

Response
To
Consultation Paper on Regulatory Appeals

24 November 2006

1 INTRODUCTION

Matheson Ormsby Prentice ('MOP') is a leading Irish corporate law firm providing a comprehensive range of legal services to our global client base. Our principal office is in Dublin and we also have offices in London, New York and Palo Alto, California.

As one of Ireland's largest law firms, MOP have considerable practical experience of the kinds of issues presented by different regulatory appeals mechanisms in Ireland and in other jurisdictions.

MOP welcomes the opportunity presented by this consultation to comment on the current regulatory appeals framework within Ireland and commends the Better Regulation Group for the informative and considered way in which this often complex subject is presented.

Given that the Regulatory Framework for Electronic Communications Networks and Services ('ECNS') is perhaps the most developed in terms of regulated utilities in Ireland, our comments are presented mainly in the context of that framework. Where comments are made in relation to regulatory frameworks other than the ECNS Regulatory Framework, this is specifically noted.

In our response we have endeavored to address the consultation questions in the context of the overarching issues raised in the consultation document, which we have grouped under the following headings:

- (a) Current Appeals Mechanisms (Questions 2, 3, 6 & 9);
- (b) Other Procedural Issues (Questions 10, 11, 23, 28); and
- (c) Alternative Appeals Mechanisms (Questions 13, 16-19, 21, 24, 27-34).

2 CURRENT APPEALS MECHANISMS

2.1 Evaluation Principles

The principles, which we deem most important, are clarity, timeliness, consistency and equality.

- Clarity

When assessing whether a given regulatory appeals process meets the principle of clarity, the types of decisions to which the appeals process applies should be clear. The decision of McKechnie J in *eircom v Commission for Communications Regulation*¹, which dealt with the application of provisions regarding the right to appeal in the electronic communications sector, has underlined the importance of ensuring that the types of decisions that can be appealed are clearly set out and also that they are consistent with EC legislative requirements where relevant.

It is also felt that any appeal process should clearly set out each element of the process and associated timelines so that parties who are potentially affected can make an assessment as to the likely timeframe for clarification on the issues under appeal.

- Timeliness

The principle of timeliness is essential to ensure that regulatory decisions are implemented in a timely and therefore cost effective manner while respecting the rights of those to whom they are directed. Clear timelines for each stage of the appeal process are therefore essential in order to secure a speedy resolution of the matter under appeal. A clear timeline for the duration of the appeal would limit uncertainty and enable necessary business planning.

1. *Eircom Ltd. v Commission for Communications Regulations* [2006] IEHC 138 (29 July 2005)

The process for appealing decisions in the ECNS regulatory framework is set down in Part 2 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003² ('Framework Regulations'). Under the Framework Regulations a person aggrieved by a regulatory decision can notify the Minister for Communications, Marine & Natural Resources ('the Minister') of his or her intention to appeal the decision. Under Regulation 4 the Minister is then required to convene an appeal panel or refer the appeal to an existing appeal panel unless court proceedings relevant to the subject matter of the appeal are initiated by any party and the Minister decides not to establish or refer the matter to an appeal panel pending determination of the such proceedings³. While the time limit for submitting the appeal notification⁴ is specified along with the period within which the Appeal Panel must endeavor to determine the matter⁵, Regulation 4 sets down no timeframe for the establishment of an appeal panel or referral of an appeal by the Minister. This represents an unnecessary delay in the process at present where it has taken 2-3 months to establish ECAPs in most appeals to date⁶.

In addition, as noted in the Consultation the time limit set down for the determination of appeals by the Electronic Communications Appeal Panel ('ECAP') is 4 months however, this is not a strict requirement and initial indications from the ECAP⁷ process are that the period of 4 months is not a realistic timeframe for complex cases. It is submitted that an exact period should be specified and should be binding in nature. The appropriate period however, will depend on whether other elements of the appeals process, such as whether the appeal panel is a standing panel or is convened on an ad hoc basis.

In this regard, it is also desirable to ensure consistency where possible between the timeframes associated with different appeals mechanisms.

- Consistency

Consistency is an essential element of any regulatory framework. In this regard, a fixed as opposed to ad hoc appeal panel process is preferable in order to avoid unnecessary duplication, delay and uncertainty. Under Regulation 8 (3) of the Framework Regulations, each ECAP is entitled to determine its own procedure. There is therefore no certainty that a subsequent appeal panel will run an appeal in a similar fashion to previous appeals or that procedural points will be resolved in a consistent manner. Since each ECAP is essentially separate there is no obligation on a particular ECAP to follow decisions made by other panels convened under the Regulations. Lack of consistency and certainty with regard to the appeal process has the potential to undermine its efficacy in terms of the overall regulatory framework. Any review of the current ECAP process and appeals in general should consider whether greater consistency and efficiency could be achieved through the appointment of a standing appeal panel, which would by its nature be able to develop some form of precedence value in terms of its decisions.

The need to ensure that all decisions are provided in writing and set out the reasons upon which they are based is also important in terms of consistency. While the requirement to provide written

2. S.I. No. 307 of 2003

3. Regulation 4 (2) of the Framework Regulations.

4. Under Regulation 3 of the Framework Regulations a person must submit their appeal notification to the Minister within 28 days of the decision.

5. Under Regulation 12 the Appeal Panel is required to endeavour to determine an appeal within 4 months of the date of its establishment or the date an appeal was referred to it.

6. Appendix 4, Consultation Paper on Regulatory Appeals.

7. Paragraph 1.22 of Decision No: 02/05 of the Electronic Communications Appeals Panel in respect of Appeal No: ECAP 2004/01, Hutchison 3G Ireland Ltd v Commission for Communications Regulation the ECAP noted that due to the complexity of the case the number of interlocutory issues it had to deal with that: "... the Panel feels that the guideline timescale of 4 months will be difficult to achieve except, perhaps, in the simplest of cases."

decisions for all appeals panels might add to the length of the decision making process, this would be outweighed by the benefit of such a requirement in ensuring legal certainty and consistency.

- Equality

While recognising that different sectors may raise different issues in a regulatory context, there are certain aspects of a regulatory framework that should be common to all. In this regard, it is noted that although ComReg also regulates the postal sector, the only appeals mechanism open to postal service providers is that of judicial review. The disadvantages of judicial review when compared to the ECAP process for example include the limited nature of the review. In this regard it is noted that the draft Third Postal Directive⁸ recently published by the European Commission, specifically proposes that parties the subject of a decision by an NRA should have the right to appeal to an independent body. Although the draft directive does not refer to the right to appeal on the merits, it is submitted that the right to have an appeal on the merits is something that should and could easily be extended to the postal sector. In this way, some element of equality could be achieved as between those sectors operating under a common regulator.

It should also be possible to appeal all decisions of regulators. By way of example, as noted in the Consultation Document, two types of Competition Authority decisions can be appealed to the High Court the first relates to mergers and the second relates to category declarations. With regard to merger decisions, only decisions to block a merger or allow it with conditions can be appealed. Decisions to allow a merger unconditionally cannot. Further, unlike appeals concerning category declarations where any person aggrieved by the declaration can appeal, only the merging parties have a right to appeal a merger decision not third parties. While recognising the importance of certainty for the merging entities this must be balanced with the rights of parties affected by the merger. The undesirability of current restrictions was highlighted in the recent Topaz case⁹ where due to an error in calculating timelines the Competition Authority inadvertently approved a merger at Phase 1 without conditions. As a result, parties who had voiced concerns and fully participated in the Competition Authority's Phase 1 investigation were left with no avenue of recourse. A system of review similar to that applied to decisions of the European Commission warrants further consideration. Decisions taken by the European Commission with regard to EC competition law are capable of appeal to the European Court of First Instance by any person demonstrating requisite standing. Where a national regulatory authority such as the Competition Authority makes decisions, which have the potential to affect parties in addition to those the subject of a decision, these too should be capable of review and a similar framework to that applied to decisions of the European Commission should be considered.

3 OTHER PROCEDURAL ISSUES

3.1 Expertise of Appeal Panels

In the same way as regulators often engage the services of specialist consultants in relation to investigations and market analysis, it is essential that an appeal panel has available to it expertise relevant to the issue under appeal. This is specifically recognised in the European ECNS Regulatory Framework, which requires that:

“Member States shall ensure that effective mechanisms exist at a national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal...to an appeal body that is independent of the parties involved. This

8. Proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC, concerning the full accomplishment of the internal market of the Community postal services (October 2006)

9. M/06/044 - Topaz / Statoil Ireland 9 October 2006

body...shall have the appropriate expertise available to it to enable it to carry out its functions...¹⁰

Under the Framework Regulations, this requirement takes the form of an entitlement on the part of the ECAP to “...inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice”. In relation one of the appeals heard by the ECAP in 2005 in respect of 3’s appeal of a ComReg SMP designation in the mobile termination market¹¹, this right was used to engage the services of an expert economist. In this way, the ECAP was able to ensure that specific expertise was acquired and the issues under appeal fully ventilated. The power to engage an expert to assist the panel in its determination of an appeal, which is similar to that available to the High Court when dealing with competition cases¹², is particularly important in highly regulated industries, which can often raise complex technical and economic issues.

The availability of expert advice when required should also ensure that the appeal body is equipped to determine the appeal without feeling the need to show deference to the regulatory body under appeal. In this regard, it is noted that in Decision No. 03/05, the ECAP clarified its view with regard to deference in its opinion on the scope of the joint dominance appeals¹³ as follows:

“3.6 On the issue of deference and in the interests of clarification, the deference to be shown to the Regulator is, as the Panel in Hutchinson stated, the view of the Regulator must be taken into account given its expertise on certain technical matters but that does not prevent the Panel from coming to a different conclusion from the Regulator.”

Ensuring that appeals bodies have sufficient resources overall is an essential requirement and is associated to the issue of sufficient expertise as all elements of the appeal process must fully supported.

3.2 Clarity of the Appeals Process

The process to be followed to launch an appeal is set out in the Framework Regulations however as noted above within the broader regulatory appeals mechanism, each ECAP is free to determine its own processes. Since each ECAP is established on an ad hoc basis this means that there is a lack of certainty in advance with regard to the specific process that will be followed during the course of a particular appeal. A standing appeal panel would provide greater certainty and improved efficiency, which in turn could deliver greater cost effectiveness in the appeals process.

3.3 Enforceability and Accountability

The enforceability of ECAP and other regulatory decisions has not to our knowledge raised any significant issues to date and accountability is felt to be sufficiently ensured by the requirements, which are set out in respect of the content of determinations¹⁴ and the

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10. Article 4 paragraph 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)
 11. ECAP 2004/01: Hutchison 3G Ireland Limited v Commission for Communications Regulation.
 12. Article 23, S.I. No. 130 of 2005, The Rules of the Superior Courts (Competition Proceedings) 2005
 13. ECAP6/2005/03 –08, appeals by O2, Vodafone and Meteor of ComReg’s decisions regarding the wholesale mobile access and origination market and associated remedies.
 14. Regulation 13 (2) of the Framework Regulations requires that any determination of an appeal panel must set out “(a) any findings on material questions of fact, referring to the evidence or other material on which those findings are 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.”

availability of judicial review where issues associated with the manner in which a decision is made are thought to arise.

3.4 Timeframe for Bringing Appeal/Leave for Appeal

The Consultation Document queries whether set timelines should be imposed within which appeals must be taken and also whether an intermediary step whereby the appellant would seek leave to appeal a regulatory decision akin to judicial review, may be useful.

Much of the discussion around regulatory appeals focuses on the need to strike a balance between the rights of those affected by a decision and the need to ensure that regulatory decisions are implemented as quickly as possible. As noted above, Regulation 3 of the Framework Regulations provides that a person must submit an appeal notification to the Minister within 28 days of the decision. Regulation 3 also sets down clearly the content of that notification. While MOP believes that a slightly longer period of between 6 weeks – 2 months would be preferable given the complexity of issues raised in the sector, it regards it as essential that some timeline be set out and therefore would support such a requirement in any appeals process.

The suggestion that a further step similar to the requirement to seek leave for judicial review cases should be considered for regulatory appeals is not something that MOP would support to the extent that it would, in most cases, simply prolong the overall regulatory appeals timeframe.

4 ALTERNATIVES TO CURRENT APPEALS MECHANISMS

4.1 Mediation and Arbitration

Among the questions posed with regard to potential alternatives is whether there is scope for using mediation/arbitration as an alternative to formal appeals mechanisms. Where a regulator takes a decision and regulated entities disagree it is hard to see how this could be viewed as a dispute between the parties capable of being aired and resolved by alternative dispute resolution ('ADR') mechanisms such as mediation or arbitration. While ADR may be useful for the resolution of disputes between industry participants its value or appropriateness as a means of resolving an undertaking's dissatisfaction with decisions taken by a sectoral regulator is therefore questionable.

4.2 Relative merits of an expert appeals body compared with a specialist Court?

Historically, one of the benefits of an expert appeals panel would have been that it was not necessarily bound by the strictures of normal court proceedings and therefore often appeals bodies were seen to offer greater flexibility in terms of procedure and evidence and were viewed as more likely to resolve cases within shorter timeframes.

In recent years the courts have become more specialised examples being the Commercial Court and the new Competition list in the High Court¹⁵, which is now functional under Mr. Justice McKechnie.

Given the success of the Commercial Court in terms of substantially reducing the average time period from entry into the Commercial Court to conclusion of the case (noted in the Consultation Paper to be approximately 10 weeks), it would appear that there is now scope for achieving benefits traditionally associated with expert appeals bodies within the Irish Court system. The strict delineation in terms of advantages and disadvantages of each framework is therefore becoming less distinct.

4.3 The Commercial Court

15. Order 63B of the Rules of the Superior Courts.

The Consultation Document notes the success of the Commercial Court and asks whether “commercial proceedings” should be interpreted as including regulated sectors. Order 63A Rule 1(g) provides that the term ‘commercial proceedings’ means:

“any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body authorised by statute to make such decisions or determination or given such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List”.

It is submitted that the term as defined in Order 63A of the Rules of the Superior Courts is sufficiently wide to cover disputes of a regulatory nature in certain circumstances. In support of this we would point to the recent decision of the Commercial Court in *Smart Mobile Limited v Commission for Communications Regulation*, of 31 October 2006, which was an appeal of a ComReg decision and not a judicial review application. In that case the regulatory dispute was directly appealed to the courts without recourse to the regulatory appeal mechanism of ECAP. Further, we note that the Commercial Court delivered a decision on 13 March 2006 in Smart’s favour that there was no abuse of proceedings in instituting the proceedings by way of appeal as opposed to by way of an application for judicial review.

4.4 Merits of a Single Appeals Body Covering a Number of Sectors

In light of comments made above, one of the key requirements arising out of existing appeals structures in relation to the regulators discussed in the Consultation Document is the need to have a standing appeal body as opposed to one that is convened on an ad hoc basis. The existence of such a body would also contribute to greater consistency and potentially greater timeliness in the resolution of appeals giving rise to benefits for both regulators and companies.

Given that there are unlikely to be a sufficient number of appeals in any one sector such as would justify the existence of a standing appeals body for individual regulated sectors, the setting up of a single appeals body to hear appeals across a number of sectors may be the most efficient appeals mechanism. The Consultation Document sets out detail on the functioning of the Competition Appeals Tribunal (‘CAT’) in the UK and the Australian Administrative Appeals Tribunal (‘AAT’). These bodies deal with appeals across a broad spectrum of administrative bodies including decisions from sector specific regulators. A single appeals body similar to the CAT in the UK or the AAT in Australia may be therefore be appropriate and further consideration should be given to the usefulness of such a body in an Irish regulatory appeals context. In selecting the types of appeals to be grouped together for the purpose of a single appeals body, it will be necessary to carefully consider the types of sectors which are conducive to similar treatment under one appeals structure.

The optimum number of members will largely depend on the nature of the appeals that are permitted to be made to the body and its structure i.e. court or specialist appeal panel.

Appointment of members to such an appeal could be made on similar basis to that set out in the Communications Regulation Act, 2002 and the Competition Act, 2002 in relation to appointments to ComReg and the Competition Authority. Under section 15 of the Communications Regulation Act 2002, for example, the Minister may appoint Commissioners and provides that a person shall not be appointed as a Commissioner:

“...unless the Civil Service and Local Appointments Commissioners, after holding a competition on behalf of the Commission, have selected him or her for appointment as a Commissioner.”

As noted above, Members of the Competition Authority are appointed in a similar way under section 35 of the Competition Act, 2002 in line with the Civil Service Commissioners Act, 1956.

Given the broader spectrum of appeals that could be made to such a body, specific provision should be made for the appointment of experts where required to assist the appeals body in its deliberations. In this way, complex sector specific issues can be addressed where they arise.

Regardless of the structure eventually decided upon whether it is numerous standing appeals bodies or a single appeal panel, it is essential that such appeal bodies be fully resourced.

Similar to appeals under the ECNS Regulatory Framework, it should be possible to appeal the merits of a decision. Ensuring that appeals across all sectors are dealt with in a similar manner would further facilitate a single body in handling appeals arising from different sectors.

As noted in the Consultation Document the regulatory bodies discussed *"...often take far-reaching decisions which can have material impacts on society, consumers, market players and on the markets themselves."*¹⁶ Given the serious effects such decisions can have on markets and individual market participants, it is essential that the suspension of a decision pending the outcome of a decision is possible in all cases. Under the Framework Regulations, an ECAP can suspend a decision where it deems such to be appropriate¹⁷. One way of assisting an appeal body in respect of suspension decisions would be greater use of Regulatory Impact Assessment by regulatory bodies in line with the Government's RIA Guidelines¹⁸. A RIA exercise should include the pros and cons associated with particular regulatory measures. Where the benefits of a particular regulatory measure were specifically stated to be an immediate change in market structure for example, the appeal body should be able to readily assess the threats posed by granting or withholding a suspension of a regulatory decision.

It should also be possible for the appeal body to suspend a decision in its entirety or in part as in some cases a regulatory measure will have multiple elements. Where certain aspects pose no immediate threat to those the subject of the decision under appeal then they should be permitted to stand pending the outcome. A provision enabling the appeal body to assess the practical effects of a decision's constituent elements would therefore facilitate more targeted use of suspension as an interim measure.

It is felt that the outcome of an appeal should not entail penalties over and above the potential costs associated with the proceedings i.e. a party should not be penalised for exercising its right of appeal. In order to ensure that a regulatory decision that is ultimately upheld does not cause undue disruption to a regulated market or competition more generally, a reasonable timeframe should be set down for the conclusion of appeals. While further consideration would need to be given to the matter, it is submitted that a period of 6 months may be reasonable where the appeal body is a standing body, with an established process for hearing appeals and the ability to rely where appropriate upon previous decisions.

In numerous places within the Consultation Document reference is made to appeals being used for the purpose of delaying the implementation of a regulatory decision. Such assertions fail to recognise that market participants like regulators have finite resources available to them internally and regardless of the availability of external advice and resources, an undertaking cannot readily afford to tie up internal resources with unwarranted regulatory appeals. In addition, the possibility under the regulatory framework for electronic communications for the ECAP to award costs is also a matter which warrants careful consideration.¹⁹ To the extent that it can be demonstrated that this concern is a real problem experienced in regulated sectors (and it is noted that no evidence to support this concern is set out in the Consultation Document), then the power of an appeal body to dismiss an appeal on the grounds that it is

16. Page 12.

17. Regulation 16 of the Framework Regulations.

18. How to conduct a Regulatory Impact Analysis, Department of the Taoiseach, 21 June 2005

19. Regulation 14 of the Framework Regulations.

“vexatious, frivolous or without substance or foundation”²⁰ and to make orders as to costs at the conclusion of an appeal should be sufficient to address this issue.

In the UK, the CAT may confirm, set aside, or vary decisions, or remit or make its own decision on the matter in line with the powers of the original decision-maker e.g. Office of Fair Trading. If a single appeal body is set up in Ireland then the possibility of conferring on it similar powers to those of the CAT should be considered further. Where an appeal body is in a position having received expert assistance to determine that a decision has not been correctly made then the ability to substitute its decision for that of the regulator may be appropriate and may ensure more speedy resolution of appeals.

5 CONCLUSION

It is submitted that if changes to appeals processes are to be addressed across multiple sectors then it is essential that the best aspects of each be maintained in any new appeal process. Flaws within current appeals processes support further investigation into the appropriateness of using a model similar to that used in the UK and Australia. Regardless of whether a single appeal panel is ultimately chosen, experience to date demonstrates the need for certain minimum requirements including:

- Standing as opposed to ad hoc appeals bodies;
- Imposition of specific timelines around all stages of an appeals process;
- Power to suspend decisions in whole or in part pending the determination of an appeal;
- Power to appoint an expert advisor where required;
- Power to dismiss appeals where deemed vexatious or unfounded;
- Power to make decisions where appropriate as opposed to being limited to confirming, setting aside, varying or remitting the original decision back to the relevant regulatory authority.

Extension of the above to existing regulatory appeals processes would go some way to improving the overall regulatory appeals framework and could represent an important means of achieving immediate results in the short term while more structural issues e.g. the setting up of a body similar to the CAT, are further investigated.

The Consultation Document represents an important first step in the review process and MOP looks forward to engaging further with the Better Regulation Group on any matters arising from this consultation process over the coming months.

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20. Regulation 9 (1) of the Framework Regulations.