



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Submission to the Review of the Administration of Civil Justice

Date: 28/02/2018

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Introduction

1. The Commission for Communications Regulation (“ComReg”) is responsible for both *ex ante* and *ex post* regulation of the electronic communications sector (amongst other things). Through the exercise of its *ex ante* regulatory role, ComReg seeks to create the conditions necessary for competition to develop within electronic communications markets by establishing the framework under which service providers may enter and operate within electronic communications markets. In parallel with this role and following legislative changes in 2007, ComReg was also designated as a National Competition Authority with respect to the *ex post* regulation of the electronic communications sector in Ireland (the application of competition law to that sector) and ComReg has concurrent powers in this regard with the Competition and Consumer Protection Commission (“CCPC”).
2. Many of the decisions taken by ComReg, for example the imposition of regulatory obligations on undertakings found to have significant market power, are the subject of a statutory appeals framework governed by the Framework Directive 2002 (as amended)¹ and the Framework Regulations 2011². Other decisions taken by ComReg, for example a decision to make an award of spectrum to a particular undertaking, or a decision to issue an urgent direction, are not subject to the same statutory appeals regime but are subject to judicial review. Finally, ComReg has a number of functions in relation to other matters such as certain issues relating to broadcasting, post, Premium Rates Services and the enforcement of certain consumer legislation.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009 (“the Framework Directive 2002 (as amended)”).

² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, S.I. No. 333 of 2011 (as amended) (“the Framework Regulations 2011”).

I Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure

3. The principal areas relevant to ComReg in the civil justice sphere are statutory appeals, enforcement proceedings and judicial review.
4. ComReg has previously noted in submissions to the Department of An Taoiseach Better Regulation Group Consultation on Regulatory Appeals that it is of the view that appeals mechanisms (and, we would submit, similarly, judicial review and enforcement procedures) should be accountable, expeditious, consistent, informed and transparent.
5. ComReg assessed the then current appeals mechanism provided for by the electronic communications framework to see if it satisfied these principles and identified some areas of concern. In particular, ComReg was concerned that the then current electronic communications appeals process was inappropriately slow. ComReg's over-riding concern was that the delay in reaching decisions under the current appeals process has meant that it is difficult to match market, technological and other changes in the electronic communications sector and to deliver the benefits of competition to consumers.
6. Therefore ComReg proposed the view that the hearing of appeals in the High Court would be more appropriate than the current appeals system. ComReg further suggested that appeals should be listed on the Competition List (or the Commercial List) of the High Court. In particular, ComReg commented favourably on the High Court's ability to hear matters directly without referral from an administrative body (which was the relevant for progress at the time of that Consultation (2006)) and the Competition List's (and Commercial List's) rigorous case management systems which is considered operated (and continue to operate) to address concerns regarding delays. In the context of enforcement proceedings relating to consumer rights, it is vitally important that such proceedings are dealt with promptly.

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7. ComReg has had an extremely positive experience of case management in the Competition and Commercial Lists of the High Court. To this end, ComReg would welcome similar case management in all spheres of the civil justice system where appropriate, such as clear timetables, appropriate directions, exchange of witness statements, active case management and efficient timetables to get to hearing.
8. In this regard, ComReg welcomes the new rules on pleadings, the conduct of trials and expert witnesses introduced by S.I. 254 of 2016 (*Rules of the Superior Courts (Conduct of Trials) 2016*).
9. ComReg also very much welcomes the case management and other provisions introduced by S.I. 255 of 2016 (*Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016*), though it clearly hopes that these provisions will ultimately lead to more stream-lined and efficient management of cases and will not simply increase the administrative pre-trial and trial burden on litigants, particularly in terms of costs.
10. ComReg notes that for reasons of insufficient resources, not all the provisions of S.I. 255 of 2016 have yet been given effect to, and would express its strong hope that such resources will be made available as soon as possible to allow full effect to be given to these provisions.
11. For the avoidance of doubt, ComReg would of course favour the removal of obsolete, unnecessary or over-complex rules of procedure, but makes no specific suggestions in this regard.

II Reviewing the law of discovery

12. For a public body with limited staff and financial resources, significant discovery exercises can be extremely onerous, time-consuming and expensive and quite disproportionate in terms of their evidential value.

13. ComReg would endorse the words of the current Chief Justice (*Bar Review*, December 2017), when he said that “*in certain types of cases disclosure has become a monster in terms of its burden on the parties, both financially and in other ways*”.

14. ComReg would also endorse the following propositions from the Commercial Law Association of Ireland “*Good Practice Discovery Guide*” (dated November 2015), where it says:

“The costs of discovery should be proportionate to the value under dispute in commercial matters. In matters where a financial value is not in dispute, the costs of discovery should be proportionate to the value which any documents discovered would bring to the matter. Proportionality should take into account the accessibility of data and the cost of retrieval, in addition to the cost of searching, reviewing, and production. Parties should not be required to produce deleted or residual data absent a demonstrated need and relevance.” (Chapter 2, Principle 5)

and

“Careful consideration should be given to defining the scope of the discovery request in order to focus it to appropriately identify data of relevance to the matter whilst balancing the costs of retrieval proportionately. A fundamental factor in this process is setting the parameters, or scope, of the search that the litigant will carry out in retrieving the documents which are to be discovered.” (Chapter 6 – Section 6.1)

15. ComReg would fully support these fundamental principles in respect of the discovery process and in particular in respect of keeping the discovery process effective, efficient, focused and proportionate.

III Encouraging alternative methods of dispute resolution

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16. ComReg would draw a broad distinction in relation to alternative methods of dispute resolution (“ADR”) between those situations in which ADR is resorted to in the context of ongoing civil litigation and situations where ComReg itself has some form of dispute resolution function or power.
17. ComReg has had very positive experience of alternative dispute resolution in the context of previous litigation, where ADR was turned to in an attempt to avoid/reduce the resource costs of proceeding to a full trial in terms of both time and financial expense. ComReg would fully support the promotion of ADR in the context of civil litigation where appropriate as a means of achieving costs savings and more effective and efficient access to justice.
18. ComReg would note, however, that there is a potential downside to free-standing dispute resolution mechanisms in that they do not necessarily finally determine a dispute, with recourse frequently/normally being available additionally to the court system and that this can involve wasteful duplication of time and effort. In this regard, ComReg would refer by way of analogy to the previous bespoke statutory appeals mechanism and body that was put in place in respect of appealable ComReg decisions, which it ultimately, as noted above, found unwieldy and less efficient than direct recourse to the civil justice system.

IV Reviewing the use of electronic communications

19. ComReg would make only some very short points in relation to this question.
20. First, ComReg welcomes the provisions of S.I. 255 of 2016 in respect of the electronic service, exchange and lodgement of court documents, though it notes that a practice direction is required before these procedures will be given effect. ComReg would encourage making such a practice direction and allowing, as a matter of course, electronic service, exchange and lodgement of court documents.

21. ComReg also considers that much could be done to make access to civil justice and the civil justice process more accessible were court documents, including formal documents, pleadings, legal submissions and, where appropriate, affidavits and witness statements available electronically to the parties, ideally online. ComReg of course recognises that there may be cases where for reasons of confidentiality or commercial sensitivity this may not be appropriate, but considers that the general principle should be one of transparency, subject to applications for exceptional treatment.
22. ComReg would not, at least for the types of matters in which it is routinely involved, consider at present that any form of “e-litigation” might be appropriate other than as outlined above.
23. ComReg also notes the need for safe and secure systems and concerns relating to cyber-security in relation to these issues.

V Achieving more effective and less costly outcomes for court users, particularly vulnerable court users

24. ComReg would welcome any measures that achieve effective justice at lower cost, and even more so any measures that achieve more effective outcomes and in a less costly manner – for all court users.
25. In this regard, ComReg would welcome measures that provide more effective and/or more efficient access to civil justice at reduced cost, in addition to measures that improve, particularly for vulnerable users, access to civil justice *simpliciter*.
26. Finally, ComReg would note that while supporting measures that improve access to more effective and efficient civil justice, it goes without saying that such should not be at the expense of the quality of civil justice currently available in Ireland nor indeed encourage frivolous or vexatious litigation of any sort. ComReg notes in particular in this regard that both the costs, and length of time taken for matters to be (finally determined) in the civil justice

system, can be not only a disincentive to seeking justice, but in some cases quite simply prohibitive of doing so.

VI Any other issues arising

27. Should ComReg be able to assist the Review in any other way, it will of course be glad to.