Commission for
Communications Regulation

General

Future Regulation of Electronic Communications Networks and Services -

ComReg submission in connection with Department of Communications, Marine and Natural Resources consultation on draft legislation

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1 Foreword

The new regulatory framework for communication networks and services will make significant changes to the way electronic communications markets are regulated. When the texts of the EU Directives were agreed early in 2002, the ODTR began its preparatory work on analysing the requirements and issued a number of public documents with the aim of providing clarity on how the provisions would operate. ComReg has continued this process.

A key issue is the need to transpose into national legislation the provisions of the Directives. ComReg therefore welcomes the publication of the draft regulations and looks forward to early adoption of these so that both operators and ComReg can finalise arrangements.

These changes come at a particularly important time in the development of telecommunications networks and services. Globally, the industry has had a particularly turbulent recent history as formerly strong players have either gone into liquidation or had to refinance their businesses. There has been a severe shortage of investment funds. Ireland has certainly not been immune from these global trends and many of our operators face challenges.

Yet in parallel users are rightly demanding new and improved services and will continue to do so. Broadband will need to become the norm for Internet access, the availability of digital terrestrial television is awaited and 3G is yet to be launched. For existing services, users should not need to endure poor service either in terms of technical quality or customer care.

Given the global environment and operational challenges, ensuring world class services is no easy matter. From a regulatory perspective, ComReg looks forward to implementing the new framework and to playing a positive part by keeping markets open, supporting competition, facilitating convergence, and ensuring dominant operators do not abuse that position.

Etain Doyle
Chairperson

2 Introduction

ComReg welcomes the chance to provide comments on the proposed instruments to transpose the European Directives on the future regulation of electronic communications. ComReg found it particularly helpful to have comprehensive draft texts available because of the clarity which this provides and wishes to thank the Minister and the staff of the Department recognising the considerable effort needed to get to this stage.

Notwithstanding the absolute importance of consultation, ComReg would like to express its hope that texts can be finalised quickly following the receipt of comments. All administrative arrangements need to be in place by 25 July 2003. These will include, for example, finalisation of the detailed conditions which will attach to the general authorisation along with any necessary modifications to or adaptation of Wireless Telegraphy Act licenses. Such work items are part of ComReg's remit and will require time and, potentially, further consultation, before completion. While certain documents have been published by ComReg with the intention of advancing discussions as early as possible, further informed consultation should ideally occur within the context of the finalised regulations. ComReg would therefore encourage the Department to do all it can to expedite the early completion of the statutory instruments so that all of the necessary arrangements can be in place by the required date.

In responding to this consultation, ComReg would like to indicate the basis on which comments are made. ComReg is designated as the responsible national regulatory authority for the sector. While national policy and legislation, including Irish input to the EU legislative role of the Council of Ministers are the Minister's responsibility, ComReg, and its predecessor the ODTR have specific responsibilities within the EU and national regulatory frameworks and have considerable experience in developing and implementing regulation. ComReg fully subscribes to the objectives of the new regulatory framework as are well summarised in the Department's introduction to the consultation and recognises that one of our key tasks is to ensure that these objectives flow through to implementation. The majority of our comments therefore aim to draw on the experience we have garnered as the national regulatory authority in order to avoid future implementation or interpretational problems. Nevertheless, we have also developed views on the best and most effective way to regulate the sector and some comments are made on this basis to assist the Minister's consideration of the issues.

In commenting upon the draft regulations, ComReg offers substantial comments on issues which it considers as headline issues. These are set out in Sections 3 to 6. In addition, there are more minor issues, some of which concern drafting. These are addressed in the final section of this paper. In its review of the draft regulations ComReg also detected a limited number of typographical errors; these are not recorded here as it is recognised that these will be captured by the Department in the final version of the Regulations. Staff of ComReg are available to the Department to clarify comments and to provide further detail if required.

As noted above, ComReg recognises the considerable effort made by the Department in preparing the draft regulations. ComReg has not commented upon specific provisions where it agrees with the manner in which the Directives are transposed as to do so would result in a disproportionately lengthy document. However ComReg would like to record the fact that it believes that much of what is in the draft texts is appropriate and helpful to the effective regulation of the sector.

3 Enforcement

3.1 Importance of Enforcement

Article 8 of the Framework Directive provides that the national regulatory authorities of Member States are required to take all reasonable measures to achieve the objectives enunciated in the Framework Directive and that such measures must be proportionate to those objectives. Enforcement measures are crucial in the achievement of those objectives and are principally addressed by Article 10 of the Authorisation Directive.

For a regulator to be effective in the performance of its duties it must therefore have available to it sufficient powers to ensure that its decisions, properly taken in accordance with the law and the objectives of regulation, are implemented. In particular, the enforcement powers available to ComReg should allow for timely intervention and provide for levels of penalties that are likely to act as deterrent to non-compliance and in the case of an actual breach of the regulations, result in fines which are at least commensurate with the impact of that offence.

In the draft policy direction of 2 December 2002, the Minister referred to the Department's strategy for the communications sector including the objective to place Ireland on a competitive par with top OECD economies and to create an innovative legislative framework that provides for appropriate regulation of the sector. The draft direction specifically requires ComReg to apply regulatory obligations in a manner consistent with those applied in equivalent circumstances in other Member States. If ComReg is to be fully effective in this regard, it must be empowered to enforce regulatory decisions with at least the same effectiveness as NRAs in other Member States.

Enforcement has been identified as a weakness of the current Irish communications regulatory regime. The European Commission has already indicated that the present penalties are low - paragraph 4.2.1 of the 7th Report on the Implementation of the Regulatory Framework in the Member States notes the following:

> *"Concerns exist in a number of cases regarding the lack of enforcement powers, in particular to ensure that incumbents apply NRA decisions. Enforcement appears to be hampered by lengthy and cumbersome procedures in France, Italy, Austria, Portugal, and by low penalties in Ireland and Germany in particular."*

The OECD report of April 2001, **Regulatory Reform in Ireland**, at page 89, repeated this concern:

> *"The ODTR needs to be strengthened to make and enforce binding decisions".*

The Minister for Public Enterprise, Mrs. O'Rourke, during the Second Stage of the Communications Regulation Bill, 18 April 2002, noted this need for improved enforcement. Having outlined the contents of what is now sections 44 and 45 of the Communications Regulation Act 2002, she said:

> *"I am confident these provisions, which have given rise to vocal complaints, represent a significantly enhanced enforcement mechanism which will enable the new commission to enforce its regulatory decisions in today's rapidly evolving communications sector."*

The recently published report by the Department of the Taoiseach in connection with the public consultation on **Towards Better Regulation** contained a commentary by Professor Lane, TCD, on the submissions received

> *"On enforcement, there was a general frustration that enforcement is lacking in many areas. From this, a guiding principle of better regulation should be to ensure that the resources are provided to ensure all regulations are effectively enforced. Otherwise, the respect for the general regulatory regime greatly suffers."*

ComReg's enforcement powers under the draft Framework Regulations are set out principally in Regulations 22 and 24 and in a number of other draft Regulations as they relate to specific offences. For ease of reference, the comments are made principally in relation to the draft Framework Regulations but apply equally to similar provisions in the other draft Regulations.

3.2 Proceedings for Offences

Draft Regulation 22 provides that summary offences under the draft Framework Regulations (other than offences relating to non-compliance with the proceedings of an Appeals Panel) may be brought and prosecuted by ComReg. It also provides that Section 44 of the Communications Regulation Act 2002 (which allows a person who is alleged to have committed an offence under the Act to make a financial payment of €1,000 and to remedy the offence in exchange for ComReg not proceeding against it) applies to offences committed under the draft Framework Regulations. The liability on summary conviction is a fine not exceeding €3,000.

ComReg recognises that this level of fine is the maximum currently allowable for summary prosecutions in respect of breaches of licence conditions. However ComReg contends that this amount is too low to act as a useful deterrent and as such is not a proportionate response to the range of potential offences under the Regulations. While the current licensing framework also provides for significant penalties for conviction on indictment - €4,000,000 or 10% of turnover, the penalties apply only to a breach of Section 111 of the Postal and Telecommunications Services Act 1983, i.e. a breach of a licensing requirement or a licence condition. By virtue of the new regulations, Section 111 becomes unenforceable as the licensing requirement will cease to be applicable and consequently the maximum penalty for a breach of a regulatory requirement will be €3,000. It is noted that indictable offences cannot be created by the Framework Regulations by virtue of Section 3 of the European Communities Act 1972. However, the effect of the revocation of Section 111 is to repeal the increase in penalties which the Oireachtas only introduced last year under the 2002 Act. ComReg recommends that the Minister consider primary legislation to address the weaknesses of penalties under the proposed regulations.

In view of the effective prohibition on prosecutions on indictment, ComReg also recommends that the penalties for offences to be dealt with in a summary manner be reconsidered along the lines addressed by Section 8 of the Competition Act 2002. Under that section the penalties (for both summary and indictable offences) operate so that if an offence continues for one or more days after its first occurrence, the person guilty of the offence is guilty of a separate offence for each day the offence occurs and is liable to be fined for each subsequent offence. It is suggested that the inclusion of similar provisions in the draft Framework Regulations could conceivably serve to redress the deficiencies identified in the previous section.

Civil fines

A possible effective alternative or supplement to the prosecution of non-compliance on indictment, but one that exists in other jurisdictions and in limited circumstances in this jurisdiction, is the imposition of civil fines. Such a system would be an exception to the usual requirement that such penalties be administered through the courts. Such a proposal involves the regulator itself making a finding that there is a breach and imposing a fine but safeguarding the rights of the alleged offender by providing for recourse to the Courts by an affected party. This principle has found favour in other jurisdictions and has been discussed in Ireland.[1] It is noted that Articles 10(3) and (4) of the Authorisation Directive explicitly make provision for NRAs to have the power to impose financial penalties. It is also noted that Head 42 of the draft Electricity Bill 2002 proposes to grant the CER the power to impose a fine on a licensee for breach of a condition.

3.3 Application to the High Court

The nature of the High Court Order

Draft Regulation 24 (7) provides a means for ComReg to apply to the High Court for an appropriate order to enforce compliance with the Regulations. Such orders would include interlocutory relief by way of injunctions. This enforcement mechanism has to offer timely redress once the procedure is initiated and in this regard draft Regulation 24 (7) is to be welcomed in that it seeks to provide a means for ComReg to apply to the court in "a summary manner".

In examining the case for an injunction, one factor would be whether the harm (breach of regulatory obligation) claimed by ComReg can be repaired by financial compensation later. Analysis of this nature is more difficult to establish in the case of a regulatory body than would be the case of a commercial body. It is therefore welcome that the draft legislation seeks to address this point and provides in Regulation 22 (4) that ComReg should not be denied interlocutory relief "solely on the basis that ComReg may not suffer any damage if such relief were not granted pending conclusion of the action."

ComReg believes that draft Regulation 24 could provide an opportunity to address the perceived difficulty regarding the low level of fines to be imposed by the courts. ComReg considers that it would be appropriate for the Court to impose a financial

[1] See "Competition" Page 216, Vol 11, Edition 8.

penalty as part of an order for relief which it may make. If provision was made, ComReg could accompany its application to the court with a request that the court impose fines on those persons who are found to be in breach of regulatory obligations. Under such a provision, a regulator does not decide on fines but merely brings a case before a civil court which hears both sides. The regulator can propose a sum that is appropriate in light of the particular issue of non-compliance and the court must consider the amount (if any) that should be payable having regard to the circumstances of the case. If the court so decides, the person can be required to pay over a sum of money. It should be noted that this procedure would be civil and not criminal.

Procedure under Regulation 24

Regulation 24 of the draft Framework Regulations provides that where in the opinion of ComReg a person has not complied with a provision under the Regulations, ComReg may accompany any notice of non-compliance with a direction to the person to do or to refrain from doing anything which ComReg specifies in the direction. Under Regulation 24(6) a person who is issued with a notice or direction may make representations in relation to the notification or direction. While ComReg can apply to the High Court for an order to enforce compliance (pursuant to draft Regulation 24 (7)), it cannot do so until one month after notifying a person of their non-compliance. There is provision for ComReg seeking an order under draft Regulation 24 before the expiration of a month by agreeing this with the person concerned, or at an earlier time stipulated by ComReg in the case of repeated offences.

ComReg's principal concern with the current text (as applies across the four sets of draft Regulations) is that that in most cases a person will have a minimum of one month to comply with a direction and ComReg cannot make an application to the court until the one month period has expired. This could mean in practice that if a person is capable of rectifying the non-compliance earlier, it will now in most cases have a minimum of one month.

Notification

Regulation 24(3) deals with the delivery of notifications and directions. These delivery provisions are replicated in the delivery of directions under Regulation 23(2) and determinations under Regulation 20(8) of the Draft Framework Regulations. They are also replicated in similar notification clauses in the other Draft Regulations.

ComReg considers it appropriate to promote the use of electronic communications generally. Accordingly we propose that ComReg be given the power to use electronic mail where suitable, as opposed to being restricted to situations where there is an element of urgency. In this regard, we note that the draft Electricity Bill provides for the service of notices by electronic means without any qualification as to urgency.

Suggested change

We propose that the clause "*in any case where ComReg considers that the immediate giving of the direction (determination/ notification or direction) is required*" be deleted from Regulation 20(8), 23(2) and 24(3) and in similar notification clauses elsewhere in the draft regulations.

3.4 Enforcement under the Authorisation Regulations – Draft Regulation 15 (12)

Notwithstanding the comments on draft Regulation 24 of the proposed Framework Regulations, ComReg considers that it may be impractical to apply for a High Court order in every instance. In particular ComReg is concerned at the possibility of non-compliance with conditions concerning radio frequency interference. The issue primarily arises in the context of an immediate threat to public safety. ComReg considers that this is contrary to the process envisaged in Article 10(6) of the Authorisation Directive which empowers urgent interim measures.

The **Directive** states that ***urgent interim measures to remedy the situation may be taken***. The draft Regulation, however, permits only three options:

- to initiate proceedings for an offence under these regulations
- to issue a notice under section 44 of the Act of 2002
- to apply to the High Court under paragraph (9).

None of the three options in the draft regulation appear to permit urgent interim measures to be taken. While we agree that that the measures in the S.I. may be sufficient, for the most part, when dealing with *serious economic or operational problems for undertakings or for users of electronic communications networks or services*; when dealing with '*an immediate and serious threat to public safety, public security or public health'*, ComReg must be enabled to take *urgent interim measures* to correct the situation. ComReg submits that, at minimum, an immediate and serious threat to public safety, public security or public health requires an immediate and serious interim response and should not be limited as in the draft regulation.

4 Appeals

The EC Framework Directive stresses the need to be able to appeal regulatory decisions with due regard to the merits of the case and indicates that this may be achieved though different mechanisms including the courts.

In considering the appropriateness of the proposed appeal arrangements as set out in regulations 4 – 7 of the draft Framework Regulations 2002, ComReg's view is that appeal panels are only justified if they allow for faster, more cost-effective and more knowledgeable resolution of disputes than current court procedures.

ComReg is not persuaded that the appeal panel will best achieve these aims and considers that the courts alone may represent a better option. This assertion is based on experience in Ireland and overseas and had been highlighted by a number of official reports, details of which can be found in Appendix 1. In light of such concerns, ComReg would recommend that a formal review of appeal arrangements be undertaken at an appropriate point. It would also be important that the criteria for such a review be specified at the outset.

4.1 Draft provisions

ComReg is concerned that there may be significant problems and substantial omissions in the current draft. ComReg submits the following suggestions to address the particular issues which arise.

Four suggestions are of particular importance to the extent that ComReg believes that a failure to remedy these would seriously jeopardise any working of the panel. These are:

- The power to vary
- Definition of appealable decisions and *locus standi*
- Overlap with the court process
- Merits of the case to be duly taken into account

In addition suggestions are made in Appendix 2 in relation to the following issues to further improve efficiency and workability:

- Objects of the Appeal Panel
- Membership of the Appeal Panel
- Reconstitution of Appeal Panel during hearing of Appeal
- Procedures before Panel
- Timeframe for decision
- Issues of evidence
- How decisions are to be made or given
- Remitting
- Costs
- Undertakings as to damages

In respect of the four primary issues we briefly present the issue of concern, the reason for our concern and finally our suggested modifications in which we often draw on existing draft legislation; most notably the Central Bank and Financial Services Authority of Ireland Bill 2002 (hereinafter "the 2002 Bill").[2]

4.2 Primary issues

4.2.1 The power to vary

Nature of concern

The appeal panel will have the power to vary decisions pending the determination of the appeal under Regulation 7(2). Regulation 5(15) appears to grant a power to confirm this varied decision on final determination. Under Regulation 5(9) the appeal panel is limited to either annul or confirm a decision. Notwithstanding this clear general provision, ComReg is concerned about this possible ambiguity in respect of the powers of the appeal panel at final determination stage created by Regulation 5(15). ComReg believes that the ambiguity should be clarified in the final regulations.

ComReg's views in relation to the general power of an Appeal Panel to vary a decision are set out in Appendix 3. ComReg also considers that the presumed intention of the power to vary a decision on an interim basis could be better expressed by granting the appeal panel the power to suspend part of a decision under Regulation 7(2) in order to allow non-contentious parts of the decision to stand.

4.2.2 Definition of a decision of Comreg and locus standi

Decisions

ComReg welcomes the fact that regulation 4(1) identifies two specific decisions, under Regulation 24 and section 44 of the 2002 Act, which are excluded from being appealable. However, by expressly excluding these two direction/notification "decisions", by application of the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), the draft is conferring appealablity on all other directions and notifications. In addition there is a danger that "interim decisions" become appealable. This term is used to mean decisions which do not impose a legally binding obligation, sanction or liability, such as a "decision" to launch an investigation, a "decision" to prosecute, a "decision" to gather data or a "decision" to undertake a market survey.

Suggested change

Relying on the precedent in Section 57A(1) in the 2002 Bill and the decision in *Ryanair v Flynn* [2000] 3 I.R. 240, ComReg suggests that the Regulation 4(1) should read:

[2] If adopted in its present form, the Bill would establish a new Financial Services Appeals Tribunal and insert a large number of sections after section 57 of the Central Bank Act 1942 (these are numbered as sections 57A to 57Z and then 57AA to 57AZ. For ease of reference, these texts will be referred to in this memorandum as (for example) "section 57F in the 2002 Bill" even though a strictly speaking it is in section 29 of the 2002 Bill.

4.(1) This Regulation applies to any user or undertaking, that is affected by a rule, decision, determination, specification or direction of ComReg under these Regulations or the Specific Regulations that has the effect of imposing a legally enforceable obligation, sanction or liability on that user or undertaking (in this Regulation and in Regulations 5, 6 and 7 collectively referred to as "an appealable decision")

Locus Standi

There is no expressed mechanism for the appeal panel or Minister to decide issues of *locus standi*. ComReg considers that it is necessary to provide a mechanism to filter out frivolous appeals and to avoid use of the appeal panel by, for example, a user or undertaking that is not affected by an appealable decision or by a body not within the definition of an undertaking in the Regulations or by a person who is not 'affected' by the decisions. Such a mechanism could be exercised by the Minister or by an Appeal Panel and in the interests of fairness such a decision should be capable of appeal to the High Court. ComReg preference is that the issue should be decided by the Minister to prevent the unnecessary establishment of an appeals panel where the matter is not an appealable decision or the appellant lacks *locus standi*.

Suggested approach

If it is necessary to decide whether a decision of ComReg is an appealable decision or if the applicant has *locus standi*, that matter is to be decided in the first instance by the Minister or by the Appeal Panel.

Either party to an appeal under these Regulations may appeal to the High Court against a decision of the Minister or Appeal Panel under subparagraph (1).

4.2.3 Overlap with the court process

ComReg believes that the proposals as they stand would allow appellants to challenge the same decision twice.

It is problematic for the same decision to be capable of being referred to both an appeal panel and the High Court. Even if the two bodies examined distinct aspects of the decision, it would not be satisfactory to have two parallel procedures with different timetables and criteria. There would be a high risk of overlap or contradiction between the two procedures.

The provisions in the draft regulations do not address the difficulties which will arise where an operator decides to utilise both procedures to its advantage, i.e. by initiating an appeal under the appeal panel and subsequently to a judicial review action. Equally, it does not address a situation where two parties wish to appeal a decision, one preferring the courts and the other requesting an appeals panel (this was the scenario in the *Aer Rianta* case). As the regulation is drafted, the Appeal Panel would be suspended. Following the judicial review application an appeal panel may be established and the whole issue reheard.

This would result in a number of major problems. Most importantly it would allow operators to have two opportunities to challenge a decision, to prepare counter arguments based on the judicial review experience, would reduce certainty as to

decisions of the High Court and delay the decision further. ComReg submits that in the interests of certainty, speed and basic fairness it should not be open to an operator to have a second chance to attack a decision.

The suspension of the appeal panel, or the suspension of the Minister's decision to establish and appeal panel also means a potential delay of up to two years where the judicial review application passes the leave stage.

Drafting Issues

Regulation 4(4) provides that the Minister cannot establish an appeal panel if an application for leave to apply for judicial review has been made. This straight forward limit on the Minister's power is modified by Regulation 4(5) which provides that the Minister may still establish an appeal panel notwithstanding that such an application has been made. Herein lies a possible drafting problem.

The "application" referred to in Regulation 4(5) is not the determination of the judicial review, but the determination of an application for leave to apply for judicial review. Judicial review is a two stage process. In the first stage the applicant requires permission of the court to bring judicial review proceedings ("the leave stage"); the second stage is the hearing of the substantial case. A determination in the leave stage is merely a 'yes' or 'no'. As currently drafted, the Minister must decide to establish an appeal panel after leave has been granted (or not). Presumably it is after the completion of the full judicial review that the Minster should make such a decision, otherwise the two actions would run together.

Regulation 4(6) may appear at first glance to suffer from the same defect. However as an extension to the time period is heard at the leave for appeal stage, the phrase the "outcome of the application" can only be taken to mean the outcome of the full judicial review proceedings.

Suggested alternative

An appellant shall choose a single forum, i.e. if the operator chooses the Courts it cannot also request an appeal panel (and vice versa). Pursuant to Article 4(1) of the Framework Directive the merits of the case must be taken into account by the Appeal Body. Therefore, if the forum chosen is the High Court, the Court should be given the power under Regulation 6 to consider the merits of the case.

If there are two types of challenges to a decision by two separate applicants they should be heard in a single forum. ComReg's preference would be for the single forum to be the High Court in a modified judicial review procedure where the merits of the case may be duly taken into account.

4.2.4 Merits of the case to be duly taken into account

The Framework Directive requires that the merits of the case are duly taken into account. In discerning the meaning of this phrase, it may be desirable for the

Minister to follow recent High Court and Supreme Court judgements on the meaning of a merit based appeals, specifically *Orange Limited v Director of Telecommunications Regulation (No. 2)* [2000] IR 159, and *Gleeson v Competition Authority* [1998] ILRM 101.[3]

The Supreme Court has endorsed a middle ground which allows the courts to consider the merits of case with reference to reasonableness which avoids "the very real danger, on a wide interpretation, of calamitous delay in finalising matters which could oppress the rights of the main contracting parties [i.e. operators and the industry as a whole] and frustrate the entire purpose of the Act".

Based on the *ratio decidendi* of these two cases, the following text is proposed:

"In appeals before it:

(1) The Appeal Panel shall ensure that the merits of the case are duly taken into account.

(2) The Appeal Panel in taking due account of the merits of the case shall not annul a decision of ComReg unless an applicant establishes as a matter of probability, taking as a whole the process leading up to the appealable decision, that:

(i) the decision reached was vitiated by a serious and significant error or a series of such errors, or

(ii) ComReg on establishing a primary fact drew inferences which, had due consideration been given to those inferences, it could not reasonably have drawn , or

(iii) there was a significant erroneous inference which was critical to the decision and which went to the root of that decision rather than an erroneous inference which relates to some detail, even if that detail is relevant.

(3) In arriving at a determination, the Appeal Panel shall have regard to the degree of expertise and specialised knowledge available to ComReg. "

ComReg has a concern that if there is no direction given in the implementing regulation, it is likely that the appeal panel will itself have to hear extensive argument as to the meaning of a merit based appeal by the parties. By defining the parameters of a merit based appeal, such delays and legal arguments can be avoided.

4.3 Review of Appeals Mechanisms

In light of experience of appeal panels in both Ireland and internationally, ComReg would recommend that a formal review of appeal arrangements is undertaken at an appropriate point. This review would include an assessment of the effectiveness of the procedures and working arrangements of the panel and a consideration of appropriate alternatives to address any deficiencies identified. A review within two years might be appropriate.

[3] In considering the scope of merit based appeals in respect of the decisions of administrative bodies, the Irish courts have contrasted the standards to be applied in judicial review proceedings, which generally focus on the procedural aspects or lawfulness of a decision, and those to be applied in a full de novo appeal (i.e. a full rehearing on the merits).

5 Spectrum Rights of Use

The radio frequency spectrum is recognised as an important national resource as confirmed by the time and resources which national administrations devote to its management. Radio communications play a vital role in the economic, social well-being of a nation with many areas of activity being increasingly dependent on radio in one form or other whether for mobile phones, broadcasting, transport (aviation, road, sea and rail), defence and emergency services, to such relatively mundane uses such as car immobilisers or inventory tracking.

In general terms the predominant regulatory requirements in relation to the use of frequency relate to frequency management to avoid interference between users of the spectrum. Existing frequency management systems evolved out of the need to coordinate the use of frequencies on a national and international basis in order to avoid interference between stations (apparatus). In many administrations, including Ireland, licensing of wireless telegraphy (WT) apparatus is based on legislation originally enacted in the early part of the 20th century and updated from time to time. In order to control the use of spectrum by WT apparatus and avoid interference, licensing of individual stations was introduced. This licensing has usually taken the form of an authorisation to operate specific apparatus tied to specific frequency bands and services. This is the structure which operates today. Licences are issued by ComReg on foot of regulations which are required by the Wireless Telegraphy Act and which need the prior consent of the Minister for Communications, Marine and Natural Resources.

Convergence and Regulation in the 21st Century

Rapid developments in communications and information technology are blurring the distinction between the 'traditional' services of fixed, mobile and broadcasting, with the introduction of devices capable of operating in any of those modes depending on the environment in which the device is being used at the time.

Radio equipment is progressively becoming more intelligent. Features are being developed, some of which are already available today, for example, to enable dynamic selection of frequencies to find and use a free channel on a network or to automatically control power to mitigate interference to other users.

This pace of change in radiocommunications is placing increasing strain on the regulatory legislation, in terms of its lack of flexibility and capability to deal with fast developing markets and in particular convergent technologies. Hence, to accommodate this pace of change, there is a trend in the regulatory world towards neutrality on the type of technology to be used. This trend implies the licensing of specific radio frequencies rather than specific apparatus.

The approach in the new EC Directives reflects this general trend towards convergence of technologies and content, and the lessening degree to which legal rules can rely on technological distinctions. The Authorisation Directive introduced the concept of a right of use for radio frequencies. ComReg believes that direct

licensing of the use of spectrum should be considered by the Department in the context of electronic communications networks and services. In proposing this, ComReg is not advocating the abandonment of apparatus licensing under the 1926 Act. In certain circumstances the legal requirement for a licence for apparatus remains appropriate. ComReg considers that the requirement should continue to apply to the use of radio frequencies which fall outside the scope of electronic communications networks and services as defined in the Directives, such as ships and aircraft radio. In addition, it should be noted that ComReg's proposal would not alter the offence of operating WT apparatus without a licence e.g. "pirate" radio.

ComReg proposal for granting spectrum rights of use

ComReg recommends the following outline scheme to the Department for consideration to replace the need to maintain WT licences as proposed in the draft regulations

- Rights of use for spectrum to be granted by ComReg where the spectrum will be used for the provision of electronic communications networks and/or services.
- WT apparatus used in accordance with the conditions specified in the right of use to be deemed to be licensed for the purposes of Section 3 of the 1926 Act. (This approach is used in relation to transmitters for independent radio and television under Section 4 of the Radio and Television Act 1988).
- Spectrum rights of use to be subject to conditions to be specified by ComReg (limited to conditions recorded in Part B of the Annex to the Authorisation Directive).
- Such conditions may, from time to time, be modified by ComReg in accordance with Article 14 of the Authorisation Directive.
- Procedures for assessing requests for rights of use may be established by ComReg and shall comply with the requirements of the Authorisation Directive.

Benefits

ComReg holds the view that providing for spectrum licensing as indicated above would:

- Be more transparent and would focus regulation on the use of the resource (radio spectrum) rather than on radio equipment,
- Be more consistent with the approach under Article 5 of the Licensing Directive; and
- Enable a more flexible and rapid response by the Regulator to requests for the introduction of new technologies – it would no longer be necessary to draw up specific regulations and licences when authoring the use of new technologies.

The scheme outlined above would make market entry requirements lighter and would also provide users and consumers with benefits through facilitating more open competition between competing technologies thus providing enhanced choice, price and quality for the end user.

6 Broadcasting Networks and Service

As indicated in ComReg Doc No. 02/114 and in earlier ODTR documents, ComReg's view is that the definition of "electronic communications service" is not one that necessarily excludes from the scope of the Directives and the new regulatory framework all aspects of the provision of paid access to broadcasting content services distributed over electronic communications networks. It is our opinion that such services are directly comparable to the provision of access to other communications services such as telephony services by end users and should be subject to standardised regulatory requirements particularly in respect of users' rights. ComReg considers that the exclusion of the provision of content services from the scope of the Directives is not, of itself, justification for omitting the related and necessary, provision of access to the communications infrastructure used to distribute or deliver the (excluded) content service.

However, ComReg is aware that views have been advanced that would suggest that the service of providing access to broadcasting content distributed over electronic communications networks to end users is not within the scope of the framework.

It is noted that the definition of electronic communications services in the draft regulations is transposed verbatim from the Framework Directive. Given that there are alternative views being put forward to ComReg's interpretation of the definition of electronic communications services, it would be very helpful if the transposing regulations clarified the matter. The alternative view would have significant consequences for the future regulation of broadcast distribution services in Ireland and in particular for the enablement of measures which ComReg might take under Section 12 (2)(c) of the Communications Regulation Act, 2002. The continuing perception as to the poor quality of service offered by the main cable and MMDS operators is a significant concern. For example, just under one third of all complaints received by ComReg in 2002 related to complaints in respect of the cable and MMDS networks and services. While it may be possible for ComReg to fulfil some limited aspects of customer care requirements as regards cable and MMDS operations under the Wireless Telegraphy Act 1926, it will not be possible to provide consumer protection for viewers subscribing to services not covered by the 1926 legislation unless the power to do so is conferred by other legislation. ComReg is also concerned that there could possibly be further negative implications for user rights in relation to access to other services delivered over electronic communications networks.

Within a broadcasting perspective, the EU Directives bring within their scope the network operation of the cable and MMDS networks, UHF "deflectors", the RTE transmission network, transmission networks operated by independent broadcasters, and any future DTT network or other transmission networks used for broadcasting. However, the view that the provision of paid access to broadcast content distributed over electronic communication networks to end users is not within the scope of the framework would imply that any measures applicable by virtue of a general authorisation condition relating to consumer protection might not be enforceable in the case of a network operator. There may also be difficulties in addressing

regulatory issues arising from networks established outside Ireland but providing services directly to consumers and end users in Ireland.

The exclusion of the provision of paid access to broadcasting content seems to contradict the aims of convergence and technological neutrality which underpin the new regulatory framework. This interpretation means that one of the key elements of convergence is outside the scope of the new package. Consumers have rights in respect of access to voice telephony and data services but not (radio and television) content services, (because the service the operators provide is considered to be content). For example, an end user's contract with an Internet Service Provider allows, *inter alia*, the end user to access Internet content. The content is clearly not covered by the Directives but the service that provides the connection (which delivers the content) from the ISP is covered. In the case of pay TV services, access to the relevant network is made available through direct connection (e.g. cable) or through radio based receive equipment (e.g. MMDS aerial, satellite dish) and this is reflected in the way in which the pay TV services are marketed (with the subscription charge typically meeting the network operation costs and associated consumer equipment such as set top boxes).

ComReg considers that it would be beneficial to operators and end users if the Department outlined its views in connection with the scope of the regulatory framework as it impacts on the delivery to end users of access to broadcast delivery platforms. If the Department considers that these services may be outside the scope of the new regulatory framework, are there any proposals to resolve the ambiguity between legislation on "broadcasting" and legislation on "electronic communications services" that will inevitably arise? In this connection ComReg notes the European Commission's Working Document published on December 9 2002 on "*Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications*[4]" which states at paragraph 5.4 that:

> *"The new EU regulatory framework for electronic communications adopted on 7 March 2002 provides a common set of rules for the sector. It covers electronic communications networks and services, as well as associated facilities, which support the provision of services via such networks or services, such as conditional access systems. Experience shows that national measures transposing EU directives can sometimes be different, so the risk exists that some implementations may not provide the clarity and legal certainty that market players require for the development of TV, mobile and convergent Information Society services. In particular, in light of the different regulatory structures in place for broadcasting and electronic communications, it will be important for Member States to clarify the respective responsibilities of the competent regulator(s)".*

It goes on to say at paragraph 6.2.1 that:

> *"A critical short term objective is for Member States to ensure that national law implementing the new framework avoids any ambiguity between legislation on 'broadcasting' and legislation on 'electronic communications*

[4] ***http://europa.eu.int/information_society/topics/telecoms/regulatory/publiconsult/documents/211_29_en.pdf***

services', so that the applicable rules for new and innovative services are clear".

In view of the importance of the issues involved, particularly consumer rights, and in the light of the Department's role in relation to both communications and broadcasting policy, ComReg considers that the Department's views on the potential ambiguities would assist in clarifying the future regulatory position of television distribution services and associated user rights.

7 Other Issues

7.1 Draft Framework Regulations

Draft Regulation 12 (1)
ComReg notes that the word "assignment" is missing from the transposition of Article 9 (1) of the Framework Directive into the draft Regulation 12 (1). Since "assignment" and "allocation" are two different processes that the NRA is tasked to deal with, it is suggested that the word "allocation" should be replaced with "allocation and assignment" in the regulation.[5]

Draft Regulation 21
This regulation deals with cross-border disputes. ComReg notes that, unlike Regulation 20, this is not restricted to disputes between undertakings. In particular, "parties" referred to in the associated Article of the Directive has been confirmed by the EU Commission as including end-users and consumers. In view of this ComReg considers that the applicability of paragraphs 5 to 11 of Regulation 20 should be qualified by the addition of "where appropriate".

7.2 Draft Authorisation Regulations

Authorisation of electronic communications networks and services, Draft Regulation 3 (6)
Draft Regulation 3 (6) states that ComReg may, after consultation with the Minister, determine that any undertaking providing an electronic communications network or service of a particular class or description specified in such determination, may not be subject to the requirement to notify ComReg under paragraph (1).

ComReg queries why consultation with the Minister is required in order for ComReg to exempt particular classes or categories of networks or services from the requirement to notify. In the case of Wireless Telegraphy Licensing, the Minister's consent is required for the making of regulations but no such consent, or consultation is required for the making of an exemption (from the licensing requirement) order. As noted in the Department's commentary on the draft regulations, a category of network or services which ComReg determines should not be subject to the requirement to notify would nevertheless be deemed to be authorised and would remain bound by the conditions of the general authorisation where these are appropriate. It is also noted that the Minister's draft policy direction of 2 December

[5] Regulation 12 (1) reads as follows:- "… and ensure that the allocation of such radio frequencies is based on ….". However, Article 9 (1) of the Framework Directive reads as follows:- "They shall ensure that the allocation and *assignment* of such radio frequencies by national regulatory authorities."

The ITU Definitions given below clearly show the difference.

allocation: Entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space *radiocommunication services* or the *radio astronomy service* under specified conditions.

Assignment: Authorization given by an administration for a radio *station* to use a radio frequency or radio frequency channel under specified conditions.

2002 referred to the need to regulate only where necessary. In the circumstances, ComReg considers it inappropriate to require consultation with the Minister on a statutory basis prior to ComReg making a determination to exempt particular categories from the notification requirement.

If the Minister decides that there is a requirement for a statutory consultation prior to ComReg making such a determination, ComReg suggests that the current wording of this draft regulation be amended as it could be inferred that consultation with the Minister is required for individual undertakings rather than for classes of undertakings as assumed to be the intention. ComReg therefore suggests for the avoidance of doubt that the text of Draft Regulation 3 (6) should be amended as follows:

> *"ComReg may, [after consultation with the Minister], determine that ~~any undertaking~~ undertakings providing an electronic communications network or electronic communications service of a particular class or description specified in such determination, may not be subject to the requirements of paragraph (1)".*

Licences under section 5 of the act of 1926, Draft Regulation 7

Without prejudice to ComReg's proposals in relation to spectrum rights of use as outlined in Section 5, ComReg believes that the procedures for awarding rights of use (or licences) in connection with broadcasting activities requires particular attention. Regulation 7(4) states that "ComReg shall, establish open, transparent and non-discriminatory procedures for the grant of licences and shall cause any such procedures to be made publicly available." Regulation 7(5) goes on to state that the decision on the grant of the licence should be made within 6 weeks and subject to any confidentiality restrictions decisions should be made public. While ComReg shares the Department's view that procedures should be open, transparent, non-discriminatory and publicly available this is not always possible in relation to broadcasting when frequencies are allocated with a view to pursuing general interest objectives or when the public consultation is already conducted by another regulatory body such as the BCI. This is recognised in the second paragraph of Article 5 (2) of the Authorisation Directive which states that "Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community Law such rights of use shall be granted through open, transparent and non-discriminatory procedures."

Therefore, in the interests of clarity and consistency it is suggested that the following text is inserted at the end of draft regulation 7(4):

> ***"****ComReg shall, establish open, transparent and non-discriminatory procedures for the grant of licences and shall cause any such procedures to be made publicly available. Such procedures may be varied from time to time by ComReg and notice of any variation shall be made publicly available. The procedures to be established by ComReg are without prejudice to specific criteria and procedures which may be adopted in respect of granting rights of use for radio frequencies to providers of radio and television content services."*

Amendment of rights and obligations, Draft Regulation 14

The wording of Regulation 14 3(a) implies that all amendment requests would be subject to a notification procedure allowing interested parties at least 28 days to make representations. ComReg feels that this would put an unnecessary burden on many of the existing licensees (such as business radio, mobile radio, radio links, community repeaters, etc) and would substantially delay the processing of future amendment requests.

Current ComReg procedures for the amendment of licences are as stipulated in the appropriate secondary legislation under the 1926 Act. A notification procedure is therefore currently not applicable for certain licence types such as: Business Radio, Mobile Radio, Temporary Business Radio, Radio Links (Point to Point and Point to Multipoint), Radio Communication Test, Community Repeaters, Aircraft, Experimenters, Ships Radio and Satellite which account for in excess of 16,000 individual licences. Amendment requests are submitted, using the appropriate form and are processed by ComReg immediately. This process facilitates both the licensee and ComReg from an efficiency perspective. Therefore, in the interests of efficiency ComReg suggests that the draft Regulation 14 is amended to include a new clause 14 (1A):

> *"(1A) For the avoidance of doubt, this regulation does not apply to an amendment of an individual licence where such amendment is required to ensure the effective and appropriate management of the radio spectrum.[6]"*

7.3 Draft Universal Service Regulations

The provision of Universal Service involves many considerations which fall under the area of social policy. It is noted that under regulations 3, 5, 6 & 8 that it is envisaged that the Minister will have a social policy input via the process whereby his consent is required with respect to any measures which may be adopted regarding the provision of universal service.

Costing and financing of Universal Services

ComReg does not believe that the drafting of the new Regulations reflects the flexibility contained in Article 12 of the new USO Directive. ComReg would request maximum flexibility with respect to the costing and financing of universal service be retained given inherent difficulties in any detailed calculation of the net cost of universal service and the need to adhere to the principle of proportionality with respect to any establishment of a sharing mechanism based on a determination of the net cost.

ComReg welcomes the Department's effort to set out a transparent process for the calculation and financing of universal service. However, the draft Regulations covering universal service and user rights regulations appear to be an almost exact replication of the existing regulation S.I. 71 of 1999 in respect of universal service costing and financing. ComReg believes that this approach can be problematic going forward as the provisions relating to cost calculation have changed substantially under the new EU framework. In particular, the responsibility for the calculation of the net cost of universal service provision is that of ComReg and not any designated universal service provider as stipulated in the existing regulations. To

[6] This additional paragraph is required to avoid a situation where it would be necessary to hold a public consultation on an amendment sought by a licensee, e.g. a variation to a radio links licence

the extent that it is the responsibility of ComReg to identify and establish the exact nature of the costs of complying with universal service obligations maximum flexibility as provided for in the Directive should be retained to enable ComReg to deal with this complex issue in both a proportionate and a practical manner.

Directive 2002/22/EC, in particular Article 12, does not require a review of the net cost of universal service provision upon a request for financing from any universal service provider nor does it make a determination of a possible unfair burden solely contingent upon a net cost calculation by any universal service provider. ComReg can initially review the likelihood of an unfair burden, if any, in the absence of a particular request for financing or any detailed estimate of the net cost. Article 15 of the Framework Directive requires a market analysis of relevant markets including an assessment of market power. To the extent that market power or dominance exists, indicating competition is yet to become effective, a determination of an unfair burden is less likely if the US provider is able to use its dominant position to recover any costs from customers, though price regulation may inhibit its ability to do this.

The Regulations as currently drafted make a review of the costing contingent upon a request for financing from the USO provider. While ComReg considers an estimate of the net cost of universal service provision from a particular designated universal service provider useful, any calculation of the net cost of universal service must be based on a particular methodology and cannot therefore necessarily be based on a particular estimate provide by a designated operator. Further, the requirement to submit a detailed cost estimate based on a particular methodology as part of a funding request may prove too onerous, for example the calculation of the accruing market benefit. It may be more practical for ComReg to request any information where appropriate to calculate the net cost of universal service, in particular, where there are a number of providers of universal service.

In light of the foregoing, ComReg does not believe that the drafting of the new Regulations reflects the flexibility contained in Article 12 of the new USO Directive. ComReg would request maximum flexibility with respect to the costing and financing of universal service given the inherent difficulties in calculating any net cost of universal service in accordance with a particular methodology; the practical difficulties in implementing such a sharing mechanism; and the need to ensure that any establishment of such a mechanism is justified based on efficient costs taking account of the state of competition in the electronic communications sector.

ComReg suggests that a frequent detailed view of the net cost of universal service provision be considered only where competition is effective.

Interoperability of consumer digital television equipment, Draft Regulation 20 (6)

ComReg notes that the drafting of this regulation specifies an implementation date of 25 April 2002. There is no date specified in the Directive as published, nor in the advanced TV standards Directive 95/47 which mandated this in 1995 or its Irish transposition (S.I. 262 of 1998). While this is an issue for the Director of Consumer Affairs, ComReg notes that this could facilitate the importing of inferior products manufactured prior to April 2002 into the Irish market.

Non-geographic Numbers, Draft Regulation 24

ComReg welcomes the current text of draft Regulation 24, which transposes USO Directive Article 28 in a way that enables ComReg to deal in a practical manner with

the issue of foreign access to Irish non-geographic numbers. Because most Irish non-geographic numbers commence with the digit "1", which is also the access digit for Dublin numbers, there are serious difficulties and/or potentially undue cost involved in opening access from abroad to the non-geographic numbers. It is therefore important for ComReg to have appropriate flexibility in handling this issue. However, since this is fundamentally an economic issue, we would suggest that the wording would be further improved by using the words "*where technically and economically justifiable*" instead of "*where technically and economically feasible*" as the latter is less precise and more subjective.

Number Portability, Draft Regulation 26

ComReg strongly supports the current drafting of Regulation 26 on Number Portability. Paragraph (3) in particular takes good account of the broad approach adopted to Number Portability in Ireland, which is generally supportive of the consumer position. The text of paragraph (3) will facilitate good regulation of NP (and particularly mobile NP, which is currently under development) and assist in the avoidance of unnecessary disputes.

Appendix 1 - Extract of views from official reports of potential drawbacks of appeal panels

Until now, all appeals have been via the courts. The draft Regulations propose to introduce an additional appeals panel whose decision, in accordance with the Directives, may in turn be reviewed by the courts. Various official reports suggest this may not be the most appropriate mechanism. The key arguments from the different reports are given below.

OECD's view

The OECD has analysed the use of an appeal panel system in Denmark and reported on the consequences of such an appeal panel:[7]

> *"...in practice, the existence of the Telecommunications Complaints Board in Denmark has served to weaken the regulatory authority and independence of the NTA, and has lead to significant delays in the implementation of regulatory decisions. This has had a negative consequence for the development of competition in the Danish telecommunications market."*

The OECD also noted the use to which the Danish appeal panel was put by operators:

> *"The existence of the Board has provided a relatively easy and cheap way to delay implementation of key decisions aimed at fostering competition."*

Ultimately the foreseeable result of having a third body, in addition to the regulator and the courts interpreting relevant legislation, is delay. In this regard, the OECD stated:

> *"...the Telecommunications Complaints Board has caused delays in all the regulatory issues that were filed to the Board...such a delay is a large burden for a rapidly evolving market such as the telecommunications sector, and has resulted in imposing a market disadvantage to new entrants in many cases."*

European Commission's view

There is no reason to believe that behaviour by operators in Ireland would differ from that encountered in Denmark. The European Commission's 7th Report on the Implementation of the Telecommunications Regulatory Package (2001) in paragraph 4.2.1 identified the tendency of operators in Ireland to use appeal procedures strategically:

> *"It appears that incumbents have, as a matter of strategy, continued the practice of appealing systematically against NRA decisions."*

Creating an appeal panel would simply enable further tactical appeals.

Governance and Accountability

The Department of Public Enterprise's review of appeal mechanisms underlined the risk of second-guessing the regulator. We would agree with the observations of the

[7] OECD 2000 "Regulatory Reform in Denmark"

Department contained at paragraph 4.1.2 of the report, Governance and Accountability in the Regulatory Process: Policy Proposals March 2000:

> *"There is the danger that provision for the appeal of a regulatory decision on its merits can give rise to a situation where so many decisions of the regulator are referred onward to the appeal body for second consideration that the appeal body becomes, in effect, the real regulator for the sector in question. Appeals on merit could also be used as a delaying tactic to postpone the effective implementation of regulators' decisions."*

High court appeal process: A lesson from the aviation sector

The conferring of power on an appeal panel to review any decision of a regulator is unprecedented in Irish law and would amount to the creation of a "regulator of the regulator". The operation of the aviation sector's appeal panel under the 2001 Act confirms the concerns expressed in the policy documents cited above. In *Aer Rianta v The Commission for Aviation Regulation* (13 November 2001), the High Court severely criticised the procedures put in place for the aviation appeal panel. In particular, there was an overlap between issues considered in actions to the appeal panel and proceedings in the High Court. If the idea of the panel was to keep complex cases out of the courts, this did not work.

It is noted that the UK Competition Commission which acts as the appeal body to hear appeals against UK regulatory decisions in a variety of sectors, including telecommunications, is sometimes cited as an example for Ireland to follow. It should be noted that it is a large scale standing organisation and follows similar procedures to that of the High Court with appellants and defendants employing large legal and expert teams. It is also noted that its recent mobile termination review took a year to complete.

Appendix 2 - Other issues relating to Appeals Panel

In the interests of clarity, clear procedures should be in place regarding the creation of and working arrangements for the panel. ComReg believes that many of these could be based on the very detailed appeal body procedures in section 29 of the Central Bank and Financial Services Authority Bill".

- Objects of the Appeal Panel

ComReg believes that express objectives of an appeal panel might assist in setting the correct culture and approach of the appeal panel. The proposals in the 2002 Bill provides a suitable template to base the objectives and the following text is adapted from Section 57B in the 2002 Bill:

> *A) The objects of Regulation (A) are as follows:*
> *(a) to establish the Appeal Panel as an independent panel to hear and determine appeals under this Regulation, and*
> *(b) to ensure that the Appeal Panel is accessible, its proceedings are efficient and effective and its decisions are fair; and*
> *(c) to enable proceedings before the Appeal Panel to be determined in an informal and expeditious manner.*

- Membership of the Appeal Panel

It may be difficult to get persons with appropriate skills and experience who are not conflicted by such previous experience as required by Article 4 of the Framework Directive which states that the appeal body must be 'independent of the parties involved'. Regulation 5(7) of the proposed implementing legislation states that an Appeal Panel shall be 'independent in the performance of its functions'.

However there is no express provision dealing with a situation where a conflict of interest does arise. For example, where a member of the appeal panel believes mid-proceedings that they may have a conflict of interest, or where one of the parties believes that a member of the appeal panel has a conflict of interest. The following clause is proposed:

> *"No person shall accept appointment to an Appeal Panel if such an appointment would place that person in a conflict of interest arising out of the subject matter of the appeal. If a conflict of interest occurs during proceedings before an Appeal Panel the member of the Appeal Panel in question shall immediately inform the Minister who may remove the member."*

The inclusion of the possibility of former judges, provided for in the 2002 Bill might also be considered as it has a number of advantages including availability of expertise and a decrease in the likelihood of successful appeals of Appeal Panel decisions.

- Reconstitution of Appeal Panel during hearing of Appeal

In the event of a conflict of interest arising mid-proceedings the appeal panel may need to be reconstituted. ComReg also considers that the possibility of a member of an Appeal Panel becoming incapacitated, or other such unforeseen circumstances, should be dealt with under the Framework Regulations. Such eventualities should be addressed by providing that the Minister may replace a member during the hearing of an appeal.

In addition, in the event of reconstitution, it should be made clear that the newly regarded appeal panel is to have regard to the evidence, and be bound by the decisions of the appeal panel made before it was reconstituted where appropriate. It may also be advisable to leave some discretion in exceptional circumstances, e.g. where the issue of bias arises, for the Chairperson to decide that that the Appeal Panel shall reconsider the proceedings from the beginning.

Again there is precedent in 57(Y)(1) in the 2002 Bill:

> *"B(1) The Minister may replace a member during the hearing of an appeal if the member becomes mentally or physically incapacitated or otherwise becomes unavailable, or ceases to be a member, before the appeal is determined. In such an event,*
> *(a) The Appeal Panel as so reconstituted is to have regard to the evidence and be bound by the decisions in relation to the matter that were given or made before it was reconstituted.*
> *(b) The Chairperson may, considering all the circumstances, decide that due to the reconstitution, the Appeal Panel, as constituted in accordance with these Regulations, shall reconsider the proceedings.*
> *(c) When reconsidering proceedings, the Appeal Panel may, for the purposes of the proceedings, have regard to any record of the proceedings before that Panel as previously constituted, including a record of any evidence taken in the proceedings."*

- Procedures before Panel

It is noted that unlike the proposals in the 2002 Bill, the procedures of the Appeal Panel are not set out in the Regulations. ComReg believes that it would be beneficial if such procedures were established in advance.

As currently drafted, an appeal panel will have to establish its own procedures. In addition, there is no requirement of uniformity amongst appeal panels, under Regulation 5(8) of the current draft it is up to each appeal panel to 'regulate its own procedure'. The consequence of this is to create a burden on members of the appeal panel, with lengthy legal submissions by both parties to the appeal and consequent delay being the likely outcome.

The following text emphasises a fair and expeditious resolution of disputes and is adapted from Section 57V in the 2002 Bill:

> *"(1) The Minister shall determine the procedures to be followed by the Appeal Panel, before the establishment of the first Appeal Panel.*
> *(2) When hearing an appeal, the Appeal Panel is limited to considering the evidence or grounds on which ComReg based the appealable decision that is the subject of the appeal.*
> *(3) The Appeal Panel is required to act with as little formality as the circumstances of the case permit.*
> *(4) In proceedings before it, the Appeal Panel is required to act as expeditiously as is practicable.*
> *(5) The Appeal Panel is not bound by any rule of law regarding the admissibility of evidence, subject to the rules of constitutional and natural justice.*
> *(6) In particular, the Appeal Panel may do all or any of the following:*
> *(a) require evidence or argument to be presented in writing and decide on the matters on which in exceptional circumstances it will hear oral evidence or argument;*

(b) require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate determination of the cases;

(c) adjourn proceedings to any time and place (including for the purpose of enabling the parties to negotiate a settlement);

(d) at any stage dismiss proceedings if the applicant has withdrawn the application to which the proceedings relate;

(e) at any stage dismiss proceedings that it considers to be frivolous or vexatious or otherwise misconceived or lacking in substance.

- Timeframe for decision

It is crucial that the delays associated with appeal panels abroad are avoided in the Irish market. In this respect, it is suggested that the time limit of 4 months in Regulation 5(12) be amended to 2 months. ComReg considers that such a time frame is fully feasible in light of the proposed informal procedural rules and the rule that evidence be heard in written submission, (with oral submission being heard as the exception where appropriate).

- Issues of evidence

The evidential issues can be considered together:

(i) Burden of proof should rest with the applicant;
(ii) The Standard of proof should be civil not criminal;
(iii) Statements should be on affidavit – no oral evidence except in exceptional circumstances,
(iv) There should be presumptions in respect of ComReg's findings of fact.

The following proposed text is based on Section 24(5) of the Competition Act 2002:

"The burden of proof shall rest at all times with the applicant. The standard of proof required to determine any question arising before the Appeal Panel shall be that applicable to civil proceedings. With respect to an issue of fact, the Appeal Panel may not receive evidence by way of testimony of any witness and shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the CCR in the appealable decision were correctly so accepted or found. However, the Appeal Panel, on the hearing of an appeal under this section, may receive evidence by way of the testimony of one or more witnesses if it considers it was unreasonable for ComReg to have accepted or found as a fact any matter concerned."

- How decisions are to be made or given

ComReg believes it is preferable for the final decision to be given by only one member on behalf of the majority of the Appeal Panel in order to discourage further appeals. With the exception that on a point of law, the opinion of the legal professional member of the appeal panel should be decisive.

The following proposed text is based on section 57AA(1) in the 2002 Bill. Subparagraph (2) is based on Article 26 of the Constitution:

"(1) If the members are not in unanimous agreement on a matter to be determined in the proceedings, before the Appeal Panel, the decision of the majority on the matter is the decision of that Panel.

(2) The final determination of the Panel shall be pronounced by one of those members as the Panel shall direct, and no other opinion, whether

assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

(3) However, a question of law (including the question whether a particular question is a question of law) arising in proceedings before the Appeal Panel is to be decided by the legal professional member of the Appeal Panel.

(4) The Appeal Panel is required to give reasons for its determination in writing within 14 days after the date on which it gave its determination.

(5) Those reasons must set out—

(a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based, and

(b) the Appeal Panel's understanding of the applicable law, and

(c) the reasoning processes that led that Panel to the conclusions that it made.

(6) A failure to comply with subparagraph (4) or (5) does not affect the validity of a decision of the Appeal Panel.

(7) The Appeal Panel shall ensure that a copy of its determination is served on each party to the proceedings."

- Remitting

This might be a useful provision in circumstances where the Appeal Panel is satisfied that an appeal is based on a technical or other small error which can be easily rectified by ComReg.

The following text, adapted from section 57(X) in the 2002 Bill, is proposed:

"(1) At any stage of proceedings to determine an appeal against an appealable decision, the Appeal Panel may remit the decision to ComReg for its consideration.

(2) ComReg shall reconsider a decision remitted under subparagraph (1) and on the reconsideration may—

(a) affirm the decision, or

(b) vary the decision, or

(c) substitute for the decision a new decision.

(d) carry out some function, procedure or technicality which if carried out will validate the decision

(3) A determination to remit the decision shall end the appeal against a decision so remitted without prejudice to the applicant's right to appeal against any subsequent decision."

- Costs

ComReg agrees with the current arrangement for costs under Regulation 4(11) and 5(10). ComReg believes that a losing party to an appeal should bear the cost of the Appeal Panel. Such an approach would:

- Provide a deterrent to the vexatious use of the Appeal Panel, which might otherwise be encouraged where an appeal is free to the applicant;
- Encourage the settlement of cases between the parties;
- Avoid passing on of the cost of appeals to all operators (as where ComReg was to pay for all the appeal panel costs) some of whom may never use the Appeal Panel.

ComReg notes the report in the *Irish Independent 09/01/03* that over half of the Commission for Aviation Regulation's annual costs is believed to be made up of costs which the aviation regulator will face as a result of one judicial review action arising from the appeal panel. ComReg hopes that the current powers to make orders for costs, which the aviation appeal panel did not have, might assist in avoiding a similar situation for the electronic communications sector.

- Undertakings as to Damages

ComReg notes that judicial review procedures allow for an application to obtain an undertaking of damages from an applicant. This arose in the case of *Broadnet v ODTR* [2000] 3 IR and ComReg recommends that a similar provision should be made in connection with appeals to appeal panels.

Broadnet v ODTR [2000] confirmed that a statutory body is entitled to seek an undertaking of damages from an applicant who is challenging a decision by way of judicial review. Such an undertaking states that if the challenger is to lose the application then it must make good any damage resulting from its erroneous challenge. This would be particularly applicable where a decision is suspended, in full or in part under Regulation 7(2), though may be sought even without such suspension. [7]

In granting an order for an undertaking of damages in *Broadnet*, Laffoy J stated:

> *"It would be patently unfair and unjust to allow the proceedings to continue without Broadnet carrying the risk of the loss occasioned thereby, if they are unjustified"*

The undertaking of damages was required to cover not only the costs, expenses and outlay of the ODTR but also the other respondent (Eircom) and notice parties who had been granted a licence (Esat/Princes/Formus). Such costs included the cost of the legal proceedings, the cost of tendering; the loss connected with the delayed 'roll-out'; loss of revenue; loss of competitive factors and loss attributable to technological advancement.

[7] The court stated that the ODTR could seek an undertaking as to damages from an applicant granted leave in judicial review. Crucially, there was no requirement that the applicant must have sought an interlocutory injunction or a stay. On affidavit, the Director swore that the decision had effectively been suspended awaiting the outcome of the judicial review, i.e. there was a "self imposed stay" on the decision.

Appendix 3 – ComReg's views in connection with the power of an Appeal Panel to vary a decision

Notwithstanding the ambiguities as to the intention in the draft regulations, the power to vary a decision of the Regulator pending the determination of the appeal which the appeal panel can go on then to confirm is problematic for the following reasons:

(a) The appeal panel is required by law to act constitutionally and adhere to the requirements of constitutional justice and fair procedure[8]. The power to vary while proceedings are pending breaches these constitutional requirements:

(i) The appeal panel varies a decision after receiving the applicant's application, but without the knowledge of ComReg's evidence, defence or reasons for the decision. To vary a decision without hearing both sides violates the fundamental principal of *audi alterem partem* (hear the other side)

(ii) The appeal panel's power to vary a decision before the determination stage is a predetermination or pre-judgement of the issues. In the alternative, it gives rise to a reasonable apprehension of such pre-judgement so as to amount to pre-judgment or objective bias as per Denham, J In *Bula Ltd and Ors -v- Tara Mines Ltd and Ors* (unreported, 3rd July, 2000).

(iii) If the appeal panel varies a decision of ComReg without first hearing ComReg's submissions, then on determination the panel will have to choose between (i) annulling ComReg's decision, (ii) confirming ComReg's decision or (iii) choosing its own varied decision. Thus the appeal panel becomes both the decision maker and judge of the merits of the decision. This violates the fundamental principal of appeal bodies *nemo judex in causa sua* (or *in propria causa*) (no man may be a judge in his own cause).
The violation is illustrated by the situation where the Appeal Panel varies the decision at an interim stage and after hearing the evidence it proceeds to confirms that its own varied decision is in fact the most meritorious option. The appeal body is no longer acting as an independent arbitrator between competing parties but is effectively choosing between its own decision and that of ComReg. Whether it is doing so or not, a reasonable apprehension is raised.

(iv) The appeal panel can vary a decision before hearing the parties' submissions, but cannot vary a decision after it hears both sides. This defeats the whole principle of adjudication

[8] It is noted that the Directives indicate that such an appeals body need not be judicial in character. The use of this phrase in Article 4 of the Framework Directive is somewhat problematic. ComReg interprets it to mean a body which is not a traditional court or institution of the judiciary. However, the proposed appeal panel is a body, inferior to a court, which is exercising limited functions and powers of a judicial nature within the meaning of Article 37.1 of the Constitution. Accordingly, the appeal panel is required to act in adherence to the requirements of constitutional justice, natural justice and fair procedures, McDonald v Bord na gCon [1965] I.R. 217.

(b) If the appeal panel doesn't use the power to vary before hearing the appeal, it limits itself to annulling or confirming ComReg's original decision. Thus there is an inbuilt bias or natural temptation for the appeal panel to always vary the decision at this stage.[9]

(c) Article 4.1 of the Framework Directive states that "the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise". Thus according to the Directive, the appeal body may decide to suspend a decision or not. The additional power to vary a decision in Regulation 7(2) seems to run counter to Article 4.1.

These infringements of fundamental constitutional requirements may result in the powers, and any determinations made under them, being struck down if examined by the High Court.

In addition, irrespective of the power to vary as currently drafted, a general power to vary a decision of the Regulator is impermissible for the following reasons:

(d) The power to vary (or make decisions for the electronic communications sector) is not necessitated or envisaged by the Framework Directive. Article 4(1) of the Directive provides that pending the outcome on an appeal "the decision of the national regulatory authority shall stand, unless the appeals body decides otherwise". This implies that ComReg's decision either stands pending the outcome of an appeal or it does not stand, whether in whole or in part. ComReg considers that Regulation 7(2) goes beyond what is necessitated by the Directives and that the power to vary should be removed.

(e) The obligation that Member States 'ensure that the merits of the case are duly taken into account' under Article 4.1 cannot be translated into an obligation to give a body the power to substitute its own decisions for the decisions of the National Regulator.

(f) The power to vary allows the appeal panel to become the de facto regulator, substituting its own decisions for that of the regulator.

(g) The power to vary an order of a regulatory authority goes beyond the power given even to a court in respect of a judicial review or a full court appeal of a decision. The reasons the courts are loath to substitute or vary decisions of regulators is summed up by Keane CJ in *Gleeson v Competition Authority* [1988] ILRM 101 and was quoted with approval in respect of the ODTR by the Supreme Court in *Orange Limited v Director of Telecommunications Regulation* (No. 2) [2000] IR 159:

> *"It would involve this Court in embarking on precisely the same exercise as the Competition Authority [i.e. the regulatory authority] with the important distinction that this Court would lack the expertise and specialised knowledge which that authority has built*

[9] For example, if ComReg issues a decision notice that a price cap should be 10p for Service X and an operator asserts that it should be 14p, then there is a temptation for the Appeal panel to vary the decision to 12p before hearing the appeal, in order to give itself an added choice at final determination stage.

up and for which it is uniquely suited. It is qualified in a way which this Court cannot be."

(h) In varying a decision, the appeal panel does not have access to the expertise, data, specialist staff, resources or consultants at the disposal of the regulator

(i) The regulator has a range of powers to make decisions for the sector and extensive powers to assist it in making these decisions, these powers are not open to the appeal panel

(j) These powers and duties of the regulator are validly conferred on it by the Oireachtas under the Telecommunications Act (Miscellaneous Provisions) 1996, and the Communications Regulation Act 2002. To have another body make decisions for the sector, may be a constitutionally invalid delegation of power (by statutory instrument) in contravention of the exclusive role intended by the Oireachtas for ComReg.

(k) The power to vary given to the Appeal Panel is beyond what is necessitated under the Directive and as such there is a strong possibility that the power to vary cannot be validly conferred by the Minister under the European Communities Act 1972.

(l) We note that the power to vary which does exist for some utility appeal panels, but not all, is confined to very limited circumstances. For example, the appeal panel for the aviation sector under section 40 of the Aviation Regulation Act 2001 has no power to vary a decision of the regulator, but merely a power to confirm or remit back to the regulator an appealed decision. In the electricity sector, the power to vary given to the appeal panel under section 30(6) of the Electricity Regulation Act 1999 is limited to one situation only, i.e. the appeal panel can vary the conditions under which a licence or an authorisation is to be granted. We further note that these limited powers to vary Regulator decisions were all created by acts of the Oireachtas and not by Ministerial legislation.