



Commission for
Communications Regulation

Response to Consultation & Decision Notice

Dispute Resolution Procedures

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Contents

1	Foreword by the Chairperson	2
2	Introduction	3
3	Background	3
3.1	LEGISLATION	5
4	Decision Notice Issues.....	6
4.1	WHAT IS A DISPUTE?.....	6
4.1.1	<i>Summary of Consultation Issues</i>	6
4.1.2	<i>Views of Respondents</i>	6
4.1.3	<i>Commission’s Position</i>	7
4.2	INVESTIGATING A DISPUTE	7
4.2.1	<i>Summary of Consultation Issues</i>	7
4.2.2	<i>Views of Respondents</i>	8
4.2.3	<i>Commission’s Position</i>	8
4.3	ALTERNATIVE MECHANISMS	9
4.3.1	<i>Summary of Consultation Issues</i>	9
4.3.2	<i>Views of Respondents</i>	9
4.3.3	<i>Commission’s Position</i>	10
4.3.4	<i>Views of Respondents</i>	11
4.3.5	<i>Commission’s Position</i>	11
5	Decision Notice Issues.....	12
5.1	RESOLUTION PROCEDURES	12
5.1.1	<i>Summary of Consultation Issues</i>	12
5.1.2	<i>Views of Respondents</i>	12
5.1.3	<i>Commission’s Position</i>	13
5.2	INTERNAL APPEAL PROVISION.....	15
5.2.1	<i>Summary of Consultation Issues</i>	15
5.2.2	<i>Views of Respondents</i>	16
5.2.3	<i>Commission’s Position</i>	16
5.3	CROSS BORDER DISPUTES	16
5.3.1	<i>Summary of Consultation Issues</i>	16
5.3.2	<i>Views of Respondents</i>	16
5.3.3	<i>Commission’s Position</i>	16
5.4	TRANSPARENCY	17
5.4.1	<i>Summary of Consultation Issues</i>	17
5.4.2	<i>Views of Respondents</i>	17
5.4.3	<i>Commission’s Position</i>	18
5.5	GENERAL COMMENTS.....	19
5.5.1	<i>Views of Respondents</i>	19
5.5.2	<i>Commission’s Position</i>	20
6	Next Steps	21
	Appendix A- List of Commission’s Position and Directions	22
	Appendix B- Dispute Resolution Procedures.....	24
	Appendix C – Required Information for submitting a dispute.....	27

1 Foreword by the Chairperson

The Commission for Communications Regulation (ComReg) is responsible for the regulation of the Irish telecommunications sector in accordance with European and National law. The legal basis for the provision of electronic communications networks, services and associated facilities is changing throughout the European Union on 25 July 2003 as a result of the introduction of five new European Directives and the transposition of four of these into Irish Law.

Arising from these developments changes are required under the new regulatory framework to ComReg's existing dispute resolution procedures to manage disputes between undertakings.

In June 2003 ComReg launched a consultation process in relation to its dispute resolution procedures¹. The consultation period ran between 20 June and 11 July 2003 and three responses to ComReg's proposed procedures were received.

The following is a list of respondents to the consultation:

- Eircom
- Esat BT
- O2

The Commission wants to thank all the respondents to the consultation for their help in assisting the finalisation of the Dispute Resolution Procedures. The responses are available for inspection at the ComReg office, excluding confidential material that respondents specifically asked to be withheld.

**Etain Doyle,
Chairperson.**

¹ Please read this Response to Consultation and Decision Notice in conjunction with the preceding consultation paper "Dispute Resolution Procedures" ComReg document no 03/69 available on ComReg's website www.comreg.ie

2 Introduction

The Consultation Paper proposed changes to ComReg's existing dispute resolution procedures in order to meet the requirements of the new EU framework package which takes effect on 25 July 2003.

On the 21st July 2003 the Minister for Communications, Marine and Natural Resources transposed four of the five EU directives that comprise the new regulatory package into Irish law. These are the Framework, Authorisation, Access and Universal Service directives. The new regulations take effect on 25 July 2003.

The new Framework Regulation² which transposed the Framework Directive into national law imposes new obligations on ComReg concerning dispute resolution.

The four key themes in the new Framework Regulation are:

- The time period for ComReg's resolution of disputes has shortened from six months to four;
- ComReg to make provision for alternative mechanisms to resolve disputes;
- Undertakings engaged or intending to engage in the provision of electronic communications networks or services or associated facilities can lodge disputes;
- ComReg must make its decision publicly available, giving the parties to the dispute a full statement of the reasons for its decision.

ComReg recognises that the dispute procedures in this paper constitute only one element of how it deals with issues raised by the industry. Many issues are dealt with in other ways including: resolution through informal contacts or negotiation; or are developed in industry fora; they become the subject of a ComReg own initiative investigation, by way of consultations or through alternative dispute mechanisms.

It should be noted that ComReg has separate procedures in place to manage consumer complaints³ and ComReg has published a Decision Notice⁴ on aspects of its future complaint handling role under the new Framework.

As mentioned in the Consultation Paper, ComReg intends to issue a further guidance on disputes later in the year.

The information contained in this document does not constitute legal or commercial advice and no liability is accepted in this regard. Readers should seek independent expert advice appropriate to their own circumstances. In particular, readers should

² S.I. 307 of 2003 European Communities (Electronic Communications networks and services) (Framework) Regulations 2003

³ ComReg Document 03/20 -ComReg's approach to consumer issues in the Irish communications market is available on ComReg's website www.comreg.ie

⁴ ComReg Document 03/86 – Decision Notice D16/03 "User's rights to communications services"- Protecting users in a developing communications market available on ComReg's website.

consult the official texts of EU and / or national legislation and not rely upon the necessarily abbreviated versions of extracts from legislation contained in this document. This document is without prejudice to the legal position or the rights and duties of ComReg to regulate the market generally.

3 Background

3.1 Legislation

ComReg will operate in the context of the obligations contained in the new EU regulatory framework; in particular Articles 20 and 21 of the European Communities (Framework Directive)⁵, and Regulation 31 and 32 of the Framework Regulation. This Regulation transposes the Directive into national law and takes effect on 25th July 2003.

The new dispute resolution procedures are also governed by the requirements of Article 8 of the Framework Directive and Section 12 of the Communications Regulations Act.

ComReg, therefore in exercise of its functions under the Communications Regulations Act, 2002⁶ herein sets out the requisite framework for the resolution of disputes between telecommunications operators.

⁵ Directive 2002/21/EC of the European Parliament and of the Council of 7/03/2002 on a common regulatory framework for electronic communications network and services.

⁶ SI 20 of 2002.

4 Decision Notice Issues

4.1 What is a dispute?

4.1.1 *Summary of Consultation Issues*

In the consultation paper ComReg suggested that, for an issue to be accepted as a dispute, and for it to be resolved under the new Dispute Resolution Procedures, it must include the following characteristics:

- The dispute should be between undertakings in connection with obligations under the Directives and the Regulations, so that the party initiating the dispute has a grievance which is based on the failure of the other party to comply with its obligations.
- The dispute should be between undertakings engaged in the provision of electronic communications networks or services or associated facilities.

4.1.2 *Views of Respondents*

One respondent believed that ComReg's definition of an undertaking entitled to lodge a dispute goes above and beyond the definition of an entitled undertaking, as set out in Article 20 of the Framework Directive. This respondent stated that Article 20 sets out the parties entitled to lodge a dispute with ComReg as a result of a party's alleged failure to meet its obligations under the Framework, Access, Authorisation and Universal Services Directives. The respondent stated that there is no reference to associated facilities in Article 20. Therefore this respondent requested ComReg to amend the scope of qualification of parties entitled to lodge a dispute to undertakings engaged in the provision of electronic communications networks or services.

Another respondent did not believe that, in order for the dispute resolution procedures to apply, the dispute must be characterised by one party claiming "...that the other party has breached its legal obligations". This respondent stated that for a matter to be considered a dispute falling within this procedure, the issue must, by its nature, be conducive to negotiation between the parties involved. Where a matter is not such that it could properly form the subject of negotiations between the parties then the matter should be considered a 'complaint' and treated accordingly.

Similarly, this respondent did not agree with ComReg's characterisation of a dispute and submitted that the following wording should be substituted for the first bullet in the definition set out in section 4.1 of the consultation paper:

"The dispute should arise between undertakings in connection with obligations under the Directives and the Regulations, such that the party initiating the dispute has a grievance which is based on the failure of the other party to negotiate and/or engage with the complainant thereby failing to comply with its obligations".

The third respondent did not comment on this section.

4.1.3 *Commission's Position*

The Framework Regulation defines who is entitled to lodge a dispute under the new resolution procedures. In that Regulation an undertaking is defined as:

‘an individual, a body corporate or an unincorporated body of persons engaged or intending to engage in the provision of electronic communications networks or services or associated facilities’.

ComReg believes that it is this definition which must be used for the dispute resolution procedures. ComReg would also draw attention to Regulation 31 of the Framework Regulation which sets out ComReg's obligations concerning dispute resolution.

ComReg believes that the respondent's suggestion regarding the characterisation of a dispute has merit. For guidance purposes, a dispute is where one undertaking has a particular grievance with another which is based on the failure of the other party to comply with its obligations and it is capable of being resolved by direct negotiation between the parties. A complaint is where one party alleges that another party is engaging in more general non-compliant behaviour which is not specific to the complainant.

Commission's Position:

These dispute resolution procedures shall apply to undertakings engaged, or intending to engage, in the provision of electronic communication services or networks or associated facilities.

4.2 Investigating a dispute

4.2.1 *Summary of Consultation Issues*

ComReg proposed in the consultation paper that for a dispute to be accepted, a number of conditions needed to be met.

The conditions proposed by ComReg were:

- ComReg is satisfied that the matter notified is best resolved within the dispute resolution procedures;
- The scope of the dispute should be clear;
- There should be a statement indicating the obligation to which the dispute relates and the legal basis for ComReg intervention;
- The party bringing the dispute should indicate its preferred remedy;
- The impact of a failure to resolve the dispute on the affected party should be outlined;

- There should have been serious and quantifiable attempts to resolve the issue bilaterally before a dispute is brought to ComReg. The Dispute Procedure should not be used as a replacement for normal commercial negotiation.
- The submission of the dispute should normally include all relevant documentary evidence.

Q. 1. Do you agree with ComReg’s proposed criteria for accepting a dispute submission? If not, please give a detailed explanation.

4.2.2 Views of Respondents

The three respondents were in broad agreement with the criteria proposed by ComReg.

One respondent particularly welcomed ComReg’s proposal that once a dispute is accepted by ComReg, the scope of the dispute would not subsequently be modified unless all parties agree. This respondent also suggested two additions to the criteria: first, in addition to indicating its preferred remedy the party initiating the dispute process should be allowed the opportunity to indicate how it would prefer the dispute to be dealt with i.e. through either the formal dispute resolution procedure, or a mediation process, or binding arbitration; and second, where there is evidence that one or more parties to the dispute have not engaged in “*serious attempts to resolve the issue bilaterally*” then ComReg should “direct” the parties to do so before accepting the dispute.

A second respondent emphasised that all attempts to resolve the issue bilaterally should be exhausted before referring the issue as a dispute to ComReg. This respondent again stressed the importance of defining an undertaking entitled to refer a dispute to ComReg in accordance with Article 20 of the Framework Directive.

The third respondent emphasised the need for clear distinction between a dispute and a complaint. Again this respondent stated that in order for an issue to qualify as a dispute the issue needed to be capable of bilateral discussion and negotiation.

4.2.3 Commission’s Position

ComReg welcomes the broad support expressed by the three respondents. ComReg is of the opinion that except in exceptional circumstances all of the conditions outlined in Appendix C need to be satisfied before a dispute will be accepted. This is important having regard to the shortened timeframe of four months within which a dispute must be resolved. Where one or more of these conditions have not been satisfied ComReg reserves the right to inform the complainant and request that all the relevant outstanding information be

submitted. The four month timeframe will only commence when all of the information required has been supplied by the complainant.

ComReg agrees with the suggestion that the complainant should be allowed in its submission to indicate how it would prefer the dispute to be dealt with e.g. through the dispute procedures, via mediation etc. However, as mentioned in the consultation paper, mediation will only be used where all the parties to the dispute agree that it is the most appropriate mechanism. In addition, at Step 2, the procedures provide an opportunity for the respondent to indicate how the dispute should be addressed. Furthermore, ComReg, taking account of all factors, reserves the right to decide on the final resolution mechanism on a case by case basis. In general, where a matter is before the courts ComReg will not accept the issue as a dispute. In all cases ComReg will consider the parties' comments before making its decision on how to manage the dispute. ComReg will therefore add this to the list of required information in Appendix C.

In relation to the point made by one respondent concerning lack of serious engagement bilaterally ComReg points out that this issue is already addressed in its conditions for accepting a dispute. Where necessary, ComReg will direct the parties to engage in good faith negotiations before accepting a dispute.

Direction 1: For a dispute to be accepted by ComReg, the complainant must submit the required information outlined in Appendix C.

4.3 Alternative Mechanisms

4.3.1 *Summary of Consultation Issues*

ComReg proposed to continue to offer the facility of mediation as an alternative to the dispute resolution procedures. ComReg stated that mediation would only be used where the parties agree to its use. In addition ComReg stated that it would continue to deal with issues referred to it by complainants in other ways including resolution through: informal contacts or negotiation; discussion and negotiation at industry fora; ComReg own initiative investigation and public consultations. ComReg stated that it would continue to choose the most appropriate method for resolving the issue on a case by case basis.

Q. 2. Do you agree with ComReg's proposal for alternative dispute resolution? If not please give a detailed reply.

4.3.2 *Views of Respondents*

All of the respondents welcomed ComReg's proposals, in particular the offer of mediation. One respondent highlighted its view as to the futility of referring

issues to industry fora for resolution, stating that agreement or consensus in such arenas was impossible.

Two respondents expressed the need for clarity of timescales for the alternative process and were disappointed that there was no description of the alternative mechanisms under consideration. One respondent cautioned that these alternative mechanisms should not be used as a means of delaying or denying undertakings their entitlement to refer a dispute to ComReg under Article 20 of the Framework Directive. Another respondent stated that ComReg should provide detail on the criteria it will use to choose the most appropriate method for resolving an issue.

A third respondent suggested that where ComReg decides to resolve the issue by means of a forum, informal contacts/ negotiation, public consultation or ComReg investigation, consultation should be limited to the parties involved and if wider consultation is necessary this should not lead to an expansion of the scope of the dispute. Where this is the case a separate consultation should be undertaken.

4.3.3 Commission's Position

ComReg intends to continue with offering mediation as an alternative mechanism for dispute resolution. ComReg believes that where mediation is used the terms of reference will be subject to discussion with the parties and that the outcome of such a process will be binding on both parties. ComReg will bear the costs associated with the provision of any mediation service. ComReg will appoint an independent external mediator or ComReg official within ten days of agreement to mediation by the parties to the dispute. ComReg may also offer mediation in the case of a cross border dispute, where NRAs jointly decide that it would resolve the dispute in a timely manner.

ComReg is required to adhere to the timelines outlined in Regulation 31 of the Framework Regulation. To clarify, where ComReg decides in Step 2 (a) of the procedures that alternative dispute mechanism should be used it will inform the parties of its decision as soon as possible, giving the reasons for its decision. From the date of ComReg's notification, the parties have four months to resolve the issue in dispute. Where the parties have failed to reach a solution within the four months and provided that legal proceedings in relation to the dispute are not in progress, each party can request ComReg to intervene. ComReg may decide to intervene at the request of a party at an earlier date. Once ComReg receives a request to intervene it shall initiate an investigation into the dispute and make a determination within four months from the date of the request, except in exceptional circumstances. The dispute will follow the procedures outlined in Appendix B.

ComReg does not accept the suggestion by one respondent that alternative mechanisms could be used to deny or delay an undertaking's right to refer a dispute to ComReg under Regulation 31. Where ComReg decides that an alternative mechanism is the most appropriate way of resolving the dispute, the party's right is neither being delayed or denied. In some instances, the dispute

may be resolved more quickly under an alternative mechanism than if it was managed through the resolution procedures.

ComReg believes that, in general, where it decides to resolve a dispute through: a forum; informal contacts/ negotiation, or ComReg investigation, the consultation should be limited to the parties involved. However, in some cases, the issue at hand may have implications beyond the parties concerned and it may be necessary to obtain other views. In such cases ComReg reserves the right to undertake a wider consultation.

Direction 2: ComReg will offer mediation as an alternative mechanism for dispute resolution, where the parties to the dispute agree to its use. The outcome of the mediation process will be binding on both parties.

Direction 3: ComReg will continue to resolve disputes between undertakings via alternative mechanisms where it decides that these are the most appropriate way to resolve the dispute. Such mechanisms will include resolution through: informal contacts or negotiation; discussion at industry fora; ComReg own initiative investigation and public consultation. ComReg will choose the most appropriate mechanism on a case by case basis.

Q. 3. Are there other alternative dispute resolution mechanisms which would be useful?

4.3.4 Views of Respondents

No suggestions were received from respondents. However, one respondent reiterated that ComReg needed to provide more detail on the process and associated timelines for alternative dispute mechanisms. A second respondent welcomed the introduction of an Appeals Panel, as set out in Article 4 of the Framework Directive and believed that once established it will be a useful body to refer ComReg decisions.

4.3.5 Commission's Position

ComReg sees no value in developing additional alternative dispute resolution mechanisms at this time.

5 Decision Notice Issues

In the Consultation Paper ComReg stated that when it had been notified of a dispute in accordance with the requirements outlined in Appendix C of the consultation paper, it would be resolved within a maximum of four months, except in exceptional circumstances. In order to meet this shortened timeframe, ComReg proposed to simplify the procedures for dealing with a dispute, and to shorten the times associated with some elements of the process.

5.1 Resolution Procedures

5.1.1 *Summary of Consultation Issues*

ComReg presented a six step procedure to resolve disputes. To assist understanding, the procedures were illustrated in a flowchart.

Q. 4. Do you agree with the procedures proposed? If you do not, please give reasons.

5.1.2 *Views of Respondents*

All respondents broadly agreed with the steps laid out in the proposed dispute resolution procedures although each respondent proposed some modifications and requested clarification on timelines.

In particular the three respondents stated that the level of detail with regard to timelines for each step was not sufficient. They suggested that in addition to providing timelines for undertakings ComReg should also publish the timelines around those steps which it undertakes in the process.

One respondent was unclear when the four month clock began and suggested that it should commence once ComReg has communicated to the parties that the dispute will be resolved using the dispute resolution procedures.

One respondent suggested that ComReg should undertake its initial assessment of a dispute resolution notice within three days of the receipt of notification. Where the information is deemed incomplete, this respondent suggested that ComReg should notify the complainant within four days from receipt of the complainant's notification and should provide full reasons for its decision. Another requested ComReg to specify the timeline when it would notify the recipient party of a dispute in Step 2. In addition, it suggested that this Step should provide for ComReg notification to the complainant of when the four month clock began.

One of the respondents expressed concern that ComReg's proposal to meet with the complainant (and where appropriate the respondent) in Step 2 may unduly delay the overall process.

One respondent expressed the belief that under ComReg's proposed process for alternative dispute resolution in Step 2 (a) where a party has sought the assistance of ComReg and has been refused, that four months is an unreasonable period to have to wait for intervention and suggested that a two-month period is the maximum period that a party should have to wait to seek ComReg intervention.

Guidance on what ComReg is likely to consider exceptional circumstances, where the four month timeframe would not apply was requested by one respondent. Another stated that where a party's submission is sent to the other party for comment ComReg should be required to seek the party's explicit permission to disclose commercially sensitive information. Two respondents stated that it was important in the interests of transparency that all parties to the dispute could view submissions by other parties (subject to business confidentiality) while one added that they should also be given an opportunity to respond.

One of the respondents sought clarification on ComReg's use of the term "in general" regarding the fourteen calendar days for a party to respond etc. This respondent believed that given the four month period, fourteen calendar days should be set as the maximum, unless the dispute has been categorised as falling within "exceptional circumstances".

One respondent did not agree with the proposal that if the information provided in accordance with Appendix C was incomplete, the four month clock would be reset, and stated that this would make the whole process open to potential abuse and delay.

It was suggested by one respondent that parties to the dispute should be given seven calendar days, rather than the fourteen proposed by ComReg to submit comments on the Draft Determination.

One respondent stressed that in its final determination ComReg is required to provide a full and clear statement of the reasons for its determination.

5.1.3 Commission's Position

ComReg is required to comply with its obligation to resolve disputes notified to it within four months, except in exceptional circumstances. Because of this commitment ComReg is of the opinion that it requires flexibility within this timeframe to effectively resolve disputes and therefore has not specified further timeframes on its actions and steps of the process.

The four month maximum timeframe will start from the **date of notification** of a dispute which satisfies the requirements outlined in Appendix C. Regulation 31 of the Framework Regulation specifies this timeline and ComReg is obliged to adhere to it, except in circumstances which ComReg consider exceptional.

ComReg agrees that the complainant should also be formally notified of the date when the four month clock commenced and adds this to Step 2 of the procedures in Appendix B.

ComReg does not accept the suggestion that the provision for meeting with the complainant (and the respondent where appropriate) in Step 2 will delay the process. Conversely, ComReg is of the opinion that such a meeting may indeed be a valuable time saver and may assist ComReg in identifying the core and all associate issues of the dispute and potential solution early in the procedures.

Regarding the comment expressed by one respondent that where ComReg opts to resolve a dispute by alternative mechanisms that four months is an unreasonable period, ComReg points out that this is a maximum time period and is mandatory under Regulation 31 (5) of the Framework Regulation.

ComReg notes that the term “exceptional circumstances” has not been defined by the Directives and the Framework Regulation. This is to allow sufficient flexibility for NRAs to determine on a case by case basis whether a dispute is exceptional in nature.

With regard to the statement concerning ComReg’s disclosure of business confidentiality, ComReg would like to clarify that it has been and will continue to be its policy not to divulge matters of business confidentiality. However, undertakings are expected to be reasonable and cannot, for example, mark their entire submission “confidential”. Rather they should include matters of business confidentiality in a separate annex to their submission(s). ComReg has a statutory obligation to decide what constitutes an issue of business confidentiality and will overrule an undertaking’s labelling where required.

ComReg remains of the opinion that where it believes that it will assist or accelerate the resolution of the dispute, each party’s submissions (subject to business confidentiality) may be sent by ComReg to the other party for comment. ComReg will decide this on a case by case basis. Furthermore, ComReg will always make available each party’s submissions for viewing by the other at all times during the dispute process. However, given the short deadline of four months it may not be feasible in some cases to allow the parties to comment on each other’s submissions. Where this is the case, the parties will have the opportunity to make such comments in their submissions to the Draft Determination.

ComReg would like to clarify that its use of the term “in general” alongside fourteen calendar days means that fourteen calendar days will be the standard time allowed for submissions. However, in some cases, submissions may be required under fourteen calendar days and ComReg will give reasons when these shortened timeframes are set. In exceptional circumstances this timeframe may be extended.

On the point of resetting the four month clock where ComReg becomes aware that the “required information outlined in Appendix C” is incomplete, ComReg is of the opinion that this is reasonable. As it is the complainant who is requesting ComReg’s intervention the onus should be on the complainant to assist ComReg to the best of its ability. At the very least, it must provide

ComReg with a comprehensive account of its dispute and all relevant information available to it. Thus, this should act as an incentive to complainants to ensure that their dispute requests are well developed before seeking ComReg intervention. It will also ensure that ComReg resources are used efficiently.

Secondly it maybe the case after two months have passed from the commencement of the dispute that ComReg finds after fuller investigation that the information supplied was not fully complete or that the focus of the dispute was incorrect, natural justice would require ComReg to re-consider the dispute as a whole and allow the respondent the full opportunity to answer the new dispute. In order to ensure fairness and natural justice it would not be possible to complete the dispute procedures in a shorter period than four months. Both these reasons should explain ComReg's decision to re-start the clock in such circumstances.

ComReg notes the suggestion to give the parties to a dispute seven calendar days to make their submissions on draft determinations. However, it is ComReg's experience that parties need fourteen calendar days in order to comment comprehensively on the draft. Previous disputes would support this position.

Finally ComReg agrees that in its final determination it is beneficial to give a full and clear statement of the reasons for its determination and the procedures provide for this.

Direction 4: The dispute resolution procedures and timeframes as described in Appendix B shall apply to all disputes between undertakings.

5.2 Internal Appeal Provision

5.2.1 *Summary of Consultation Issues*

ComReg proposed to remove the internal appeal provision which was provided for in the existing procedures. ComReg believed that this element of the existing procedures was not as effective as it was envisaged and sought the industry's views on whether a provision for appealing a Final Determination internally in ComReg should be included in the proposed procedures.

Q. 5. Do you think there should be a provision for requesting an internal ComReg review of a Final Determination? Please give reasons for your answer.

5.2.2 *Views of Respondents*

The three respondents agreed with ComReg's suggestion to remove the provision for an internal ComReg appeal. All three mentioned the proposed Appeal Panel in the Draft Framework Regulation and were of the opinion that this Panel would adequately deal with appeals of ComReg Final Determinations regarding disputes where required.

5.2.3 *Commission's Position*

ComReg accepts the respondents' views on the removal of the internal appeals provision and notes the alternative appeal mechanisms available to parties. Therefore there will be no provision for an internal ComReg appeal in the new dispute resolution procedures.

Commission's Position:

There will be no provision for an internal ComReg appeal in the dispute resolution procedures.

5.3 Cross Border Disputes

5.3.1 *Summary of Consultation Issues*

In the consultation paper ComReg stated that in the case of a cross-border dispute, it would co-ordinate its response with other NRAs involved. ComReg stated that it would expect to follow the proposed resolution procedures and would communicate with the complainant within two weeks of receiving the formal notice of dispute. Where the dispute had been accepted, this communication would include a proposed timetable for resolving the dispute, haven taken into account co-ordination with other NRAs.

5.3.2 *Views of Respondents*

One respondent queried whether ComReg's proposal to notify the complainant of its decision to accept the dispute within two weeks of receiving the formal notice of the dispute would apply to disputes submitted in a national context.

5.3.3 *Commission's Position*

The two week response in the case of a cross border dispute does not apply to a dispute in the national context. ComReg believes in the case of a cross border dispute that it will need two weeks to consult with the other relevant NRA(s) before communicating their joint decision on how to manage the dispute.

Where ComReg and the other NRA(s) decide to accept the dispute, this communication will include a proposed timetable for resolving the dispute, taking into account co-ordination with other NRAs. ComReg would expect to follow the standard dispute procedures to resolve the dispute.

The Framework Regulation stipulates that ComReg and the other NRA(s) may make arrangements to decline to resolve the dispute where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8 of the Framework Directive.

Such arrangements shall include provision for ComReg or the NRA(s) to inform the parties without delay where they agree to jointly decline to resolve the dispute. If after four months the dispute is not resolved, and the dispute has not been brought before the courts by the party seeking redress, and if either party requests, ComReg shall coordinate with the other NRA(s) in order to bring about a resolution of the dispute.

Where appropriate, ComReg will coordinate its position with other NRA(s) in accordance with any procedures agreed by the Independent Regulators Group and/or European Regulators Group.

5.4 Transparency

5.4.1 *Summary of Consultation Issues*

In order to meet with the Framework Directive requirements on transparency, ComReg proposed to publish the scope and outcome of disputes on its website having regard to business confidentiality. In addition, ComReg stated that it would outline the reasoning for its decision in the Draft and Final Determinations.

<p>Q. 6. Do you agree with ComReg's proposals regarding transparency? If not, please give reasons.</p>

5.4.2 *Views of Respondents*

One of the respondents advised that where a party (other than a party to the dispute) is allowed to comment on the scope of the dispute in Step 2 (b) this comment should not be allowed to alter the scope of the dispute, unless as suggested by ComReg in the consultation paper, all parties to the dispute agree to this.

A second respondent did not agree with ComReg's proposal to publish a draft determination on its website in all cases. This should only occur where other parties have made substantive submissions in response to ComReg's publication of the scope of the dispute in Step 2. This respondent also sought clarification on whether the publication of the outcome of the dispute and ComReg's reasoning would be covered by the same publication.

Two of the three respondents, agreed that matters pertaining to business confidentiality within a determination should not be published, while one

suggested that this should not preclude ComReg from publishing the determination, with detailed reasons upon which it is based.

One respondent believed that it was imperative that ComReg determinations (including a full statement of the reasons for the decision) are made available to the public and that this is required by Article 20 (4) of the Framework Directive. This respondent noted that providing an outline of ComReg's reasoning as part of the determination was insufficient in meeting ComReg's obligations under the Directive.

5.4.3 *Commission's Position*

ComReg agrees with the comment that where it publishes the scope of the dispute on its website in Step 2 (b), and comments are made by parties (other than the parties to the dispute), the scope will not change unless the parties to the dispute agree.

Draft Determinations may be published on ComReg's website. This will be decided by ComReg on a case by case basis. Where ComReg is of the opinion that the issue in dispute is one which has an impact on the wider market it may publish the Draft Determination (having regard to business confidentiality) on its website. All interested parties will be allowed to submit comments to ComReg. In other disputes, the issue may only be of relevance to the parties to the dispute and in these cases, draft determinations will not be published.

ComReg would also like to provide clarification on the Final Determination. The Final Determination published on ComReg's website will include a full and clear statement of ComReg's reasons for its decision. A copy of this document will also be sent to the parties to the dispute by email and post. Matters pertaining to business confidentiality will not be published in the Final Determination.

Commission's Position:

In order to comply with its obligations on transparency, ComReg will:

- **Publish the scope of any dispute on its website having regard to the requirements of business confidentiality;**
- **Where appropriate ComReg may publish a Draft Determination on its website having regard to business confidentiality;**
- **Publish the outcome of the resolution of the dispute in the form of a Final Determination on its website, having regard to business confidentiality;**
- **The Final Determination will include a full and clear statement of ComReg's reasons for its decision.**

5.5 General Comments

In addition to submitting comments on the specific questions posed by ComReg in the consultation paper, all three respondents made some general comments.

5.5.1 Views of Respondents

One respondent stressed that implementation of Final Determinations is extremely important and suggested that ComReg could greatly improve in ensuring compliance with its determinations.

Transparency of ComReg's internal management of disputes was suggested by one respondent and would increase clarity among the parties to a dispute.

Clear guidance from ComReg on the distinction between a complaint and a dispute is needed. In addition, clear and unambiguous guidelines on ComReg's processes for managing complaints are also required. Another party stated that this ambiguity had led in the past to the dispute resolution process being circumvented by complainants which subsequently result in a determination by ComReg without reference to the dispute process.

One of the respondents re-iterated that Article 20(1) of the Framework Directive provides that a binding decision should be issued by a national regulatory authority in "*the shortest possible time frame and in any case within four months, except in exceptional circumstances.*" This respondent took issue with ComReg's statement in the consultation paper that it would *endeavour* to resolve a dispute within the four month time frame and stated that Article 20 makes no reference to a regulatory authority endeavouring to resolve a dispute.

This respondent also believed that ComReg's statement that "where a party to a dispute fails to provide information or a response within the requested timeframe, ComReg would not grant an extension, would not accept late submissions and would base its determination on the best information available to ComReg" was an unfair and unbalanced approach, especially as ComReg was not giving itself specific timelines for its tasks in the procedures. Another respondent stated that exceptional circumstances could arise which prevented a party to the dispute from providing a submission on time (e.g. the existence of a large number of concurrent disputes involving one party). This respondent submitted that the procedures adopted by ComReg should contain some flexibility for the management of a dispute process when these "exceptional circumstances" arise.

One respondent, commenting on the existing procedures under which disputes were to be resolved within six months, stated that it was its experience that in many cases the six month timeframe had not been adhered to. This respondent believed that there could be no absolute in terms of the time it took to resolve dispute issues and that imposing strict timeframes may actually damage the

quality of decisions. However, in the interests of efficiency and effectiveness, this respondent concluded that disputes should be resolved in a timely manner.

One suggestion from a respondent was that the process for dispute resolution is limited in scope by written terms of reference developed by ComReg having received the initial complaint from the complainant.

5.5.2 *Commission's Position*

Compliance with determinations is of the utmost importance and ComReg will take every appropriate measure to ensure that these are fully complied with.

All requests for ComReg intervention for disputes may take any format (email, letter etc.) but must except in exceptional circumstances contain the information outlined in Appendix C of this paper before ComReg will consider the issue further. Once the required information is supplied to ComReg the dispute procedures and timelines commence. As outlined in the procedures, the dispute may then be managed via the standard procedures or via alternative mechanisms. This should address the respondent's concern that some undertakings have circumvented the procedures in the past.

The four month timeframe does not permit slippage on ComReg's part or on behalf of the parties to the dispute. ComReg will ensure that it carries out its work in a timely manner and re-iterates that it will not grant extensions or accept late submissions and it will base its determination on the best information available to it.

ComReg does not agree that the number of disputes involving one particular undertaking constitutes an exceptional circumstance within the meaning of Article 31 of the Framework Regulation.

6 Next Steps

This consultation process focused on ComReg's new procedures for the resolution of disputes between undertakings. ComReg intends to issue further guidance on disputes later by the end of October 2003.

Appendix A- List of Commission's Position and Directions

For ease of reference, the following sets out a list of the Commission's Positions and Directions set out in this Decision Notice

Commission's Position: These dispute resolution procedures shall apply to undertakings engaged, or intending to engage, in the provision of electronic communication services or networks or associated facilities.

Direction 1: For a dispute to be accepted by ComReg, the complainant must submit the required information outlined in Appendix C.

Direction 2: ComReg will offer mediation as an alternative mechanism for dispute resolution, where the parties to the dispute agree to its use. The outcome of the mediation process will be binding on both parties.

Direction 3: ComReg will continue to resolve disputes between undertakings via alternative mechanisms where it decides that these are the most appropriate way to resolve the dispute. Such mechanisms will include resolution through: informal contacts or negotiation; discussion at industry fora; ComReg own initiative investigation and public consultation. ComReg will choose the most appropriate mechanism on a case by case basis.

Direction 4: The dispute resolution procedures and timeframes as described in Appendix B shall apply to all disputes between undertakings

Commission's Position:

There will be no provision for an internal ComReg appeal in the dispute resolution procedures.

Commission's Position:

In order to comply with its obligations on transparency, ComReg will:

- **Publish the scope of any dispute on its website having regard to the requirements of business confidentiality;**
- **Where appropriate ComReg may publish a Draft Determination on its website having regard to business confidentiality;**
- **Publish the outcome of the resolution of the dispute in the form of a Final Determination on its website, having regard to business confidentiality;**
- **The Final Determination will include a full and clear statement of ComReg's reasons for its decision.**

Appendix B- Dispute Resolution Procedures

Step 1:

ComReg receives written notice of dispute containing the required information outlined in Appendix C. ComReg will determine whether the notice conforms to the definition of a dispute, will assess the adequacy of information provided, and the legal basis for the dispute.

The four month maximum timeframe will start from the date of notification of a dispute which satisfies the requirements outlined in Appendix C.

Step 2:

ComReg formally notifies the respondent of the complaint and a copy of the dispute submission will be sent to the respondent. ComReg will inform the respondent when the 4 month clock commenced. The respondent will be allowed to give submissions within seven calendar days on whether an investigation under the dispute procedures should be undertaken by ComReg.⁷ ComReg will also notify the complainant when the four month clock commenced.

If necessary, ComReg will meet with the complainant to discuss the dispute submission (and also, where deemed appropriate, ComReg will arrange to meet the respondent to the dispute).

Having regard to information from the parties to the dispute, ComReg may opt for one of two options:

(a) Where ComReg is satisfied that other means of resolving the dispute in a timely manner are available to the parties, or, if legal proceedings in relation to the dispute have been initiated by either party, it will inform the parties of its decision not to investigate the dispute as soon as possible, including the reasons for such a decision.

If, four months from the date of a decision not to investigate, the dispute is not resolved and legal proceedings by either party in relation to the dispute are not in progress, ComReg shall at the request of either party initiate an investigation and make a determination within a further four months.

(b) Where ComReg decides to use the dispute resolution procedures, it will inform the parties of such a decision as soon as possible and identify the ComReg contact for the dispute. The scope of the dispute will not subsequently be modified, unless all parties agree. In addition, ComReg will publish the scope of the dispute on its website.

Step 3:

From the date of ComReg's communication of its decision to use the dispute resolution procedures in Step 2 (b), the respondent will in general be required to respond within fourteen calendar days.

⁷ It should be noted that that this is different to the right to give submissions on the grounds of the complaint. The respondent will have opportunity to do this at Step 3.

Step 4:

Following a detailed analysis of all submissions, ComReg may do all or any of the following:

- (i) Request more information in writing from the Parties;
- (ii) Meet with the Parties; together or individually;
- (iii) Decide that the issue, in part or in entirety, may be withdrawn from the dispute procedures and would be more effectively dealt with via other mechanisms.

Step 5:

ComReg presents a draft determination. Depending on the subject of the dispute and its impact on the wider market, this may be published on its website, having regard to the requirements of business confidentiality, or may be sent to the parties to the dispute only.

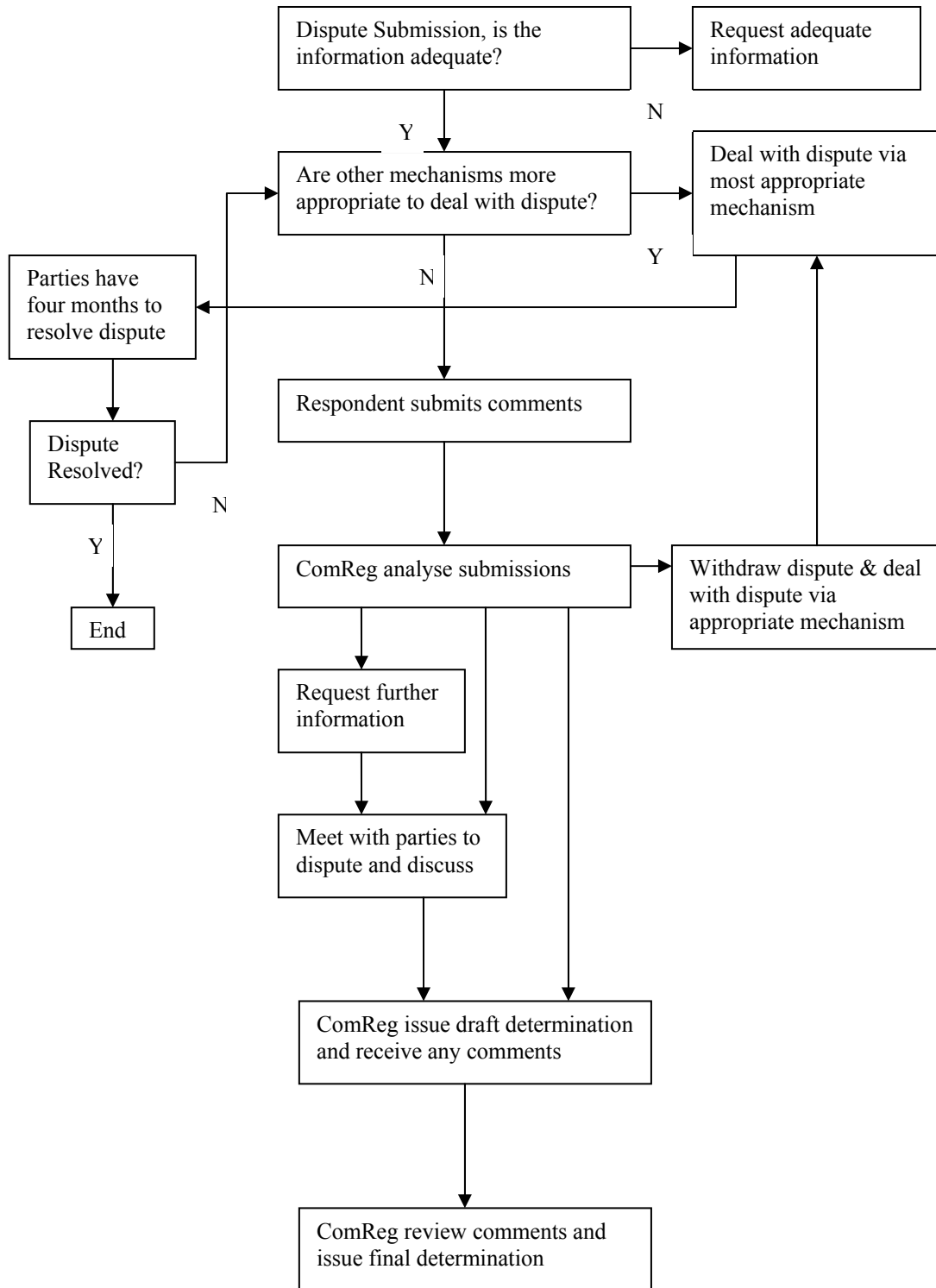
In general, parties to the dispute and/or the wider industry will have fourteen calendar days to submit comments on the draft determination

Step 6:

Following further analysis of all submissions and comments ComReg publishes a final determination. ComReg will publish the final determination on its website, having regard to the requirements of business confidentiality. This determination will include a full and clear statement of the reasons for ComReg's decision. A copy of this final determination will also be sent to the parties to the dispute.

The determination shall not preclude either party from appealing ComReg's determination under Regulation 3 of the Framework Regulation or from any right of action it may have before the courts.

- Procedure Flowchart



Appendix C – Required Information for submitting a dispute

Type of Information	Information Required
Contact details	Both parties
Scope of the dispute	Detailed and clear description of the dispute. This should include product/service descriptions where relevant.
Basis for the dispute	Specific legislative background to the dispute, with reference to legal/contractual clauses where appropriate and the legal basis for ComReg intervention
Preferred Dispute Resolution Mechanism	The dispute mechanism desired by the complainant
Attempts to resolve the dispute	Comprehensive evidence should be provided of attempts to resolve the issue bilaterally. This should include notice of whether the dispute is or has been before any other body.
Documentary Evidence	All allegations should be supported by documentary evidence where possible
Impact of the dispute	This should cover the impact which the disputed issue has on the complainant's business. Where possible, this should include quantification, and it would be helpful to provide documentary evidence.
Proposed remedy	The outcome desired by complainant.

Information should be presented in the knowledge that unless it is clearly marked as confidential, it will be passed to the other party in the dispute.

All requests for dispute resolution should be sent to the following central point within ComReg:

Head of Market Management

Market Operations
ComReg
Irish Life Centre
Abbey Court
Lower Abbey St
Dublin1

Or Via Email to disputes@comreg.ie

Or Via Fax to +353 1 8049680

