



Commission for
Communications Regulation

ComReg's response to the public consultation "Independent Review of Airport Charges Regulation in Ireland"

General Document

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Contents

Section	Page
1 Introduction	3
2 Responses to issues	5
Appeals	5
Organisation Structure.....	6

1 Introduction

1. The Commission for Communications Regulation (“ComReg”) is the national regulatory authority for the electronic communications and postal sectors. ComReg was established in 2002¹ having taken over the functions of the Office of the Director of Telecommunications Regulation which was set up in 1997. ComReg’s statutory functions and objectives are established by primary legislation, namely the Communications Regulation Acts 2002 to 2015², and various other pieces of legislation, which amongst other things transpose European Union law into Irish legislation³.
2. In this submission to the public consultation being run by the Department of Transport, Tourism and Sport, ComReg gives its general observations on two of the key areas on which the report by Indecon International Economic Consultants (“the Indecon Report” and “Indecon”) gives recommendations for the airport charges regulatory regime, namely “Accountability and Appeals Process” and “Appropriate Organisational Structures”. ComReg gives these views from its perspective as an economic regulator operating in Ireland.
3. ComReg notes the proposal in the Indecon Report to abolish the current appeals process applicable to the airport charges regulation regime and replace it with a system involving a “strengthened” appeals panel comprised of individually appointed members. In ComReg’s experience the hearing of appeals of regulatory decisions by the High Court (in particular the Commercial Court or the High Court Competition list) is preferable to appeals being heard by an appeals panel comprised of individually appointed members.

¹ Under Part 2 of the Communications Regulation Act, 2002

² The Communications Regulation Act, 2002 as amended by *inter alia* the Communications Regulation (Amendment) Act 2007, the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 and the Communications Regulation (Postal Services) Act 2011

³ Including the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.

4. ComReg's experience is that co-operation amongst economic regulators and other public bodies can work well. In particular, secondments of staff between public bodies, and making use of centralised services such as those provided by the Office of Government Procurement or the Office of the Government Chief Information Officer have been of benefit. However, while formal bilateral agreements between particular agencies have proved useful when used to co-ordinate regulatory functions, we do not consider them to be an effective way of achieving operational synergies.

2 Responses

Appeals

5. The key characteristics of an effective regulatory appeals system are expertise, speed, consistency and certainty in decision making. An appeals body should itself be composed of experts or have access to the necessary expertise. Delays in coming to final, enforceable decisions create an uncertain environment. Therefore, minimising delay of appeals with a view to achieving certainty of regulation is better for all stakeholders.

6. ComReg comments below in relation to regulatory appeals processes. These comments are informed by its experience of appeals of its decisions to a non-court appeals body known as the Electronic Communications Appeals Panel⁴ ("ECAP"). ECAP was an appeals panel established by the Minister for Communications, Marine and Natural Resources on an *ad hoc* basis. This regime was unsatisfactory as it resulted in a significant delay in the resolution of cases. Such a slow moving appeals process was not suitable for appeals in the fast moving telecoms industry where delays could often be used to the advantage of parties. In 2007 this system was replaced and now appeals of ComReg's decisions are brought directly to the High Court. Cases can be resolved within a timeframe of less than 6 months under this new regime. ComReg considers this new regime to be preferable to the old regime.

7. ComReg's experience of the High Court (and in most instances the Commercial List of the High Court, the Commercial Court) hearing regulatory appeals has been positive. Appeals have been heard quickly and the court has demonstrated sufficient expertise, even in cases involving complex technical issues. In ComReg's experience, the ability to appeal decisions of regulators to the High Court is preferable to appeals being heard by an appeals panel comprised of individually appointed members.

⁴ Established under Part 2 of the European Communities (Electronic Communications Networks and Services) Framework Regulations 2003, which were revoked in 2007. Prior to 2007 appeals of ComReg's decisions were to the ECAP.

8. ComReg considers that utilising existing courts as the appeals body for regulatory decisions minimises risk of delay, as using a standing body obviates the need to source (and in some circumstances agree) the composition of the appeals panel. ComReg notes that a key failing of the ECAP was the delay caused by its *ad hoc* nature, meaning that for each appeal a sufficient number of professionals with the requisite expertise, without conflicts of interest, with availability to sit on such a panel at relatively short notice, had to be sourced.
9. The hearing of appeals by the High Court, is, in ComReg's experience, preferable to the hearing of appeals by an *ad hoc* appeals panels as there is no necessity to interpret and formulate new administrative procedures. Efficient processes are facilitated by the case management operated in the courts system and, in particular, ComReg has found the rigorous case management system in operation in the Commercial Court to be very effective. The judiciary has expertise in dealing with complex issues and regulatory matters. Any lack of expertise, in particular, gaps in technical knowledge, could, in ComReg's view, be addressed by expert witnesses or *amici curiae* on a case by case basis.
10. In general terms, ComReg advocates the streamlining of appeals processes across regulatory regimes. ComReg considers it undesirable that the appeals process is different for different regulators (i.e. decisions of some regulators are subject to review by an "appeals panel" and others by the High Court).

Organisation Structure

11. ComReg's experience is that co-operation amongst economic regulators and other public bodies can work well.

12. ComReg draws a distinction between sharing of services and co-ordination of regulatory functions. With regard to sharing of services, ComReg's experience is that the greatest synergies and economies of scale are achieved where public bodies use centralised government services such as those provided by the Office of Government Procurement or adopt solutions developed by Office of the Government Chief Information Officer. Small public bodies seeking to do joint-tendering for services or sharing of services bilaterally may create overheads rather than achieve synergies.
13. It is worth noting that ComReg and the Commission for Aviation Regulation ("CAR") have in the past successfully mutually shared resources in the form of secondees. ComReg observes that secondments and external consultants can be a useful way of mitigating expertise gaps. However, while formal bilateral agreements between particular agencies have proved useful when used to co-ordinate regulatory functions, we do not consider them to be an effective way of achieving operational synergies.
14. ComReg would like to make the general point that, in its view, more standardised regulatory powers would improve the efficiency and effectiveness of regulation and facilitate co-operation between regulators. ComReg does not consider that all regulators should have the same powers, but rather that where they do enjoy the same powers in certain areas, those powers should be more or less uniform⁵. ComReg is of the view that different requirements and needs could be accommodated in a standardised regime. ComReg provided more detail on this proposal in its response to the recent Law Reform Commission consultation titled "Issues Paper – Regulatory Enforcement and Corporate Offences", ComReg Document No. 16/25.

⁵ ComReg's position is that the powers of individual regulators should not be diminished in order to achieve consistency and that, in general and where possible, powers should be standardised to the highest standard across the board i.e. leveled up rather than leveled down. ComReg provided a sample list of the powers it would consider appropriate for standardisation in its response to the recent consultation by the Law Reform Commission "Issues Paper – Regulatory Enforcement and Corporate Offences", in ComReg Document 16/25.

