



Commission for
Communications Regulation

Consultation Paper

The treatment of confidential information

Draft Guidelines

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All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg YY/NN” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5 p.m. on Tuesday
1st February 2005, to:

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Please note ComReg will publish all submissions with any
Response to Consultation, subject to the standard confidentiality
procedure.

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Foreword by the Chairperson

This consultation document sets out draft guidelines on how ComReg deals with claims by respondents for confidential treatment of information and submissions which they supply to us.

In recent months a number of operators have raised issues of confidentiality with ComReg and we have therefore decided to publish the draft guidelines in the interests of transparency.

Any comments on the draft guidelines should be sent to ComReg by Tuesday 1st February 2005.

Isolde Goggin
Chairperson

1.1 GUIDELINES ON THE TREATMENT OF CONFIDENTIAL INFORMATION

The purpose of the document

1. These Guidelines explain how ComReg will treat claims by respondents that information supplied to it, for example in the course of a consultation process, is confidential. ComReg will normally follow these Guidelines and will give reasons if it departs from them. The Guidelines are intended to assist stakeholders in understanding ComReg's processes and thus aid transparency.
2. The Guidelines are without prejudice to the provisions of the Freedom of Information Acts and the data protection legislation. Furthermore there are specific arrangements regarding the exchange of information between ComReg and the Competition Authority and between ComReg and the European Commission to which reference should be made¹.

The legislative framework

3. A number of provisions in the Regulations which transpose the EU Communications Directives deal with confidential information. For example, Regulation 21 of the Framework Regulations² provides:

“In these Regulations the Regulator shall, subject to the Freedom of Information Acts 1997 and 2003, maintain and accept as confidential any information provided by an undertaking expressed by it to be confidential, except where the Regulator has good reason to consider otherwise”.

4. Similarly, Regulation 17(11) provides:

“The Regulator shall, subject to the protection of the confidentiality of any information which it considers to be confidential, publish from time to time such information as would, in the opinion of the Regulator, contribute to an open and competitive market”.

¹ See the co-operation agreement between ComReg and the Competition Authority dated 16th December 2002 (available on ComReg's web-site) and also Regulation 17 (6) of the European Communities (Electronic Communications Network and Services)(Framework) Regulations 2003, S.I. No. 307 of 2003.

² European Communities (Electronic Communications Network and Services)(Framework) Regulations 2003, S.I. No. 307 of 2003.

5. In the context of cooperation with the Director of Consumer Affairs, Regulation 18(2) of the Framework Regulations provides:

“The Regulator and the Director of Consumer Affairs shall, subject to the Freedom of Information Acts 1997 and 2003, maintain and accept as confidential any information provided [.....] by an undertaking providing electronic communications networks or services expressed by it to be confidential, except where the Regulator and the Director of Consumer Affairs have good reason to consider otherwise”.

6. Finally in this regard, Regulation 3 of the Access Regulations ³ provides:

“For the purposes of these Regulations, where the Regulator may consider whether information is confidential or not, it shall, subject to the Freedom of Information Acts 1997 and 2003, accept as confidential any information which is expressed to be confidential, except where it has good reasons to consider otherwise”.

7. As can be seen, all of the above provisions give ComReg a measure of discretion with regard to the treatment of information for which confidentiality is claimed.
8. Other provisions of the Regulations are silent on the question of ComReg’s discretion. For example, Regulation 19(6) of the Framework Regulations (which deals with consultation prior to the adoption of certain types of measures) provides:

“The results of any consultation under this Regulation shall be made publicly available by the Regulator, except in the case of confidential information”.
9. Although this provision does not refer to whether or not ComReg considers information to be confidential, it is clear that ComReg would still have to make an assessment of whether the information is, as a matter of fact and law, confidential.
10. A number of provisions similar to those quoted above are to be found in the implementing Regulations.

ComReg’s practice with regard to the treatment of claims for confidentiality

11. Against the background set out above, ComReg will adopt the practice described below.
12. Respondents who supply information and observations to ComReg are asked to supply a non-confidential document, with any information for which confidentiality is claimed supplied in a separate annex. This is particularly important as ComReg intends to publish respondents’ submissions on its website.

³ European Communities (Electronic Communications Network and Services)(Access) Regulations 2003, S.I. No. 305 of 2003.

13. Where a respondent supplies only a document for which confidentiality is claimed (in other words, where the request in paragraph 12 has not been complied with), or where the document contains various paragraphs or other material spread throughout the document which are alleged to be confidential, the following procedure will apply.
14. In the first place ComReg will request that a non-confidential version be supplied within a particular time period.
15. If the respondent fails to supply a non-confidential version within the stipulated timescale, ComReg will assess the information supplied to see whether, as a matter of fact and law, the material is confidential.
16. In making its assessment, ComReg will apply the tests laid down by law. These tests are well known. In essence, the material must have the necessary “quality of confidence” for it to be confidential. In this regard, Comreg will assess:
 - (a) Whether the material is material which the respondent believes would be injurious to him (or advantageous to his competitors or others) if it were released.
 - (b) Whether the respondent believes the material to be confidential.
 - (c) Whether that belief is reasonable.
 - (d) The usages and practices of the communications sector with regard to the material in question.
17. If ComReg concludes that the material is not confidential it will so inform the respondent and give reasons for the conclusion it has reached. If ComReg proposes to publish the material in question, it will give the respondent a period of seven days within which to make representations. (This period of time is the same as that provided for in cases in which the European Commission requests ComReg to provide it with information ⁴).
18. In urgent cases, the period of seven days may be abridged.
19. Having considered any representations which the respondent has made, ComReg may publish the material in question if it considers that the case for confidentiality has not been made out.
20. Where ComReg does publish the material, it will state its reasons for so doing.



⁴ See Regulation 17(6) of the Framework Regulations.

2 Submitting Comments

The consultation period will run from 11th to 1st February 2005 during which the Commission welcomes written comments on any of the issues raised in this paper.

Having analysed and considered the comments received, ComReg will review the subject matter of the consultation and publish its response (if any) and will subsequently issue the guidelines in their final form.

In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its offices.

Comments should be submitted by **5 p.m. on Tuesday 1st February 2005** to:

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