



Commission for
Communications Regulation

Information Notice

Guidance on the Submission of Competition Complaints relating to the Electronic Communications Sector

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1 Foreword

Consumers of electronic communications services are best served through a well functioning competitive marketplace within which a range of service providers offer consumers high quality and competitively priced services. However, in certain cases, competition issues may arise within a market requiring intervention in order to protect the competitive process and, in turn, consumer interests.

The Commission for Communications Regulation (ComReg), through the exercise of its *ex ante* regulatory role, already seeks to create the conditions necessary for competition to develop by establishing the framework under which service providers may enter and operate within the electronic communications market. In parallel with this role and following recent legislative changes, ComReg also shares responsibility with the Competition Authority for investigating breaches of competition law in the electronic communications sector on an *ex post* basis.

Given ComReg's broadened remit to investigate competition law breaches and, having to date received a small number of queries and complaints, initial guidance is being provided to interested parties to inform them of ComReg's expanded role, to explain what information is required when submitting a complaint and to outline what can be generally expected of ComReg when dealing with a complaint.

While it is expected that the pursuit of *ex ante* solutions may, in particular cases, provide a more immediate and appropriate means of resolving complaints, ComReg will nonetheless seek to utilise its complimentary *ex post* competition enforcement powers, where appropriate, to ensure fair competition in the provision of electronic communications services within the market.

This guidance is not binding on ComReg and will be applied flexibly. ComReg will, however, have regard to this guidance when exercising its competition law functions. Nonetheless, where an individual case justifies it, ComReg may adopt a different approach.

2 Introduction

Background

- 2.1 The Commission for Communications Regulation (“ComReg”) is the statutory body responsible for the *ex ante* regulation of the electronic communications and postal sectors. However, following the introduction of the Communications Regulation (Amendment) Act 2007 ComReg was given the additional function of investigating *ex post* competition law breaches in the electronic communications sector. Before 2007 only the Competition Authority could investigate breaches of competition law. ComReg now has the power to investigate competition law breaches under Irish law in the electronic communications sector. In addition, ComReg has been designated¹ as a national competition authority pursuant to European Council Regulation 1/2003² and, as such, has the power to investigate breaches of European competition law in the electronic communications sector.
- 2.2 Given ComReg’s broadened remit to investigate competition law breaches, initial guidance is being provided to interested parties to both inform them of ComReg’s expanded role and to assist them by providing information about how to submit a complaint to ComReg regarding alleged breaches of competition law by undertakings operating in the electronic communications sector.

Legislation

- 2.3 Part 4 of the Communications Regulation (Amendment) Act 2007 (“the 2007 Act”) amends the Competition Act 2002 (“the Competition Act 2002”). Section 31 of the 2007 Act inserts a new Section 47A in the Competition Act 2002, providing that, in addition to its other functions, ComReg now has the function of investigating, either on its own initiative or in response to a complaint made to it by any person, the existence of an agreement, decision or concerted practice, or the occurrence of an abuse of dominance, involving the provision of an electronic communications service or electronic communications network, or associated facilities³.
- 2.4 The Competition Authority and ComReg are, therefore, both designated as competition authorities, although ComReg’s role in this regard is limited to investigating breaches of competition law in relation to the provision of an electronic communications service or network or associated facilities.

Liaison and Co-operation between ComReg and the Competition Authority

- 2.5 Section 31 of the 2007 Act also amends the Competition Act 2002 to address co-operation between the Competition Authority and ComReg in the exercise of their respective powers and functions. Amongst the sections inserted in the Competition Act 2002 by Section 31 of the 2007 Act include provisions relating to:

¹ Pursuant to the European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) (Amendment) Regulations 2007 (S.I. 525/2007).

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

³ An Electronic Communications Service, Electronic Communications Network and Associated Facilities are defined in Section 2 of the Communications Regulation Acts 2002 to 2010.

- Notification⁴ arrangements between ComReg and the Competition Authority relating to the performance of functions under the Competition Act 2002 (as amended).
- Co-operation⁵ between ComReg and the Competition Authority to facilitate the efficient and effective performance of their respective functions.

2.6 In exercising its competition law powers, either on its own initiative or in response to a complaint, ComReg will liaise with the Competition Authority in respect of the exercise of its functions under the Competition Act 2002 and also with the European Commission in respect of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)⁶.

⁴ For example, sections 47C and 47D of the Competition Act 2002 (as amended) provide that ComReg, before performing any of its functions under the Competition Act 2002 must notify the Competition Authority in writing of its intention to perform that function; and that notification takes place between ComReg and the Competition Authority in relation to suspicions, on reasonable grounds, that there exists certain agreements, decisions, practices prohibited by section 4 or abuses prohibited by section 5 of the Competition Act 2002 (as amended) in relation to the provision of an electronic communications service or electronic communications network, or an associated facility.

⁵ ComReg and the Authority entered into a co-operation agreement (the 'Co-operation Agreement') on 23 June 2008, a copy of which is available at www.comreg.ie.

⁶ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have been renumbered Articles 101 and 102 respectively of the TFEU.

3 Overview of Role of ComReg

- 3.1 ComReg was set up under the Communications Regulation Act 2002, as amended (“the 2002 Act”). Its functions include ensuring compliance⁷ by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities. Obligations on undertakings in the electronic communications sector derive from a number of sources including the 2002 Act and other legislation which implements into Irish law the EU legal framework for regulating electronic communications services and networks. Many of these obligations can only be imposed by ComReg following a market analysis and the designation of significant market power on an operator. Such *ex ante* (i.e. before the fact) obligations are imposed where a market is not effectively competitive and competition law remedies are not sufficient to address problems in the market. *Ex ante* regulation applies over a particular timeframe and is designed to create the necessary conditions to facilitate the development of competition. Over time, as competition in regulated markets becomes effective and sustainable, the need to apply *ex ante* regulation is reduced or eliminated.
- 3.2 In parallel with its *ex ante* regulatory functions, ComReg can also examine anti-competitive practices which have occurred or are ongoing. Such investigations must be carried out on an *ex post* basis, (i.e. after the fact) where the purported anti-competitive behaviour must either have occurred or be ongoing. It should be noted that the investigation of anti-competitive behaviour on an *ex post* basis can also occur in electronic communications markets where *ex ante* regulation applies. The anti-competitive practices which are prohibited are set out in sections 4 and 5 of the Competition Act 2002 (as amended). Section 4 prohibits agreements, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the State. Section 5 prohibits the abuse of a dominant position in a defined market within the State. In addition, ComReg has the power to investigate and take action for breaches of the equivalent EU law provisions, i.e. Articles 101 and 102 of the TFEU⁸.
- 3.3 Although the European Commission and ComReg have defined particular markets in the electronic communications sector for the purposes of applying *ex ante* regulation where necessary, such market definitions are without prejudice to any markets which may be defined for the purposes of applying *ex post* competition law.

ComReg’s Competition Law Powers

- 3.4 ComReg has the power to carry out an investigation where there are grounds for believing that a breach of competition law may have occurred or is occurring in relation to the provision of an electronic communications service or network or associated facilities. An investigation may be carried out pursuant to a complaint or on ComReg’s own initiative. At the end of its investigation, if ComReg believes that there is a breach of competition law, it can issue court proceedings (civil or criminal) against an undertaking. It is important to note that ComReg cannot itself make a finding of a breach

⁷ Compliance activities can arise in response to complaints raised by undertakings or through ComReg’s own initiative investigations.

⁸ In relation to investigations into Article 101, ComReg will have regard to the Guidelines on the application of Article 81(3) of the Treaty, OJ 2004/C 101/08.

of competition law as only a court can do this.

3.5 Specifically, ComReg may carry out an investigation under the Competition Act 2002 (as amended) where it is suspected that there is or has been

- An agreement, decision of an association of undertakings, or concerted practice which has as its object or effect the prevention, restriction or distortion of competition within the State or a part of it (breach of section 4 of the Competition Act 2002);
- An agreement, decision of an association of undertakings, or concerted practice which has as its object or effect the prevention, restriction or distortion of competition within the common market or any part of it (breach of Article 101 of the TFEU);
- An abuse of a dominant position within the State or a part of it (breach of section 5 of the Competition Act 2002); or
- An abuse of a dominant position within the common market or any part of it (breach of Article 102 of the TFEU)

involving the provision of an electronic communications service or electronic communications network, or associated facilities.

3.6 Competition law applies to undertakings, i.e. an entity (which can include a person) engaged for gain in the production, supply or distribution of goods or the provision of a service.

3.7 In the course of carrying out an investigation, ComReg has a number of significant statutory powers which it can use to assist it in gathering information and evidence concerning behaviour which may be in breach of competition law. These powers include the ability:

- to enter and search business premises without a warrant⁹;
- to require the production of written information¹⁰;
- to compel persons to appear before ComReg and give evidence or produce documents¹¹.

3.8 ComReg may investigate competition law breaches with a view to bringing civil or criminal proceedings against an undertaking for a breach of competition law. In relation to criminal proceedings, ComReg may only bring summary proceedings, with maximum penalties of €3,000 and/or 6 months imprisonment. However the Director of Public Prosecutions (DPP) may bring proceedings on indictment carrying a maximum fine of €4,000,000 or 10 per cent of turnover and/or 5 years imprisonment. ComReg may bring civil proceedings which carry a lower burden of proof and seek relief by way of injunction or declaration.

⁹ Pursuant to section 39 of the 2002 Act as amended by section 16(i) of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010, Number 2 of 2010.

¹⁰ Pursuant to section 13(D) 1of the 2002 Act.

¹¹ Pursuant to section 38A of the 2002 Act.

4 Complaints on Competition Law Issues

Introduction

- 4.1 This section provides some general guidance to assist parties when considering submitting a complaint to ComReg concerning alleged competition law breaches and to provide an overview of ComReg's general approach in dealing with any such complaints.
- 4.2 It should be noted this guidance does not apply to the submission of disputes or complaints relating to alleged breaches of *ex ante* regulatory obligations. ComReg has already published¹² separate procedures for the handling of disputes, which have a separate legislative basis.
- 4.3 ComReg intends to keep the guidance set out in this Information Notice under review having regard to ongoing experience, legislative or other developments. ComReg may, at its sole discretion, amend and re-publish this guidance.

Submitting a complaint to ComReg

- 4.4 Any individual or company can make a complaint to ComReg where they are of the view that there has been or is a breach of competition law in relation to the provision of an electronic communications service or electronic communications network or associated facility. The person or company making the complaint may or may not be directly affected by the conduct complained of.
- 4.5 ComReg expects well resourced companies to provide sufficient detail in their complaints. It is in the complainant's interest to include as much relevant information as possible in their complaint and it should at least include the following information:
- A. Complainant's name, address and contact details (telephone number and email address);
 - B. The identity, address and contact details of the party (or parties) being complained about, supported by evidence that the party is an undertaking¹³ which is involved in the provision of an electronic communications service, an electronic communications network or associated facilities;
 - C. The relationship, if any, between the complainant and the party being complained about;
 - D. Full factual background information that is giving rise to the complaint;
 - E. How the conduct complained of negatively impacts on the complainant, competition and consumers;
 - F. Clear identification of the products/services affected by the alleged anti-competitive conduct;
 - G. Clear identification of the geographic area within the State affected by the alleged anti-competitive conduct;

¹² ComReg Document 10/18R, Dispute Resolution Procedures – Framework Regulations, Response to Consultation and Decision Notice D18/03.

¹³ Pursuant to the Competition Act 2002, an undertaking means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.

- H. Sufficient particulars about the anti-competitive conduct complained about and why the complainant considers the conduct to be such (for example an allegation about predatory pricing or margin squeeze should contain relevant pricing/costing information);
- I. Details of any interaction with the undertaking complained against in relation to the alleged anti-competitive conduct, including any attempt to bring the conduct to an end;
- J. In the case of a complaint by a company, a statement by a senior officer, preferably the CEO, verifying that all due care has been taken to ensure that the information/evidence submitted is correct and complete;
- K. General evidence to support the complaint and any other issues considered by the complainant to be relevant.

4.6 Excessive claims of confidentiality in relation to information supplied can significantly slow down the investigation of complaints. If a complainant considers that information it is providing is confidential in nature, it should be clearly marked as such. A separate non-confidential version together with an explanation which justifies why certain information should be treated as confidential should be submitted at the same time as a confidential version of the complaint. ComReg may consider whether or not such information may need to be disclosed in order to effectively investigate the matter. In such circumstances, ComReg will discuss the matter with the complainant and allow them the opportunity to make representations.

4.7 As noted previously in paragraphs 2.5 and 2.6, ComReg is required to engage with the Competition Authority in respect of the exercise of its functions under the Competition Act 2002. The Co-Operation Agreement between ComReg and the Competition Authority sets out the basis upon which information is to be exchanged.

4.8 ComReg is also required to notify the European Commission under Article 11 of European Council Regulation 1/2003 before initiating formal investigative measures under Articles 101 and 102 of the TFEU.

4.9 Engagement with the Competition Authority and the European Commission will occur at the appropriate stage during the complaint management process.

4.10 There are a number of ways within which a complaint can be submitted. A complainant should provide the details specified in paragraph 4.5 and submit them to the Competition Policy Manager (ideally in hard copy by post, but alternatively by email) as follows:

By post to: Competition Policy Manager
 Commission for Communications Regulation
 Wholesale Division
 Blocks D, E & F
 Abbey Court
 Irish Life Centre
 Lower Abbey Street
 Dublin 1.

By email to: competition@comreg.ie

By Fax to: +353 1 8049695

Treatment of Complaints by ComReg

4.11 This section provides some general guidance as to how ComReg will deal with complaints submitted to it. Typically, there will be three phases to complaint management, namely the:

- Initial Assessment
- Investigation
- Opinion

4.12 It is not possible to state how long it will take to deal with individual complaints as this will depend on the complexity of the issues involved. ComReg will seek to handle competition complaints as efficiently and expeditiously as possible, giving priority to those cases in light of issues such as the level of impact on consumers, whether the alleged anti-competitive conduct is ongoing and in light of the efficient and effective use by ComReg of its available resources. Further details are provided below on what can typically be expected to occur during these complaint handling phases.

Initial Assessment Phase

4.13 After receiving a complaint ComReg will acknowledge receipt within a short period of time, typically within 10 working days. The complaint will typically be assigned to a case officer(s)/case team, on foot of which ComReg will carry out an initial assessment to ascertain whether a complaint would warrant an investigation. During the initial assessment phase, ComReg may meet with the complainant or request further information from them or other parties, including the undertaking complained of¹⁴, in order to establish, in more detail, the nature of the complaint, whether the behaviour contravenes the Competition Act 2002 and whether it is causing harm to competition and consumers.

4.14 ComReg will only proceed from initial assessment to open an investigation where, *inter alia*, it has reasonable grounds for suspecting that an infringement may have occurred. In doing so, the issues that ComReg will consider include:

- Whether the complainant has identified a possible breach which clearly falls within the remit of the Competition Act 2002 (as amended)
- Whether the alleged breach involves the provision of an electronic communications service, an electronic communications network or associated facilities¹⁵;
- Whether the initial evidence suggests a possible breach;
- The duration over which the alleged breach occurred and whether the alleged anti-competitive behaviour is ongoing¹⁶;
- Whether the behaviour is likely to significantly harm consumer welfare;

¹⁴ This may involve providing details of the complaint to the undertaking complained of.

¹⁵ An Electronic Communications Service, Electronic Communications Network and Associated Facilities are defined in Section 2 of the Communications Regulation Acts 2002 to 2010.

¹⁶ Notwithstanding the fact that anti-competitive behaviour may no longer be occurring, ComReg may still seek to investigate the complaint where it has, for example, a precedent value or where there is a risk that such anti-competitive behaviour was likely to re-occur.

- Whether an investigation would be an appropriate use of ComReg’s resources considering *inter alia* the extent or complexity of the investigation required, the likelihood of establishing an infringement and whether application of *ex ante* regulatory powers would be more appropriate.

4.15 If ComReg decides to close a complaint at the initial assessment stage without proceeding to open an investigation, it will inform the complainant in writing of its decision and the reasons for same.

4.16 Where the party complained against has been contacted at the initial assessment stage, it will also be informed of the decision not to proceed with an investigation.

Investigative Phase

4.17 Once ComReg has decided to investigate a suspected competition law infringement, it will notify the relevant parties, i.e. the complainant and the undertaking complained against, to inform them of its intention to proceed to the investigative stage. At this stage, the general scope of the alleged anti-competitive behaviour being investigated will have been established. However, during the conduct of the investigation, the scope may be amended having regard to the consideration of evidence being gathered during this time.

4.18 ComReg may seek to obtain information on a voluntary basis and/or use its legal powers¹⁷ (as discussed in paragraph 3.7) in order to gather information in the course of its investigation.

4.19 ComReg may also publish notice of the carrying out of an investigation, unless such publication could hinder this. Any details published would typically be limited to briefly identifying the undertaking(s) subject to the investigation, the behaviour giving rise to the alleged competition law breach, the scope of the investigation and the likely product markets and geographic area affected, although these would have yet to be established as part of the investigation.

4.20 It is important to note that where ComReg moves to open an investigation, it should not be taken that the party complained against has breached competition law. Rather it means that a potential breach of competition law is being investigated, the outcome of which has not yet been determined. The commencement of an investigation does not, therefore, prejudice the outcome.

4.21 In some cases, an investigation may commence by examining a particular set of circumstances that suggest conduct of one type, but information may later come to light which indicates another type of potentially anti-competitive behaviour. Also, early analysis may suggest that a number of companies may have been acting unlawfully, but later it evolves that there is only enough evidence to warrant a further investigation into some of these. ComReg may need to exercise its administrative discretion to focus its resources on investigating a limited set of activities or companies.

Opinion Phase

4.22 Where ComReg’s opinion is that there has been a breach of competition law, it will inform the party against whom the opinion has been made of the basis for this and the action it intends to take.

¹⁷ As noted earlier, ComReg is also required to liaise with the Competition Authority and the European Commission where it seeks to exercise its competition law powers.

- 4.23 ComReg may afford the party concerned an opportunity to immediately and indefinitely cease the conduct and to offer ComReg specific undertakings, where appropriate and possible¹⁸.
- 4.24 At the conclusion of the investigation, ComReg will inform the parties concerned, including the complainant, as to the outcome.
- 4.25 ComReg also reserves the right to publish on its website details regarding the undertakings provided and/or its intentions regarding the commencement of enforcement action.
- 4.26 ComReg may issue civil or criminal proceedings. Only a court can make a finding that a breach of competition law has taken place. If enforcement action ensues, ComReg will inform the complainant but may not engage further given the need to protect the integrity of the enforcement process.

What ComReg cannot do

- 4.27 ComReg is unable to provide legal advice to complainants on the particulars of their case, including the likelihood of success. Complainants should, therefore, seek their own independent legal advice. Complainants should also note that they may have private action remedies available to them, in particular, under section 14 of the Competition Act 2002.
- 4.28 It is not ComReg's policy to inform complainants or other parties how many complaints, if any, have been received about a particular undertaking.
- 4.29 ComReg cannot provide precise details as to the timing and progress of the phases involved in a particular complaint, particularly as these may vary on a case by case basis, depending on the information provided and the complexity of the issues involved.

¹⁸ To be determined by ComReg having regard to the particular case giving rise to ComReg's opinion that the party has breached the Competition Act 2002. Such undertaking may, for example, require that the party (i) immediately ceases the anti-competitive behaviour/practices (ii) acknowledges and accepts that its behaviour/practices were in breach of section 5 of the Competition Act 2002 (iii) other requirements having regard to the particular circumstances of the case. ComReg can not accept undertakings where the breach would also be a breach of article 102 TFEU as the only entity which can accept any such commitments are the Irish Courts or the European Commission.