to any enquiry made or question put by a member of ComReg, a member of the Garda Síochána, or an Authorised Officer,
- due consideration is given by the court to its accuracy or otherwise.

Notes 5.5

This provision is related to the preceding provision (5.4) re Admissibility of documents into Evidence and it is similar to Section 13(3) and 13(4) of the Competition Act, 2002.

Section 13 of the Competition Act, 2002 relates to the admissibility of statements in documents that are submitted in evidence, and provides that statements made by a person, to the effect that another person has committed an offence, may be admitted, subject to certain qualifications as to when the document was created and the manner in which it was obtained

This provision will, subject to any further legal safeguards that may be advised in the drafting process, provide an in-built protection relating to the weight to be given to such evidence for the person who is the subject of the statements, similar to Section 13 of the Competition Act.

Part 3 - Enforcement of Regulatory Decisions

Head 6 – Summary Offences

6.1 Provide for

the creation of new summary offences, for the pre-existing provisions set out below:

- European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, SI No 305 of 2003:
 - Regulation 5(2), 5(3), 5(4), 5(5), relating to access and interconnection rights and obligations
 - Regulation 7(1), 7(2), 7(3), 7(4), and 7(5), which relate to conditional access systems and other facilities

- European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations, SI No 308 of 2003
 - Regulation 3(1), 3(2), 3(3), which relate to failure to satisfy reasonable request to connections and access to the publicly available telephone services at a fixed location
 - Regulation 4(1), 4(2), 4(3), 4(4) relating to failure to provide directory inquiry services and directories
 - Regulation 5(1), 5(5), 5(6) relating to failure to provide public pay telephones
 - Regulation 9(1), 9(2) relating to Failure to apply control of expenditure measures
 - Regulation 10(1), relating to failure to comply with quality of service measures
 - Regulation 12(7) relating to Failure to pay USO levy
 - Regulation 14(5) and 14(8) relating to failure to comply with retail tariff controls
 - Regulation 16(3) relating to failure to comply with carrier selection and carrier pre-selection obligations

- Regulation 17 relating to Failure to provide end-users contract
- Regulation 18(6) relating to Failure to publish information on quality of service
- Regulation 20 (1), 20 (3), 20(5) relating to failure to observe consumer digital TV equipment standards
- Regulation 21(1), 21(2), 21(3) relating to Failure to provide access to operator assistance and directory inquiry services
- Regulation 22(1), 22(2) relating to Failure to comply with measures relating to single European emergency call number
- Regulation 23(3) relating to Failure to comply with measures relating to European Telephone Access Codes
- Regulation 25(1)re failure to provide additional specified facilities
- Regulation 26(1) relating to failure to provide number portability

6.2 Provide for

the creation of new summary offences, for failure by an undertaking to observe measures imposed by ComReg pursuant to the pre-existing provisions set out below:

- European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, SI No 307 of 2003
 - Regulation 27(4) re Failure to comply with SMP obligations
- European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations, SI No 308 of 2003
 - Regulation 6(2) re failure to provide specific measures for disabled users
 - Regulation 8(3) and 8(4) re Failure to comply tariff affordability measures
 - Regulations 10(2), 10(3) 10(4), and 10(5) re failure to comply with quality of service measures
 - Regulation 14(1) and 14(3) re failure to comply with retail tariff controls
 - Regulation 15(1) re failure to comply with regulatory controls on leased lines
 - Regulation 16(1) re failure to comply with carrier selection and carrier pre-selection obligations
 - Regulation 18(4) re failure to publish information on quality of service
 - Regulation 23(2) and 23(4) re failure to comply with requirements relating to special access between the State and Northern Ireland
 - Regulation 25(4) re failure to comply with a direction to provide additional facilities
 - Regulation 26(2) re failure to comply with obligations in relation to number portability
 - Regulation 28(2) re failure to implement code of practice dispute resolution.

6.3 Provide that:

A person found guilty of an offence under this Head is liable on summary conviction to a fine not exceeding €5,000.

6.3 Provide for

the increase of the penalty for summary offences set out in the following pre-existing provisions to be increased from €3,000 to €5,000:

- Regulation 20(3) of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, SI No 305 of 2003
- Regulation 25(4) of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003, SI No 306 of 2003
- Regulation 33(4) of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, SI No 307 of 2003
- Regulation 35(3) of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations, SI No 308 of 2003
- Regulation 17(1)(d) of the European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations, SI No 535 of 2003
- Section 39(6) of the Communications Regulation Act, 2002.

Notes 6

There are a number of obligations set out in the European Communities Regulations in question for which no specific summary offence is provided. In the context of the enforcement regime to be set out elsewhere in this Act, it is considered desirable to include provisions for summary offences for the obligations in question to support the enforcement regime set out elsewhere in the Act.

It is also appropriate to update the penalty for summary offences in the pre-existing European Communities S.I.'s to €5,000 and, for Section 39(6) (relating to cooperation with Authorised Officers) of the Communications Regulation Act, 2002.



As stated earlier, the option of imprisonment has not been provided for in relation to offences in this Bill.

When drafted, the Bill will provide that the different enforcement tools available to ComReg and the Data Protection Commissioner will be applied in such a way to ensure that the principles of natural justice, double jeopardy and self-incrimination are honoured.

Head 7 - Continuing Fines

7.1 Provide that:

Where an undertaking is guilty of an offence under the following provisions, that undertaking shall be guilty of a further separate offence for every day that the misbehaviour occurs following the first contravention for which the undertaking was convicted, and liable on summary conviction to a fine of €2,000 for each such offence:

- European Communities (Electronic Communications Networks & services) Authorisation) Regulations, 2003, S.I. 306 of 2003:
 - Reg 4(5) (notification re provision of services),
 - Reg 8(7) (compliance with conditions of general authorisation),
 - 4Reg 14(4) (compliance with conditions re use of numbers);
- European Communities (Electronic Communications Networks & Services)(Framework) Regulations, 2003, S.I. 307 of 2003:
 - Reg 17(4) (provision of info to ensure compliance with decisions under European Electronic Communications Regulatory Package),
 - Reg 22(2) (allocating numbers not assigned),
 - Reg 24(3) (obligations re account separation etc).
 - Reg 27(4) SMP obligations.
 - Reg 31(8) (Failure to cooperate with a dispute resolution investigation).
- Communications Regulation Act, 2002
 - Section 39(6) of this Act makes non-cooperation with Authorised Officers appointed under that section a summary offence.

Notes 7

This new continuing fines regime will provide ComReg with an additional enforcement tool to complement their existing powers. Such a regime will allow for, (in addition to the fine for the original misbehaviour), the imposition of fines through an accumulation of additional fines for each separate offence that is committed every day that non-compliant behaviour continues.

It is intended to apply a similar style of continuing fines regime to that of Section 8(3) of the Competition Act, 2002, in that a separate offence is deemed to have been committed each day following the first contravention.

This will present an increased deterrent, which should improve and assist with regulatory compliance.

Legislative precedents for a continuing fines regime have provided that the level of penalty for a continuing default would be lower than those in respect of the original offence. An amount of €2,000 has been proposed in this Bill, but will be subject to the advice of the Parliamentary Counsel.

It is acknowledged that the list of offences included here to which a continuing fines regime might apply, may increase following further consultation with ComReg.

Head 8 - Indictable Offences

8.1 Provide that:

Where an undertaking is guilty of an offence under any of the following Regulations:

- 4(5)
failure to notify Regulator re provision of electronic communications network or services;
- 8(7)
non-compliance with conditions of general authorisation;
- 14(4)
non-compliance with conditions attached to a right of use of numbers;
- of European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 S.I. No. 306 of 2003;
 - 17(4)
non-compliance with requests by Regulator for information;
 - 22(2)
allocation by undertakings of numbers from the national numbering scheme not assigned to them;
 - 24(3)
non-compliance with obligations relating to account separation and financial reports;
- of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, S.I. No. 307 of 2003;
 - 13(9)
unsolicited communications (under certain circumstances);
of the European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations 2003, S.I. No. 535 of 2003,

that undertaking will be liable, on conviction on indictment, to a fine not exceeding whichever of the following amounts is the greater, namely €4,000,000 or 10% of turnover of the undertaking in the financial year ending in the 12 months prior to conviction.



Notes 8.1

Enforcement is a key element of effective regulation and the purpose of this Head is to provide for increased penalties for ComReg and the Data Protection Commissioner respectively with a view to achieving compliance with statutory requirements.

The current regulatory regime (a regulatory package of 5 EU Directives were transposed in 2003) provides for summary proceedings with a maximum fine of €3,000 and the option of civil proceedings for non-compliance with obligations under that regime. There are no indictable offences under the European Electronic Communications Regulatory Package as transposition was carried out under the European Communities Act, 1972, section 3 of which prohibits indictable offences.

Effective enforcement is vital to secure regulatory compliance and so the behaviours and offences in this Head have been selected as warranting the option of indictable proceedings.

Notes 8.1 (continued)

The regulations listed in 8.1 lists the obligations for which non-compliance render an undertaking subject to a summary offence of up to €3,000, and Head 6.4 of this Bill provides for an increase in that penalty from €3,000 to €5,000.

- *Regulation 4(5) of S.I. No. 306 of 2003 (Authorisation) makes an undertaking's failure to notify the Regulator of its intention to provide an electronic communications network or service, before actually doing so, and failure to notify the regulator of any changes to the information supplied in this regard an offence. This requirement is provided for in the interest of good management of the market by the Regulator.*
- *Regulation 8(7) of S.I. No. 306 of 2003 (Authorisation) provides that an undertaking's failure to comply with any conditions attached to its general authorisation is an offence. The regulatory package transposed in 2003 replaced the licensing system with an authorisation procedure and the Regulator may attach conditions to general authorisations in order to regulate the market effectively.*
- *Regulation 14(4) of S.I. No. 306 of 2003 (Authorisation) provides that failure to comply with any conditions attached to right granted to an undertaking for the use of numbers is an offence. ComReg has sole responsibility for the overall management of the national numbering resource.*

- *Regulation 17(4) of S.I. No. 307 of 2003 (Framework) makes non-compliance with requests by the Regulator for information as provided for in Regulation 17(1) an offence. Regulation 17 allows the Regulator to seek information, including financial information for the purpose of ensuring compliance with decisions and determinations made in accordance with the European Electronic Communications Regulatory Package.*
- *Regulation 22(2) of S.I. No. 307 of 2003 (Framework) makes it an offence for an undertaking to allocate numbers from the national numbering scheme that have not been allocated to them by the Regulator.*
- *Regulation 24(3) of S.I. No. 307 of 2003 (Framework) makes failure to comply with obligations re account separation and financial reports an offence. This requirement is key to the regulatory regime.*
- *Regulation 13(9) of S.I. No. 535 of 2003 (Data Protection and Privacy) makes it an offence, in certain circumstances, to phone or send unsolicited communications (by fax, email, automated calling machine). Each unsolicited communication or call is a separate offence. Responsibility for the enforcement of this offence lies with the Office of the Data Protection Commissioner.*

8.2 Provide that:

Where an undertaking does not comply with obligations under the following Regulations

- Regulation 27(4) of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, S.I. No. 307 of 2003, which relates to SMP obligations; or
- Regulation 26 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations 2003, S.I. No. 308 of 2003, which relates to Number Portability obligations;

that undertaking is guilty of an offence and liable on conviction on indictment, to a fine not exceeding whichever of the following amounts is the greater, namely €4,000,000 or 10% of turnover of the undertaking in the financial year ending in the 12 months prior to conviction.

Notes 8.2

Some regulations under the Regulatory Pack of 2003 provided for obligations where non-compliance was not explicitly deemed to be an offence in the European Electronic Communications Regulatory Package. Head 6 now provides for summary offences for these obligations with a penalty of up to €5,000 for non-compliance. This Head now renders non-compliance with these obligations subject to conviction on indictment.

- *Regulation 27(4) of S.I. No. 307 of 2003 (Framework) allows the Regulator to impose obligations as appropriate on undertakings designated as having significant market power (SMP) following the market analysis procedure of Regulation 27. This is a key function of the new regime – specific obligations can offer protection from abusive behaviour to Irish consumers, as well as competitors of a dominant operator.*
- *Regulation 26 of S.I. No. 308 of 2003 (Universal Service and Users' Rights), which relates to Number Portability obligations. This is a critical enforcement requirement to facilitate competition among operators. The ability to retain a number is a critical factor for consumers when switching between operators and therefore, compliance with related obligations is important.*

Head 9 – Offences for Failure to Comply With Direction Notice

9.1 Provide for

a summary offence for failure to comply with Direction notices issued by the ComReg or the Data Protection Commissioner under the following pre-existing provisions:

- Regulation 17 of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003, SI No 305 of 2003
- Regulation 23 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003, SI No 306 Of 2003
- Regulation 34 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, SI No 307 of 2003
- Regulation 31 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations, SI No 308 of 2003
- Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations, SI No 535 of 2003

9.2

A person found guilty of an offence under 9.1 is liable on summary conviction to a fine not exceeding €5,000

Notes 9.1

The purpose of this provision is to create a summary offence for failure to comply with Direction notices issued by ComReg and the Data Protection Commissioner under the pre-existing provisions in question. At present there is no provision for summary offences for failure to do or not to do an action prescribed by ComReg or the Data Protection Commissioner under the Directions in question. The inclusion of this summary offence regime will provide ComReg with an additional enforcement tool.

Notes 9.2

A penalty of a fine has been provided for, but as stated earlier, the option of imprisonment has not been provided for in this Bill.

9.3 Provide that

ComReg may, for the purpose of further specifying requirements to be complied with in relation to all offences provided for in this Act, issue Directions to an undertaking to do or refrain from doing anything which the ComReg specifies in the Direction, similar to the provisions at Head 9.1 above

9.4

A person found guilty of an offence under this 9.3 is liable on summary conviction to a fine not exceeding €5,000

Notes 9.3

This provision will extend the Direction making provision to all summary offences provided for in the Act. The inclusion of the provisions at Section 9.3 will enable a consistent approach to enforcement between the pre-existing regime, as set out in the European Communities SI's and the new enforcement regime provided for in this Act.

Head 10 – Extension of Section 44 of the Communications Regulation Act, 2002 provision

10.1 Provide that:

Any summary offence under this Act is an offence to which Section 44 of the Communications Regulation Act, 2002 applies.

Notes 10.1

Section 44 of the Communications Regulation Act, 2002 provides that where ComReg has reasonable grounds for believing that an undertaking has committed certain offences, it can issue a notice of intention to prosecute to that undertaking. The notice gives the undertaking 21 days to remedy the suspected offence and pay ComReg a fine of €1,000 in lieu of prosecution, or face prosecution. Where the undertaking fails to remedy the offence or pay the fine, ComReg may proceed with prosecuting the offence.

This procedure also applies already to summary offences provided for under the European Electronic Communications Regulatory Package of 2003, and this Head now extends this procedure to the offences created under this Act.

Provision 10(1) above does not apply to offences under this Act for which responsibility for prosecution does not fall to ComReg as the Section 44 of the Communications Regulation Act, 2002 type provision is specific to ComReg.

Note for information: The penalties for some offences under the European Electronic Communications Regulatory Package have been amended under this new Act where responsibility for prosecution does not lie ComReg (listed below at (a) and (b)). These offences are not offences to which provision 10.1 applies, as the Section 44 type provision is specific to ComReg under the Communications Regulation Act, 2002.

- *The European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations 2003, SI 535 of 2003 provides for offences for unsolicited communications, which are the responsibility of the Data Protection Commissioner. Head 8(1) of this Bill provides for conviction on indictment for those offences and Head 6 increases the penalty for the summary offences provided for in that SI from €3,000 to €5,000.*
- *The European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, SI 307 of 2003 provides for an offence relating to attendance before an Electronic Communications Appeals Panel established under that SI. These offences may be prosecuted by an Appeal*

Panel and Head 6 of this Bill, increases the penalty for the summary offence provided for in that SI, from €3,000 to 5,000.

10.2 Provide that:

A notice issued under Section 44 of the Communications Regulation Act, 2002 as provided for in 10(1) above, is not subject to appeal to the Electronic Communications Appeal Panel. Regulation 3(1) of S.I. 307 of 2003, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 to be amended accordingly.

Notes 10.2

S.I. 307 of 2003, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 provides for the establishment of an Electronic Communications Appeals Panel to hear and determine appeals against decisions made by ComReg. Regulation 3(1) of that SI provides that notices under Section 44 of the Communications Regulation Act, 2002 are not subject to appeal. This Provision now extends this exclusion to notices of this type issued under this Act.

Part 4 – Emergency Call Handling

Head 11 - Setting up of an Emergency Call Answering Service

11.1 Provide for the:

- designation of an entity as the Emergency Call Answering Service (ECAS) Operator;
- entering into a contract with the ECAS Operator in such form as the Minister considers necessary or desirable for the effective operation of the Emergency Call Answering Service;
- Provide an obligation on ECAS Operator to provide whatever information is required by the Minister or ComReg in the administration of their functions;
- Setting of guidelines for ECAS Operator to determine what is a genuine emergency call.

Notes 11.1

Eircom who have been providing the emergency call answering service in Ireland have advised that they are no longer minded to provide the service. This section provides for the Minister to identify an undertaking to provide the service and to enter into a contract for the provision of the service. As part of the monitoring of the quality of the provision of the service, the ECAS Operator should be obliged to provide whatever information is required by the Minister or ComReg to regulate for the proper provision of the service. It is also proposed that guidelines in relation to determining what is an emergency call be given to the ECAS Operator. Where the ECAS Operator can show that they have followed these guidelines they may be indemnified in respect of their handling of the emergency call.

11.2 Provide additional powers and obligations on ComReg to:

- Monitor the service provided by ECAS Operator;
- Report, as required, on the quality of service provided by the ECAS Operator to the Minister;
- Set the criteria by which ComReg will determine the regulated fees to be charged by ECAS Operator;
- Determine a per call fee to be paid by undertakings who forward calls to the ECAS Operator which will allow for the proper funding and ongoing investment in the ECAS service;
- Set up a sinking fund to cover unforeseen expenses in relation to the operation of the ECAS service.

Notes 11.2

This section provides for the modification of ComReg's functions as detailed in Section 10(1) of the Communications Regulation Act, 2002 to include the functions of monitoring the quality of the service provided by ECAS and for producing as required reports on the quality of the service provided by ECAS.

In order to fund the provision of the service criteria for the setting of ECAS charges will have to be put in place and ComReg will be required to determine a per call charge to be paid by undertakings who forward calls to the ECAS. The funds generated by this charge shall be used by the ECAS Operator for the proper provision of the service and to cater for any expenses considered necessary for the ongoing provision of the service. It is proposed that the criteria for these charges will be stated in Section 10(1)(g) of the Communications Regulation Act, 2002. It is also proposed that that the reserve/sinking fund be expressly provided for in Section 10(1)(g) of the Communications Regulation Act, 2002.

11.3 Provide for

an increase in the penalty provided in Section 13(1) of the Post Office (Amendment) Act, 1951 from £800 to €5,000.

Notes 11.3

This section proposes increasing the penalties provided in Section 13(1) from £800 to €5,000. Section 4 of the Postal and Telecommunications Services Act, 1983 (No. 24) provides for a summary fine of £800 (as well as penalties on indictment) for contravention of a number of Acts as well as Section 13(1) of the Post Office (Amendment) Act, 1951.

The offences created in the existing section can be used in cases of nuisance or malicious calls to the emergency services. The purpose of this section is to increase the maximum penalty that can be handed down by way of a summary offence in the District Court.

Part 5 - Regulation of the IEDR

Head 12 - Regulation of the Internet .ie Domain Name by ComReg

12.1 ComReg may by Regulation provide for:

- the transfer of powers, in relation to the regulation of the .ie domain name, vested in the Minister to ComReg
- access by ComReg to the .ie domain name database on an ongoing basis
- the creation of an offence, where the operator of the Internet .ie domain name, fails to comply with regulations introduced by ComReg.
- Provide for increase of summary fine under subsection (3) of Section 31 of the above Act to €5,000.

Notes 12.1

Section 31 of the Electronic Commerce Act, 2000 provides powers to the Minister to make regulations in respect of the management of the .ie domain name. To date the Minister has not made any such regulations. The purpose of this Section is to transfer the Minister's powers to ComReg and for the creation of an offence where the operator of the .ie domain name fails to comply with regulations introduced by ComReg. The Section also intends to provide ComReg with access to the .ie domain database to ensure that the list of registered users is at all times kept up to date and functioning on the Internet.