



Commission for
Communications Regulation

ComReg submission

ComReg's response to the Consultation Paper on Regulatory Appeals

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1 Executive Summary

The Commission for Communications Regulation ('ComReg') is of the view that appeals mechanisms should be accountable, expeditious, consistent, informed and transparent. ComReg assessed the current appeals mechanism provided for by the electronic communications framework to see if it satisfied these principles and identified some areas of concern. In particular, ComReg is concerned that the current electronic communications appeals process is inappropriately slow. The over-riding concern is that the delay in reaching decisions under the current appeals process has meant that it is difficult to match market, technological and other changes in the electronic communications sector and to deliver the benefits of competition to consumers.

Therefore ComReg is of the view that the hearing of appeals in the High Court would be more appropriate than the current appeals system. ComReg would further suggest that appeals should be listed on the Competition List of the High Court. In particular, the High Court's ability to hear matters directly without referral from an administrative body and the Competition List's rigorous case management systems should operate to address concerns regarding delays. ComReg also considered the appropriateness of alternative mechanisms such as the Competition Appeals Tribunal in the UK and concluded that, were such mechanisms to be made available, within the High Court, ComReg would support them.

2 Submission

2.1 Overview of appeals mechanisms available against ComReg's decisions

ComReg is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radio-communications and broadcasting transmission) and the postal sector.

The majority of ComReg's decisions are appealable using the appeals mechanism set out in Article 4 of the Framework Directive¹ and Part 2 of the implementing Framework Regulations². A summary of this appeals mechanism is contained in the Consultation Paper on Regulatory Appeals (the 'Consultation Paper')³ and ComReg/ODTR statistics regarding judicial review and appeals to ECAP (1998-2006) are contained in Appendix 1 of this submission.

ComReg also makes decisions, outside the remit of the electronic communications framework, for which no appeal on the merits exists e.g. postal regulation decisions. In these instances, the only remedy currently available is by way of judicial review, which is limited to a scrutiny of the process by which a decision has been made. It has recently been suggested that an appeals mechanism, broadly similar to that in the electronic communications framework, should be introduced in a postal context⁴. However this current submission deals with the status quo and while all the general comments are equally applicable to postal appeals, if they are introduced, particular comments refer to the current appeals mechanism in the electronic communications framework

2.2 Comments on current appeals process

Speed

ComReg is concerned that the current appeals process can be inappropriately slow. Previous experience of appeals taken under the new electronic communications framework has been that appeals to the Electronic Communications Appeal Panel ('ECAP') have taken between 8 and 11 months from the time of bringing of a challenge to the initiation of the full hearing. Pending the final ruling of the ECAP, there is no certainty for the parties to the appeal or for the industry

¹ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

² European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003, as amended by the European communities (Electronic Communications Networks and Services)(Framework)(Amendment) Regulations, S.I. No. 210 of 2006

³ See page 13 of the Consultation Paper

⁴ Note that on 18 October 2006, it was proposed by the Commission to alter the text of Postal Directive 97/67/EC via a Third Directive. In relation to appeals, it is proposed to introduce a similar appeals mechanism to Article 4 of the Framework Directive. The text is the same as that providing for the telecommunications appeals mechanism, however the following text is not included 'This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism'.

in general and the benefits to consumers are delayed. ComReg primarily attributes this delay to the lack of strict timelines⁵ and the non-standing nature of the ECAP⁶. The ECAP's decision could then in turn be subject to a judicial review, which could further delay the implementation of a decision.

ComReg has concerns that an appeals mechanism that operates slowly may facilitate a regulated entity trying to delay implementation of a decision. However, the over-riding concern is that the delay in reaching decisions under the current telecommunications appeals process has meant that it is difficult to match market, technological and other changes in the sector and deliver the benefits of competition to consumers.

Costs

Direct costs to the State of the previous ECAPs have been relatively low. However the cost to make ECAPs fully effective would be substantially more. If an existing administrative body such as the Courts or a standing body were to replace the current system, it is ComReg's view that this would likely be more cost effective for the State.

Lack of clarity of procedures to be used in the appeals procedure

A broad procedural framework for the appeals procedure is set out in Part 2 of the Framework Regulations⁷. However many other more detailed procedural issues relating to the conduct of the case arise in the context of an appeal and as these are established separately by each ECAP on an ad hoc basis there is little clarity for either party. To date it seems that each ECAP will follow the procedural decisions of previous ECAPs but this is not required or guaranteed. In order to extrapolate these decisions it would be necessary to scrutinise each individual decision which means that the procedures are not clear or accessible.

ComReg notes that it would be in the interests of all parties if procedural issues relating to the conduct of cases were set out in detail. ComReg points by way of example to the UK where detailed rules of procedure govern the conduct of cases before the Competition Appeals Tribunal ('CAT') and are set out in legislation⁸. Alternatively if the Courts were to provide the appeals mechanism established law, court rules etc., would apply.

⁵ The only timeline specified is that in Regulation 12(1) of the Framework Regulations which provides that 'An Appeal Panel shall as far as practicable in the circumstances, endeavour to determine an appeal within 4 months of the date of establishment of the Appeal Panel or from the date upon which an appeal was referred to an Appeal Panel, as the case may be'. This 4 month timeframe is non-binding and the Appeals Panel has stated that it will in general be difficult to achieve. In Decision No: 02/05 of the Electronic Communications Appeals Panel in respect of Appeal No: ECAP 2004/01, the ECAP stated that 'In view of these experiences, the Panel feels that the guideline timescale of 4 months will be difficult to achieve except, perhaps, in the simplest of cases.'

⁶ In contrast to other existing administrative bodies, such as the Courts, with their established experience, mechanisms and permanent, dedicated administrative resources.

⁷ This section deals with many procedural issues such as Functions and procedure of Appeal Panel (Regulation 8), Submission of observations by other parties to Appeal Panel (Regulation 10), Service and lodgement of documents relating to appeals (Regulation 15).

⁸ All cases commenced after 20 June 2003 are governed by the Competition Appeal Tribunal Rules 2003, which have been amended by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

Expertise

Regulation 5 of the Framework Regulations provides that an ECAP must have 3 members, at least one of whom shall be a practicing barrister or solicitor with at least 7 years experience and the others shall have such commercial, technical, economic, regulatory or financial experience as the Minister considers appropriate. However, there are a limited number of persons available in this or other jurisdictions with the requisite expertise who are not conflicted. ComReg is of the view that it would be preferable if at least one member of an appeals panel had competition law expertise (to date that has not been the case).

2.3 Proposal

In order to meet the criteria which ComReg considers appropriate to assess appeals mechanisms, and in the light of its experiences with the current appeals mechanisms, ComReg is of the view that the hearing of appeals in the High Court, specifically on the Competition List, would be the most appropriate mechanism going forward. The reasons for this proposal are as follows;

- The High Court's ability to hear matters directly without referral from an administrative body and in particular the Competition List's rigorous case management systems should operate to address concerns regarding delays. It is clear from the analysis done in Appendix 1 that experience to date shows that the Courts are more expedient than the ECAP. The use of an existing body (rather than one set up on an ad hoc basis) should reduce delay in decision making, which in turn reduces costs to industry and consumers. Furthermore, a decision of the High Court is not amenable to judicial review, whereas the decision of an ECAP could be subject to a judicial review. Therefore if the High Court were to hear the appeal, there would be less potential for delay.
- Dedicated judges should contribute towards legal certainty. Furthermore, many of ComReg's decisions involve competition law concepts applied to the telecommunications sector and therefore judges hearing the Competition List will have expertise that may be useful in hearing electronic communications appeals. The Independent Regulator Group ('IRG') has warned that a situation where appeals against decisions by the national competition authority go to a court different from the one dealing with appeals against market review decisions by the national regulator could result in inconsistent application of sector specific law on the one hand and general competition law on the other⁹.

⁹ "In most countries the court assessing dominance under competition law is also the relevant court concerning market reviews (Italy, Portugal (partly), Romania, Slovenia, Switzerland, Spain, Czech Republic, Finland (partly: final appeal body is the same), Luxembourg, Hungary (but not the same section), Cyprus, UK, Netherlands, Iceland, Latvia, Lithuania, Estonia and Poland) whereas in France, Ireland, Malta, Denmark, Norway, Sweden, Germany and Austria appeals against decisions by the national competition authority go to a court different from the one dealing with appeals against market review decisions by the NRA. This bears the risk of inconsistent application of sector specific law on the one hand and general competition law on the other. Conflicting views between different courts once became an issue in Austria." [Emphasis added]- IRG Report on national appeal procedures Plen (04)46

- If necessary, the judge could avail of expert advice from expert assessors¹⁰, as is the case for matters listed in the Competition List in the High Court, thus assuring expertise is available. Also, the problem of sourcing non-permanent panel members who are not conflicted with the parties before them will be alleviated (judges holding permanent positions will have a certain level of expertise and will probably not be conflicted).
- As a standing body, the High Court could hear and could likely deal with interlocutory/interim issues more efficiently than the current ECAP. A further advantage would be that in the event of interlocutory/interim issues arising, if necessary, a court order could be made therefore guaranteeing enforceability.
- The use of existing systems, which have a proven track record, would in ComReg's view be preferable to the creation of a new body that has little experience and may have limited administrative support. ComReg is of the view that the costs to the State would be less if an existing system were used.

Recently, concerns have been voiced regarding issues raised by this Consultation Paper to the effect that it would be inappropriate for the Courts to have more than a limited role in the regulatory appeals process as the Courts should not try to second guess regulatory authorities' deliberations and outcomes. ComReg is of the view that the Courts could review these decisions, even taking the merits of the decision into account if appropriate, without impinging on the role of the Regulator or offending against the doctrine of separation of powers. It is important to note that currently the ECAP (and Courts if they were to take on this role) can only confirm or annul (in whole or in part) a decision of ComReg or direct ComReg to amend its decision to remedy a technical defect in the appealed decision, and they do not replace the decision of ComReg.

The Consultation Paper also asked respondents to consider the appropriateness of alternative mechanisms such as the CAT in the UK. Were such mechanisms to be made available to ComReg and if they were within the High Court, with a judge of the High Court chairing the tribunal, ComReg would support them. Standing tribunals allow for development of expertise, ensure consistency in rulings and deliver required administrative capabilities efficiently. Concerns in relation to delays and legal certainty would be addressed by such a standing tribunal.

ComReg recognises that the setting up of a CAT may give rise to constitutional issues but is of the view that they would not be insurmountable. ComReg further notes however that a specific standing tribunal may not be cost-efficient due to relatively small volumes of regulatory appeals.

¹⁰ 'a person to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person..... has skill and experience'. Rule 23(1) Order: 63B, Competition Proceedings - S.I. No. 130 of 2005 Rules other Superior Courts (Competition Proceedings) 2005

3 Responses to questions for consultation

Evaluation of Current Appeals Mechanisms

3.1.1 Question 1

In respect of any of the six regulators under review, do you think that individuals are well-served in terms of:

- (a) Accessibility to information/assistance for appealing against regulators' decisions?
- (b) Effectiveness of the service experienced?
- (c) Recommendations as to the best way of dealing with consumer appeals?

The text preceding this question indicates that by 'individuals', the question means individual consumers/citizens. To date ComReg's experience has been that consumers have not sought to appeal decisions of ComReg. Decisions of ComReg are in general directed at operators and promote the interests of consumers as required by ComReg's objectives and functions. Consumers have the opportunity to input into ComReg's decisions by responding to consultations (individually or via consumer bodies e.g. the National Consumer Agency) and also via the Consumer Advisory Panel established by ComReg in order to assist ComReg in developing and enhancing its understanding of consumer issues in relation to the communications sector. ComReg's website provides comprehensive information on decisions made by ComReg, including the full text of any consultations issued, to which individuals are invited to respond.

3.1.2 Question 2

Are there particular principles which you consider important in evaluating appeals mechanisms? If yes, please specify and comment on whether you consider current appeals provisions satisfy these principles.

ComReg is of the view that appeals mechanisms should be accountable, expeditious, consistent, informed and transparent. As regards these particular principles ComReg notes the following:

- Accountability: ComReg is of the view that appeals mechanisms should be accountable.
- Expeditiousness: Experience to date has been that there have been substantial delays at each stage of the appeals process i.e. when constituting the ECAP, commencing the appeal and making the final decision. The only timeline specified is that in Regulation 12(1) of the Framework Regulations which provides that 'An Appeal Panel shall as far as practicable in the circumstances, endeavour to determine an appeal within 4 months of the date of establishment of the Appeal Panel or from the date upon which an appeal was referred to an Appeal Panel, as

the case may be'. This 4 month timeframe is non-binding and the ECAP has stated that it will in general be difficult to achieve¹¹.

- Consistency: The body of decisions on procedural issues built up in 2005 have to a degree contributed to consistency of decisions but these are not binding on any subsequent ECAPs that may be constituted in the event of future appeals.
- Informed: the availability of external industry experts means that any ECAP can instruct an expert to inform it where it considers this necessary. Any ECAP must have 3 members, at least one of whom shall be a practicing barrister or solicitor with at least 7 years experience and the others shall have such commercial, technical, economic, regulatory or financial experience as the Minister considers appropriate. However, there are limited persons available in this or other jurisdictions with the requisite expertise that are not conflicted. ComReg is of the view that it would be preferable if at least one member of an appeals panel had competition law expertise (to date that has not been the case).
- Transparency: ComReg notes that is a clear need for transparent procedures to be used when appointing members of ECAP and external experts.

3.1.3 Question 3

Is the appeals mechanism operating efficiently?

Largely because of the ad hoc nature of the establishment of the ECAP, the appeals mechanism works slowly. This can be contrasted with other existing administrative bodies, such as the Courts, with their established experience, mechanisms and permanent, dedicated administrative resources.

3.1.4 Question 4

Is the appeals mechanism cost effective for all parties and for the State?

In relation to the parties to the appeal, costs have been high. Although the appeals process is envisaged as more informal than court proceedings, in practice experience to date has been that each party to the appeal has had Senior Counsel representation, which has resulted in high costs for parties.

Direct costs to the State of the previous ECAPs have been relatively low. However the cost to make ECAPs fully effective would be substantially more. If an existing administrative body such as the Courts or a standing body were to replace the current system, it is ComReg's view that this would likely be more cost effective for the State.

¹¹ In Decision No: 02/05 of the Electronic Communications Appeals Panel in respect of Appeal No: ECAP 2004/01, the ECAP stated that 'In view of these experiences, the Panel feels that the guideline timescale of 4 months will be difficult to achieve except, perhaps, in the simplest of cases.'

3.1.5 Question 5

Are the time and resources involved in appeals commensurate with the significance of the issue under appeal?

Yes, it would appear so given that the issues to date have been significant issues and the resources expended have not been excessive.

3.1.6 Question 6

Does the appeals process deliver decisions sufficiently quickly to achieve legal certainty and avoid uncertainty for industry?

No, previous experience of appeals taken under the electronic communications framework has been that appeals to ECAP have taken between 8 and 11 months from the time of bringing of a challenge to the initiation of the full hearing. Given the speed at which conditions in the electronic communications market change, such delays are inappropriate and indeed could result in the finding of the ECAP being moot at the time of the finding.

3.1.7 Question 7

Do those hearing an appeal have equivalent expertise at their disposal to those making the original decision?

See comments on page 5 in relation to expertise.

3.1.8 Question 8

Do the processes appear to lead to a fair and balanced outcome?

The main problem is delay and the uncertainty that this can create. In this regard see the response to question 6 above.

3.1.9 Question 9

Are the appeals procedures clear and accessible to potential appellants and to regulators?

A broad procedural framework for the appeals procedure is set out in Part 2 of the Framework Regulations¹². However many other more detailed procedural issues relating to the conduct of the case arise in the context of an appeal and as these are established separately by each ECAP on an ad hoc basis there is little clarity for either party. To date it

¹² This section deals with many procedural issues such as Functions and procedure of Appeal Panel (Regulation 8), Submission of observations by other parties to Appeal Panel (Regulation 10), Service and lodgement of documents relating to appeals (Regulation 15).

seems that each ECAP will follow the procedural decisions of previous ECAPs but this is not required or guaranteed. In order to extrapolate these decisions it would be necessary to scrutinise each individual decision which means that the procedures are not clear or accessible.

ComReg notes that it would be in the interests of all parties if procedural issues relating to the conduct of cases were set out in detail. ComReg points by way of example to the UK where detailed rules of procedure govern the conduct of cases before the CAT and are set out in legislation¹³. Alternatively if the Courts were to provide the appeals mechanism established law, court rules etc., would apply.

3.1.10 Question 10

Can the appeals mechanism deliver an enforceable decision or is another body required to endorse the decision and order compliance?

Yes, the appeals mechanism can deliver an enforceable decision. Regulation 13(4) of the Framework Regulations provides that 'a determination of an Appeal Panel shall be final and conclusive'. However ComReg must go to the High Court for an order of compliance, in the event of non-compliance with a confirmed decision of ComReg. ComReg notes that if the appeals were heard in the High Court, the final enforcement stage could be dealt with on application to the same judge that heard the appeal.

3.1.11 Question 11

Are the provisions for setting up the appeals body and for appeals from it, appropriate in terms of accountability?

ComReg is of the view that is a clear need for transparent procedures to be used when appointing of members of ECAP and external experts.

3.1.12 Question 12

Can the rules and structures that govern the appeals mechanism be adapted sufficiently quickly to match market, technological and other changes in the sector?

The over-riding concern is that the delay in reaching decisions under the current telecommunications appeals process has meant that it is difficult to match market, technological and other changes in the sector and deliver the benefits of competition to consumers

As mentioned above, procedural rules governing the hearing of the appeals are not prescribed (Regulation 8(3) of the Framework Regulations provides that 'An Appeal

¹³ All cases commenced after 20 June 2003 are governed by the Competition Appeal Tribunal Rules 2003, which have been amended by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

Panel may, subject to these Regulations, determine its own procedure') and therefore they are flexible enough to be adapted at short notice.

3.1.13 Question 13

Are there appeals mechanisms in other jurisdictions which work well, and which should be considered in the Irish context? Please supply details.

As outlined above, ComReg is of the view that the hearing of appeals in the High Court (in particular in the Competition List) would be the most appropriate mechanism going forward. However ComReg believes that an appeals mechanism similar to the CAT could be considered in the Irish context. Benefits of introducing such a mechanism in an Irish electronic communications context might include;

- Expertise: The three persons on a CAT panel to hear a particular case must consist of either the President or a legally qualified chairman drawn from the CAT's panel of chairmen, (who must have "appropriate experience of competition law and practice") and two other members drawn from a panel of some 20 persons with relevant specialist knowledge in such areas as law, economics, accountancy and business.
- Transparency as to procedural rules: Detailed rules of procedure govern the conduct of cases before the CAT and are set out in legislation and nearly every eventuality is governed by proper procedural regulations;
- Speed: Active case management and strict timetables put in place by the tribunal (with the proviso that in general the CAT will aim to complete straightforward cases in within nine months) would be advisable in an Irish context, and
- Efficiency: a standing panel could result in less replication of administrative costs.

Were such mechanisms to be made available to ComReg and if they were within the High Court, with a judge of the High Court chairing the tribunal, ComReg would support them. ComReg notes however that a specific standing tribunal may not be cost-efficient due to the probability of relatively small numbers of regulatory appeals.

Alternatives to Current Appeals Mechanisms

3.1.14 Question 14

Are there other potential advantages/disadvantages of the appeals mechanisms detailed in Table 4.1 that are not identified in the table?

No.

3.1.15 Question 15

Do you agree with the potential advantages/disadvantages attributed to the various appeals mechanisms in Table 4.1?

Yes.

3.1.16 Question 16

Is there scope for using mediation/arbitration as an alternative to formal appeals mechanisms? Are there particular sectors where such alternative approaches could have particular applicability/value?

This is not applicable to ComReg as the Framework Directive requires the use of a specific formal appeals mechanism.

3.1.17 Question 17

What are the relative merits of an expert appeals body compared with a specialist Court?

A potential benefit of an expert appeals body is that there is more scope to avoid unnecessary formalities, which a court could not avoid. This increased flexibility may result in quicker and more effective decision making, however in practise it has not had this result in ComReg's experience.

A specialist court similar to the Competition List in the High Court could result in increased expertise being used in decision making and may facilitate the building up of knowledge in the area by certain judges.

A court has the administrative structure to efficiently handle the volume of appeals experienced in that it could hear multiple matters.

As a standing body, a court could hear and could likely deal with interlocutory/interim issues more efficiently than an ad hoc expert appeals body. A further advantage would be that in the event of interlocutory/interim issues arising, if necessary, a court order could be made therefore guaranteeing enforceability.

As a court is a standing body, there is less likelihood of delay. Also, the problem sourcing non-permanent panel members who are not conflicted with the parties before them will be alleviated (judges holding permanent positions will have a certain level of expertise and will probably not be conflicted).

3.1.18 Question 18

Would a Court supported by a panel of experts (along the lines of the UK Competition Appeals Tribunal) be appropriate in any of the sectors in question? Please explain why/why not.

Yes in the electronic communications sector, see answer to question 13.

3.1.19 Question 19

Should an extension of the use of the Commercial Court to other sectors be considered?
Should “commercial” be interpreted as including regulatory sectors?

In ComReg's view yes the use of the High Court would be appropriate for electronic communications appeals, specifically the Competition List of the High Court. A concern voiced recently in relation to issues raised by this consultation on Regulatory Appeals was that it would be inappropriate for the Courts to have more than a limited role in the regulatory appeals process as the Courts should not try to second guess regulatory authorities' deliberations and outcomes. ComReg would be of the view that the Courts could review these decisions, even taking the merits of the decision into account if appropriate, without impinging on the role of the Regulator or offending against the doctrine of separation of powers. It is important to note that currently the ECAP (and Courts if they were to take on this role) can only confirm or annul (in whole or in part) a decision of ComReg or direct ComReg to amend its decision to remedy a technical defect in the appealed decision, and they do not replace the decision of the regulator.

3.1.20 Question 20

Would the hearing of appeals in Courts using assessors be an appropriate alternative to an appeals panel?

Yes, in particular if there is a specific listing (for example the Commercial List in the High Court), in order to ensure judges have the appropriate experience.

3.1.21 Question 21

- (a) What are the relative merits of a single appeals body for a number of sectors compared with having a separate appeals body for each sector?
(b) Would it be possible and beneficial to have a single appeals body operating different rules for different sectors?

Question (a): The merits of a single appeals body for a number of sectors compared with having a separate appeals body for each sector would include potential consistency in procedures, potential synergies from hearing appeals in different sectors (e.g. electricity and telecommunications), and possibly increased cost efficiency.

However, ComReg notes that not all factors are similar in the various sectors that may be considered. Sectoral regulation depends on the dynamics of the relevant markets and the mechanism used must be capable of responding to these various dynamics which may not be possible with a separate panel outside of the Courts system. In general, ComReg is of the view that one appeals panel, independent of the Courts, would not be suitable for all sectors. ComReg notes that, unlike many other of the regulatory bodies, it applies competition law concepts and therefore there may be

synergies to be had from having a single appeals body, within the Courts system, hearing both competition law and electronic communications framework appeals¹⁴.

Question (b) A single appeals body operating different rules for different sectors would be complex and probably not practical. As different sectors appeals mechanisms operate under different legislative requirements it would be difficult. Even if it were proposed to enact streamlining legislation, some industries appeals processes are restricted by the relevant European Directives.

3.1.22 Question 22

What are the relative merits of a standing appeals body compared with an appeals panel formed for the duration of a particular appeal?

ECAP is convened by the Minister on an ad hoc basis following a request from one of the potential appellants. ComReg is of the view that a standing body could expedite the process, could likely deal with interlocutory/interim issues more efficiently, could ensure increased availability of expertise, and may result in procedures improving.

While ComReg recognises that there are merits to a standing appeals body, ComReg notes that a specific standing tribunal, outside the Courts system, may not be cost-efficient due to relatively small volumes of regulatory appeals.

3.1.23 Question 23

Should appellants be bound to appeal within certain timeframes? If yes, what is a realistic time period to set and are there any other considerations?

Yes they should. At present Regulation 3(3) of the Framework Regulations provides that the notification of intention to appeal must be made to the Minister and the Regulator within 28 days of the decision. ComReg notes that it is not in the interests of certainty in the market or legal certainty that an appellant could substantially delay appealing the decision of a Regulator. Such delays could substantially hinder the development of competition in a rapidly evolving market such as the communications sector.

3.1.24 Question 24

Are there mechanisms which could avoid vexatious or delaying appeals while at the same time ensuring that the right of appeal of citizens/undertakings is not unduly compromised?

Yes. The Framework Regulations provide that an Appeal Panel shall have an absolute discretion to dismiss an appeal where, 'having considered the grounds of appeal, the

¹⁴ See footnote 10 *ibid*

Appeal Panel is of the opinion that the appeal is vexatious, frivolous or without substance or foundation' (Regulation 9(1) (a)). In order to avoid appeals with the purpose of delay, ComReg would advocate that the most appropriate method of avoiding such appeals would be to ensure the appeals mechanism is as efficient as possible. This will ensure that while retaining the right to appeal, appeal is less attractive as a delaying tactic.

Other procedural issues

3.1.25 Question 27

How should appointments to an appeals panel be made?

ComReg is of the view that appointments to appeals panels should be made in an open and transparent manner, equivalent to all other public appointments.

3.1.26 Question 28

Should a mechanism be established whereby leave to appeal would need to be sought and granted? If so, what person/body should be given the power to grant or refuse leave to appeal?

This question is not applicable to electronic communications as the Framework Directive prescribes the appeals mechanism which does not envisage the granting of leave to appeal.

However the current electronic communications framework gives the Minister the discretion not to establish an appeal panel or refer an appeal to an appeal panel already established pending the determination of court proceedings, initiated by any party, relevant to the subject matter of the appeal¹⁵.

3.1.27 Question 29

Should appeals be allowed in relation to the facts on which the regulatory decision was based, or should appeals be confined to conclusions drawn by the regulator from these facts?

A merits based appeal is required by the Framework Directive.

3.1.28 Question 30

Should an appeals body have the power to remit the case to the regulator for a new decision, or the power to replace the regulator's decision with its own? Should this vary from sector to sector?

¹⁵ Regulation 4(2) of the Framework Regulations

ComReg is of the view that an appeals body should not have the power to replace the regulator's decision with its own. The current situation is that the Framework Regulations sets out the system which does not envisage the appellate body replacing the regulators decision with its own only remitting the case to the regulator for a new decision (although it does provide for directing the Regulator to amend its decision if the appeal may be resolved by curing a technical defect in the appealed decision – Regulation 9(3) of the Framework Regulations). ComReg is of the view that this is the appropriate approach. Enabling an appeals body to replace to regulator's decision with its own would amount to an inappropriate impingement on the role of the Regulator, which considers both economic, policy and harmonisation considerations when making a decision, areas that are beyond the scope of the judiciary.

3.1.29 Question 31

Should the regulator's decision stand during the appeals process? What would be the implications of such an approach? Should certain types of decisions stand?

Question 32

Should there be scope for suspending parts of a decision and who should adjudicate on this?

Question 33

Where a decision has not been suspended and an appeal is upheld, what type of remedy should be available for the appellant and who should decide this?

ComReg is of the view that because of market issues involved in certain decisions made by ComReg (e.g. the designation of Significant Market Power), the appeals mechanism for electronic communications issues must allow for the possibility of granting a stay, where warranted. Not to allow for a stay of the regulator's decision in certain circumstances, could result in effective implementation of the decision in a manner which is impossible to rescind if the decision is overturned.

3.1.30 Question 34

Are there any outstanding issues/challenges in improving appeals mechanisms that are not reflected in this Paper? Please specify.

No.

Appendix 1

ComReg/ODTR Statistics Regarding Judicial Review and Appeals to ECAP (1998-2006)

Comparison of time periods for possible stages of review of decisions:

The experience to date has been compared to show how long it takes for a decision to be appealed, including the time limit to bring the appeal, the time for an appeal to be assigned a forum for hearing, the time for the first hearing to occur to assess the appeal procedures, the time for a stay application to be heard if requested, the time for the full hearing and the time for a judgement to be issued if not given at the full hearing. All of these metrics factor into the efficiency of the appeal mechanism. The data indicates that for challenges to ComReg/ODTR decisions High Court procedures (by judicial review, appeal on a point of law or a hearing in the commercial list of the High Court) have generally been faster than those of ECAP. The data below reflects in more detail the experience in each case.

Type of Challenge	Time limit to bring challenge	Time to establish panel to hear appeal and stay ¹⁶	Time to preliminary hearing	Time to hear stay application	Time to full hearing	Time to final ruling
A. High Court Judicial Review and Commercial List (data 1998-2006)	6 months	Court already exists	- 3 months (1 case) - 2 months (1 case) - 6 days (1 case) - 1 day (1 case)	Immediate upon summary application	- 2 months (1 case) - 2.5 months (1 case) - 6 months (1 case)	- 5.5 months (1 case) - 10 months (1 case)
B. High Court appeal on a point of law by Plenary Summons (data 1998-2002)	Varies per legislation from 10-30 days	Court already exists	No data	Immediate upon summary application	- 11 months (1 case) - 7 months (1 case <i>but note this was appeal of above to Supreme Court</i>)	No data
C. Appeal to ECAP (data 2004-2006)	28 days per Regulations	- 1 month (2 cases) - 2 months (4 cases) - 3 months (4 cases) - None established (1 case)	- 5.5 months (1 case) - 4 months (5 cases) - 5 months (4 cases)	- 4 months (1 case) - None (1 case settled within 3 months and stay never heard)	- 11 months (2 cases) - 9 months (3 cases) - 8 months (3 cases)	- 13 months (1 case)

¹⁶ All time periods are cumulative