



Vodafone Response to the Government Consultation Paper on Regulatory Appeals

Consultation Paper on Regulatory Appeals

GENERAL COMMENT

1. Introduction

- 1.1 Where the State intervenes in the free market economy through the delegated authority of an independent body charged with regulating a particular industry or sector, it is a fundamental right of persons affected by the decisions of such regulatory body to have access to effective mechanisms by which decisions can be scrutinised and challenged in the context of applicable laws and the accepted principles of regulatory practice.
- 1.2 Vodafone¹, Ireland's leading mobile communications network operator and service provider, is authorised to conduct its business by one such regulatory body, the Commission for Communications Regulation (ComReg). Vodafone is regularly affected by the acts, decisions and determinations of ComReg. Some of these have or are intended to have a significant impact on Vodafone's commercial operations, but they often can also have wider implications for the electronic communications market and related industry sectors.
- 1.3 Vodafone welcomes the opportunity to contribute to this Consultation on Regulatory Appeals. Vodafone has most experience of and interest in the appeals mechanisms which are relevant to the electronic communications sector and this Response focuses therefore on the appellate process as it pertains in that context.

2. Electronic Communications Sector

- 2.1 As a licensed mobile communications operator, Vodafone is subject to the regulatory oversight of the national regulatory authority for electronic communications, ComReg. ComReg's powers are set out principally in the Communications Act, 2002 and in the legislation comprising the 'New Regulatory Framework'. The New Regulatory Framework is based on a series of EU Directives, adopted by the Parliament and the Council in March, 2002, which are intended to establish a common regulatory framework for all

¹ Vodafone has more than 2 million customers in Ireland and employs approximately 1,500 people. The company was originally a subsidiary of Telecom Eireann and operated under the 'Eircell' brand. As mobile communications were widely adopted in Ireland in the late 1990s, Eircell developed significantly and in May 2001, the company was acquired by Vodafone Group Plc. Vodafone Group is the world's largest mobile operator, with a significant presence in Europe, the Middle East, Africa, Asia Pacific and the United States, through various subsidiary undertakings, joint ventures, associated undertakings and investments. In Ireland, Vodafone currently has approximately 48% share of a market in which the mobile 'penetration rate' exceeds 103%.

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aspects of electronic communications in the EU². Each of these Directives has been transposed into Irish law by secondary legislation³.

- 2.2 The New Regulatory Framework recognises the critical importance of appellate processes in the context of the electronic communications sector. The Framework Directive states as follows at Article 4:

“(1) Member States shall ensure that effective mechanisms exist at 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 against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

(2) Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.”

- 2.3 The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (the “Framework Regulations”) transpose the Framework Directive into domestic Irish law. Part 2 of the Framework Regulations establishes an appeals process which applies to any user or undertaking that is affected by a decision, designation, determination, specification, requirement, direction or any other act of an equivalent nature of ComReg under the New Regulatory Framework (hereinafter a ‘Decision’).
- 2.4 Any such user or undertaking aggrieved by a Decision may, within 28 days of the Decision, notify the Minister for Communications, Marine and Natural

² Comprising Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications (the “Framework Directive”), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities and Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service users’ rights relating to electronic communications networks and services.

³ The Directives are transposed into Irish law by the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (SI 307 of 2003), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 (SI 306 of 2003), the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (SI 305 of 2003), and the European Communities (Electronic Communications Networks and Services) (Universal Service and Users Rights) Regulations 2003 (SI 308 of 2003) respectively.

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Resources and ComReg in writing of its intention to appeal the Decision and of the grounds of appeal. Regulation 3(4)(d) requires an appeal notification to state “*in full the grounds of appeal and the reasons, considerations and arguments on which they are based*”. Regulation 3(4)(d) requires something more than a bare statement of the grounds of appeal (as would be the norm in a notice of appeal in a litigation context). It appears that what is contemplated by the Framework Regulations is something of a hybrid between such a notice of appeal and complete legal submissions.

2.5 Regulation 3(5) expressly provides that grounds of appeal may plead that the decision at issue is vitiated by errors of fact, including inferences of fact and/or errors of law, including issues of jurisdiction and procedure. It is clear that the Framework Regulations contemplate – and the Framework Directive mandates – a wide-ranging review of the decision at issue, both as to its legal validity and on its merits.

2.6 Detailed provision for the constitution, functions, powers and procedures of Appeal Panels established under the Framework Regulations are contained in Regulations 4–16. Ultimately, the function of an Appeal Panel is to determine appeals referred to it under the Regulations in the manner provided for by Article 12(3) of the Regulations, which is in the following terms:

“Upon the hearing of an appeal, the Appeal Panel may confirm or annul, in whole or in part, the determination and shall notify its determination in accordance with Regulation 13.”

2.7 The appeals mechanism provided for in the Framework Regulations, which is clearly a merits-based mechanism, is in addition to and not in replacement of the process of judicial review, which may offer an alternative basis for challenging a Decision of the regulator.

3. Importance of Effective Appeals Mechanisms

3.1 It is crucial that there are effective appeal mechanisms available to undertakings engaged in providing electronic communications networks and/or services in the event that they are adversely affected by ComReg Decisions which they consider to have an unsound basis in law and/or fact.

3.2 It is particularly important that ComReg Decisions are subject to effective scrutiny and challenge, given that:

(a) ComReg’s Decisions often have far reaching financial, commercial, technical and strategic consequences for undertakings in the electronic communications sector, their shareholders and their customers, including those undertakings directly affected by the Decisions, as well as undertakings operating in related and dependent economic areas;

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- (b) ComReg's decisions are legally binding on the undertakings to which they are addressed; and
- (c) the judicial review process is not sufficient on its own to safeguard fully the rights of undertakings in this context.

4. ECAP experience to date

- 4.1 The appeals mechanism referred to in the Framework Regulations, whereby electronic communications appeal panels ("ECAP") are established by the Minister on an ad hoc basis, has been in place since July 2003. As far as we are aware, all appeals to date have arisen as a result of Decisions that ComReg has taken pursuant to its review of certain national communications sub-markets, which it is obliged by law to conduct. Indeed, we understand that all appeals that have been taken to date under the New Regulatory Framework have been concerned with ComReg's Decisions to either designate undertakings with significant market power and/or impose particular regulatory remedies on foot of such designations. These types of Decisions have particularly serious implications, as they often directly impact on market structures, wholesale and retail costs and the services that operators offer to their customers.
- 4.2 The Consultation Paper states that there have been 11 appeals to 1st March 2006. While it may be technically true that 11 appeal notices have been lodged by different parties, in reality only 7 ComReg Decisions have been appealed using this process. As it has been the practice of ECAP to group appeals by different undertakings of related Decisions and deal with them in one aggregate appeal process, there have in fact only been 6 distinct appeal processes since ECAP's inception.
- 4.3 The first ECAP was established on 21st September 2004 following notification of an appeal by Hutchison 3G Ireland Limited, on 24th August 2004, of ComReg's Decision to designate it with significant market power in the wholesale voice call termination market on individual mobile networks ("the Mobile Termination Appeal"). Vodafone Ireland, O2 (Ireland) and Meteor Mobile Communications were all designated interested parties to this appeal. A preliminary hearing took place on 5th November 2004 to discuss procedural issues. A second preliminary hearing was rescheduled from 26th November 2004 to 14th January 2005 due to the ill health of one of the members of the appeals panel. The panel made a ruling on certain fundamental issues pertaining to the appeal (scope of appeal and discovery) on 10th February 2005. Following an exchange of documents in the March – May period and a number of further meetings concerning the confidentiality of documents, the substantive appeal hearing took place in two and a half days between 21st – 23rd July, 2005. ECAP annulled ComReg's decision to designate Hutchison as having significant market power in the wholesale voice call termination

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market⁴. This is the only appeal that has resulted in a written decision by ECAP on the merits of a ComReg Decision.

- 4.4 The second ECAP was established following notification of appeals by Vodafone, O2 Communications (Ireland) and Meteor Mobile Communications in March 2005 against ComReg's Decision to jointly designate Vodafone and O2 as having significant market power in the market for wholesale mobile access and call origination in public mobile telephony networks, and the related ComReg Decision to impose certain regulatory constraints on Vodafone and O2 as a result of their designation, which was appealed in April 2005. In effect, six appeals were combined and considered by the same ECAP. As in the Hutchison case, it was necessary to conduct a number of preliminary hearings to determine certain procedural issues. There was also a discovery process which took some weeks to complete. The hearing of these appeals commenced on 13th December 2005. The following day, it was agreed by the appellants and ComReg that the Decisions in question would be annulled by consent. This resulted in the withdrawal of the appeals and consequently, it was not necessary for ECAP to adjudicate on the matter.
- 4.5 Four appeals have also been commenced (all by eircom) but all were settled and/or discontinued by the parties prior to the substantive hearing.

5. ECAP is working effectively

- 5.1 Vodafone believes that there is nothing inherently inefficient or unfair about the manner in which ECAP appeals are currently conducted. Although the ECAP system is relatively new and has only been tested in a few cases, it is Vodafone's belief that it has worked effectively to date:-
- (a) The ECAP system has proved to be **efficient**. Only 6 appeal panels have been established to date to hear a total of 11 appeals. Related appeals are grouped to avoid duplication. Only 2 appeals have reached substantive hearing, indicating that the process can encourage parties to resolve their differences. The frequent use of preliminary hearings allows for effective case management by appeal panels. Timetables for exchange of submissions and documents are generally tight and decisions on preliminary issues are delivered quickly. Procedures are determined on an ad hoc basis to suit the particular circumstances of the case in question. ECAP members familiarise themselves with the parties' cases and submissions prior to hearings and this allows for to be used most effectively. Administrative bureaucracy is kept to a minimum. Efficiency can be expected to improve further as ECAP gains experience and as procedural rules and processes are fully developed.
- (b) The ECAP system has proved to be **fair**. ECAP has demonstrated that it is clearly a fair and independent forum in which regulatory decisions

⁴ Decision No. 02/05 in respect of Appeal No. ECAP2004/01.

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can be challenged and scrutinised. Both sides are given equal opportunity to present their cases and no undue deference appears to be shown to the regulator.

- (c) The ECAP system benefits from a level of **expertise** which is appropriate to appeal mechanisms of this kind. Members of ECAP have a broad range of experience across different, but relevant areas – law, economics, technology, commerce and finance – and are highly regarded in these fields. To date they have proved adept at understanding and applying complex legal, economic, technical and regulatory issues as they have arisen. Furthermore, it is open to an appeals panel to engage external expert assistance in relation to particular aspects of an appeal, as occurred in the Mobile Termination Appeal.
- (d) The ECAP system appears to have been operated **cost effectively** to date. The expenses incurred by parties to date do not appear to have been excessive, relative to the magnitude and complexity of the matters that have been at issue.
- (e) For the reasons given in the remainder of this Response, the ECAP system, in Vodafone’s view, satisfies all the necessary criteria of an **effective** appeals mechanism.

5.2 Despite the novelty of this appeals mechanism and the relatively few occasions on which it has been invoked, all the major fixed and mobile operators in Ireland have invested time and resources – and in several cases *significant* time and resources – in gaining an understanding as to how ECAP operators. ECAP has developed its own body of precedent as regards electronic communications law and relevant procedural practices and this brings welcome legal certainty to the appeals system.

5.3 As part of the Better Regulation process, it is of course important and relevant to look at the appeals mechanisms as they function at present and where necessary to recommend improvements in those processes. However, where mechanisms are seen to be functioning efficiently and cost-effectively, care must be exercised before any changes to the current system are made. Unfortunately, the Consultation Paper does not contain or refer to any meaningful analysis of the ECAP system (or any other current appeals mechanism) which has been carried out. In particular:

- (a) no evidence has emerged since ECAP’s inception to suggest that any significant changes are required to create an appeals mechanism that is efficient and effective and which renders the regulator fully accountable; and
- (b) no evidence has been presented to demonstrate that there is likely to be any better appeals mechanism that would be appropriate for the

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electronic communications sector in Ireland under the New Regulatory Framework.

- 5.4 An appropriate regulatory impact assessment should be carried out prior to any significant modification of the current appeals mechanism as it operates in the electronic communications sector, given the current lack of evidence of any significant problems with the existing model, the pre-eminence of the regulatory principle of accountability and the critical importance of the issues that arise in this important sector.

RESPONSE TO CONSULTATION QUESTIONS

5.5 Our response to the specific Questions raised in the Consultation paper are set out below.

PART A – EVALUATING APPEAL MECHANISMS

Question 2.

Are there particular principles which you consider important in evaluating appeals mechanisms? If yes, please specify and comment on whether you consider current appeals provisions satisfy these principles.

5.6 Please see table below.

Criteria for Effective Appeals Mechanism	Application of Criteria to ECAP
<p>Appeal bodies have a particular role to play in ensuring regulators are properly accountable. An effective appeals process ought to act as an independent check on the regulatory process, ensuring that regulators are conducting their activities in accordance with the applicable legal framework and the principles of good regulation.</p>	<p>ECAP is a body which is independent in the performance of its functions.</p> <p>Members of the Houses of the Oireachtas or the European Parliament or local authorities (or candidates for election to any of the foregoing) are not eligible for appointment to ECAP.</p> <p>ECAP members are not permitted to take part in appeals where they have an interest or where they acquire an interest (pecuniary or otherwise) that could conflict with the proper performance of that person's functions in relation to an appeal.</p> <p>The experience of the ECAP to date suggests that it does provide an effective check on the powers of the regulator. It is a body with appropriate expertise, which has demonstrated itself capable of understanding and dealing expeditiously with complex procedural, legal, economic, regulatory, technical, financial and commercial issues.</p>
<p>Appeal bodies must be readily accessible to aggrieved parties while at the same</p>	<p>The ECAP appeal mechanism is readily available to aggrieved parties who</p>

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<p>time they should not be required to hear vexatious or frivolous appeals.</p>	<p>comply with the procedural requirements set out in the Framework Regulations. It is also open to interested parties to make submissions to ECAP on matters of particular concern to them.</p> <p>ECAP has an absolute discretion to dismiss an appeal where it is of the opinion that it is vexatious, frivolous or without substance or foundation or where it considers that the appeal should not be considered further by it having regard to the nature of the appeal, any previous decision which in its opinion is relevant or the existence of any relevant court proceedings.</p> <p>There is no evidence that the appeal process has been abused by appellants or prospective appellants to date.</p>
<p>Appeal mechanisms must operate efficiently and expeditiously.</p>	<p>ECAP is required by the Framework Regulations to act ‘as expeditiously as is practicable’ and shall ‘as far as practicable in the circumstances, endeavour to determine an appeal within 4 months of the date of establishment of the Appeal Panel or from the date upon which an appeal was referred to an Appeal Panel’¹.</p> <p>Experience of ECAP to date suggests that it does operate reasonably efficiently and expeditiously, although the appeal of two ComReg Decisions has, for various reasons, taken longer than 4 months.</p> <p>More than one appeal can be heard and determined by an appeal panel at the same time.</p> <p>Appeal processes are assiduously case-managed by the ECAP.</p> <p>Timeframes for resolution of preliminary issues (procedures, exchange of documents/reports etc) are relatively</p>

¹ Copy H3G Quote.

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	<p>short and rigidly adhered to.</p> <p>The timeframe for completion of appeals can be expected to reduce over time as familiarity with procedures and issues increases.</p> <p>ECAP members familiarise themselves with appeal submissions and issues prior to hearings.</p> <p>ECAP can adjourn proceedings to any time or place.</p> <p>Where ECAP cannot decide a matter unanimously, the majority view prevails.</p> <p>ECAP may, if it is satisfied that an appeal may be resolved by curing a technical defect in the appealed decision, direct the regulator to amend its decision and the regulator shall amend its decision according to ECAP's direction.</p> <p>ECAP is required to notify the parties to an appeal of its determination and as soon as practicable thereafter publish that determination.</p> <p>In Vodafone's opinion, the ECAP has operated effectively and expeditiously in all appeals to date.</p>
<p>Appeal bodies should not be restricted by formal rules of procedure.</p>	<p>ECAP has power to determine its own procedures, subject to the Framework Regulations.</p> <p>According to the Framework Regulations, ECAP is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. ECAP is required by the Framework Regulations to act with as little formality as the circumstances of the case permit, 'without regard to technicalities or legal forms'.</p> <p>In Vodafone's opinion, ECAP has clearly</p>

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	<p>demonstrated its ability to establish rules of procedure on a case by case basis and this has contributed to the efficiency with which appeals have been conducted to date.</p>
<p>Parties to appeals must have an adequate opportunity to present their case to the appeals body and to understand the position of the other party.</p>	<p>ECAP is required by the Framework Regulations to ensure that each party to an appeal is given a reasonable opportunity to be heard and to present its case and to have their submissions in relation to the appeal considered.</p> <p>Vodafone’s experience of the ECAP to date is that appellants are given a fair opportunity to present their case and hear the arguments made by the regulator.</p>
<p>Timeframes for resolving preliminary issues, exchanging reports and documents and determining the appeal must be fair and realistic.</p>	<p>The Framework Regulations permit ECAP to require parties to confine the presentation of their cases to such periods of time as it considers to be reasonably necessary for a fair and adequate hearing.</p>
<p>Appeal bodies must have all powers necessary to conduct a full merits-based review of the decision of the regulator, in order that the regulator is held fully to account for its decisions.</p>	<p>Under the Framework Regulations, ECAP is required to ensure that all relevant material is disclosed to it so as to enable it to determine all the relevant facts in issue in the case. ECAP can require evidence or argument to be presented in writing or orally.</p> <p>The standard of review by ECAP is based on the correctness of the regulator’s decision.</p>
<p>There should be provision for expert witnesses to be called to give evidence.</p>	<p>Expert witnesses, (particularly expert economic witnesses), make an important contribution to ECAP hearings, which often have to deal with complex issues of law, economics, regulation and fact.</p> <p>ECAP can, by summons, enforce the attendance of witnesses and examine witnesses on oath or otherwise.</p> <p>Witnesses before ECAP are entitled to the same immunities and privileges as if</p>

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	<p>they were witnesses before the High Court.</p> <p>It is an offence for a witness to refuse to take an oath or produce a document in his power or control where ECAP requires it, fail to answer any question to which the ECAP may lawfully require an answer, or do anything which, if ECAP were a court of law, would constitute contempt of court.</p>
<p>Appeal bodies must have the power to stay decisions of a regulator when required.</p>	<p>Under the Framework Regulations, pending the outcome of an appeal, a decision of the regulator stands, unless ECAP decides (following application by an appellant) to suspend it until the determination of the appeal.</p>
<p>Appeal bodies must have the power to annul decisions of a regulator when required.</p>	<p>ECAP may confirm or annul, in whole or in part, a ComReg Decision.</p>
<p>All documents relevant to the adoption of the decision and upon which the regulator's decision is based should be made available to the aggrieved party.</p>	<p>ECAP has the power to compel the production of documents by issuing a summons.</p> <p>To date, there have been exchanges of documentation between ComReg and various appellants.</p>
<p>Dealings between the appeal body and parties to the appeal must be open and transparent, to the maximum extent possible.</p>	<p>ECAP appears to operate in an open and transparent manner.</p>
<p>Third parties who have a legitimate interest in an appeal should have an opportunity to make submissions to the appeals body.</p>	<p>ECAP is required to give a copy of the appeal to any third party which it considers to have an interest in an appeal and that party is entitled to make written submissions to the Appeals Panel within a period specified by it.</p>
<p>Appeal bodies should have all the resources necessary to fulfil their functions under legislation.</p>	<p>The Minister makes available to ECAP such staff, premises, equipment, services and other resources as he considers necessary to enable it to perform its functions, after consultation with the</p>

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	<p>Minister for Finance.</p> <p>Vodafone’s experience of ECAP in the past is that it has been short of certain resources (adequate hearing rooms, photocopying capability etc.) but these matters can be easily addressed.</p>
<p>Appeal bodies should have the expertise necessary to fulfil their functions under legislation.</p>	<p>Each ECAP consists of 3 persons appointed by the Minister, at least one of whom shall be a practising barrister or solicitor with at least 7 years experience and the others shall have such commercial technical, economic, regulatory or financial experience as the Minister considers appropriate.</p> <p>ECAP may also appoint its own external advisers to assist it (for example, in the Mobile Termination Appeal, ECAP appointed an expert economist to provide input on certain aspects of that case).</p>
<p>Appeal bodies should offer a cost effective appeals mechanism.</p>	<p>ECAP is cost effective for the State. As an ad hoc body constituted from a pool of persons who are readily available to participate in it, it can be established relatively quickly and ongoing running costs are minimised.</p> <p>ECAP can determine that the whole or part of the costs that it incurs shall be paid to the Minister of Finance by any person it may order to do so.</p> <p>Parties who are successful in their appeals may have the whole or part of their costs paid by another party.</p> <p>Costs incurred by ComReg and/or the State in the course of an appeal, may ultimately be included in a levy imposed by ComReg on electronic communications undertakings under the Communications Regulation Act, 2002.</p>
<p>Appeal bodies should apply the law and the principles of good regulation in a</p>	<p>The experience to date has been that ECAP has applied the law and the</p>

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consistent manner.	principles of good regulation in a consistent manner.
Appeal bodies should be accountable	<p>Where ECAP dismisses an appeal, it is required to state the main reasons and considerations on which the decision to do so is based.</p> <p>Determinations of ECAP are required to set out (a) any findings on material questions of fact, referring to the evidence or other material on which those findings are based; (b) ECAP's understanding of the applicable law; and (c) the reasoning processes that led ECAP to the conclusions that it made.</p> <p>Proceedings in ECAP may themselves be subject to a judicial review process.</p>

Question 3.

Is the appeals mechanism operating efficiently?

- 5.7 Vodafone considers that the ECAP mechanism is, in general, operating efficiently for the reasons stated above and it will become even more efficient as it moves up the 'learning curve', experience is gained and procedures become established. We firmly believe that the ECAP form of appeal mechanism, which is informal and flexible while at the same time retaining necessary and appropriate expertise, offers the most efficient means of resolving highly complex and commercially critical regulatory disputes within acceptable timeframes.
- 5.8 The fact that:
- (a) all appeals to date have resulted in ComReg Decisions being annulled, either by ECAP or by consent of the parties;
 - (b) only 2 appeal processes have reached full hearing; and
 - (c) all other appeal processes appear to have been settled strongly suggests that the mechanism is working effectively, is not being abused and constitutes an effective check on the powers exercised by the regulator.
- 5.9 Although there may be some scope for improving the existing process we are not aware of any material inefficiencies that would warrant radical overhaul of this particular appeals mechanism.

Question 4.

Is the appeals mechanism cost effective for all parties and for the State?

- 5.10 ECAP appeals can involve considerable expense in terms of legal costs and expert input, but Vodafone's experience is that it is no less costly to operate the ECAP process than other dispute resolution mechanism. Cost is a function of the complexity, the significance and the novelty of the issues involved which all have a bearing on the time taken to work through the appeals process. Invariably, the issues at stake in ECAP appeals are of such critical importance and complexity that they involve the parties incurring considerable expense through the engagement of legal and other expert assistance but these costs are not excessive given the nature of the matters being appealed.
- 5.11 Provision is made in the Framework Regulations for legal and expert witness costs to be recovered by the successful party and by ECAP itself. It is therefore cost effective for those parties, even though where ComReg is required to pay the appellant's costs, these costs are ultimately passed back to industry through the levy system. One way or another, the industry incurs the cost of regulation, but this cost is acceptable when one considers the costs that would be incurred in having to comply with or implement the consequences of bad or unlawful regulation, given the deep implications this has for market structures and the commercial plans of undertakings operating in those markets.
- 5.12 In the long run, costs can and should be reduced or avoided by regulators improving the quality of their decision making processes, complying with their legal obligations and adhering to the principles of good regulation.

Question 5.

Are the time and resources involved in appeals commensurate with the significance of the issue under appeal?

- 5.13 Vodafone has only had experience of one ECAP appeal process as an appellant. In that instance, the issues were of fundamental importance to the company and the mobile market in general. ComReg's decision had the potential to significantly disrupt the market and the business models and commercial strategies of the company. It was therefore vitally important that the decisions in question were appealed. The time and resources involved in pursuing that process were commensurate with the significance of the matters in dispute.
- 5.14 The appeal process took five and a half months to complete from the time that the ECAP was established by the Minister. In our view, it would be difficult to improve significantly upon this timeframe, given the importance and complexity of the issues, the high commercial stakes involved and the fact that six appeals by three separate undertakings were effectively combined in one appellate process.

Question 6.

Does the appeals process deliver decisions sufficiently quickly to achieve legal certainty and avoid uncertainty for industry?

- 5.15 Clearly, it is important that the appeals mechanism is operated efficiently and decisions are rendered as soon as practicably possible. It is in no-one's interests, least of all the undertakings directly affected by the regulator's decision, that regulatory or legal uncertainty should prevail for longer than is necessary, particularly given the financial, technical, strategic and commercial implications this can have and opportunities that can arise for others to engage in regulatory gaming.
- 5.16 In the circumstances, bearing in mind the complexity and importance of the issues in question and the necessity of ensuring that the fundamental rights of parties in presenting their cases are respected and not prejudiced by the wish to make or to obtain a rapid decision, the ECAP appeals process can and does deliver decisions and achieve results efficiently through active case management. Legal certainty generally follows.
- 5.17 Some legal and regulatory certainty can be achieved, for a limited period, through the suspension of a regulator's decision and the maintenance of the status quo pending the determination of the appeal. It is important however that the opportunity for an undertaking to apply for such a suspension is available as soon as possible following the establishment of the appeals panel.

Question 7.

Do those hearing an appeal have equivalent expertise at their disposal to those making the original decision?

- 5.18 It is important to note that those persons who sit on an appeals panel to hear and determine an appeal have a slightly different task facing them than those within the regulatory body who make the original decision and so their expertise may not have to be equivalent in all respects.
- 5.19 Nevertheless, Vodafone is satisfied, based on its experience to date, that the ECAP has had sufficient legal, commercial, technical, economic, regulatory and financial experience at its disposal in order to allow it to consider the issues and determine the appeals that have come before it.
- 5.20 ECAP has, on one occasion, also appointed its own economic expert to assist it in understanding certain issues. The availability to ECAP of the option of engaging external persons guarantees that it should have the necessary expertise to resolve any issue.

Question 8.

Do the processes appear to lead to a fair and balanced outcome?

5.21 Yes. As far as we are aware, all ECAP appeals to date, other than save the Mobile Termination Appeal (which ECAP adjudicated on following a substantive hearing), have resulted in the appealed decisions being annulled by consent or withdrawn by consent. Appellants and ComReg must have been of the view that these were fair and balanced outcomes, otherwise they would not have been achieved.

Question 9.

Are the appeals procedures clear and accessible to potential appellants and to regulators?

5.22 Yes, under the Framework Regulations, ECAP is entitled to determine its own procedures, subject to the Regulations. To the extent that certain procedures are not already made clear in the Framework Regulations, they are largely developed on an ad hoc basis, as required in the circumstances of a particular appeal. Parties to any appeal therefore have an opportunity to contribute to the development of the appeal procedures that will apply in their case. In any case, ECAP determines what the appropriate procedures should be, the practise has been to confirm them to the parties in writing.

5.23 Many basic procedural issues were considered and resolved in the early appeals which ECAP had to deal with. ComReg and any potential appellants will be aware of these through their own experience of the process and through the ECAP decisions which have been published to date.

Question 10.

Can the appeals mechanism deliver an enforceable decision or is another body required to endorse the decision and order compliance?

5.24 ECAP can deliver an enforceable decision to confirm or annul in whole or in part a determination of ComReg. No other body is required to endorse that ECAP decision.

Question 11.

Are the provisions for setting up the appeals body, and for appeals from it, appropriate in terms of accountability?

5.25 The ECAP is not a standing body. It is established by the Minister for Communications, Marine and Natural Resources under the Framework Regulations on an ad hoc basis, in response to an appeal being notified to the Minister. Vodafone has no issue with this particular mechanism as such although any delays in establishing an appeals panel following notification of an appeal should be minimised.

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- 5.26 There are no appeals on the merits of ECAP determinations, which are final and conclusive, although there is the possibility of judicial review of an ECAP decision, which is appropriate.

Question 12.

Can the rules and structures that govern the appeals mechanism be adapted sufficiently quickly to match market, technological and other changes in the sector?

- 5.27 Each ECAP has the discretion to determine its own procedures. This flexibility allows for necessary and rapid adaptations in the event that there are market, technological and other relevant changes in the sector.
- 5.28 The expertise of the ECAP itself and the expertise available to the ECAP through the engagement of external specialists where required, has been referred to above. ECAP appears to be able to deal with any market and other developments should they occur.

Question 13.

Are there appeals mechanisms in other jurisdictions which work well, and which should be considered in the Irish context? Please supply details.

- 5.29 We are not aware of any appeal mechanisms in other jurisdictions that are likely to function significantly better than the ECAP, which we consider has proved itself to be an effective and efficient body in each of the appeals to date and is likely only to become more adept as all relevant parties gain experience of it and the body of applicable law and practice develops.

PART B – ISSUES AND CHALLENGES IN DEVELOPING APPEALS SYSTEMS

Question 14.

Are there other potential advantages/disadvantages of the appeals mechanisms detailed in Table 4.1 that are not identified in the table?

- 5.30 Vodafone considers that there are certainly other potential advantages of an expert appeals panel that are not identified in Table 4.1 of the Consultation Paper. See paragraph 5.31 below.

Question 15.

Do you agree with the potential advantages/disadvantages attributed to the various appeals mechanisms in Table 4.1?

- 5.31 Vodafone does not agree that certain of the advantages attributed to various courts in Table 4.1 are exclusive to these bodies. Many of these are equally applicable to expert appeals panels, such as the ECAP.

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<u>Alleged Advantages of Various Courts over ECAP</u>	Vodafone Comment
Specialist Courts develop specialist expertise more readily.	It is unclear why this is not equally applicable, (or perhaps even more applicable) to ECAP, which is drawn from a diverse panel of experts, each of whom is considered by the Minister to have relevant legal, regulatory, technical, commercial and/or financial expertise and experience to hear and determine appeals.
It is proposed that judges in specialist courts and general courts would not be subject to conflicts of interest.	This is equally applicable to ECAP members who are required by the Framework Regulations to be independent in the performance of their functions and may not take part in an appeal in the event that they acquire a conflicting interest. They are also required to disclose any potential conflict of interest and may not participate in an appeal without the consent of the appellant and ComReg.
Specialist courts, general courts and courts advised by expert panels have the power to issue interlocutory orders.	This is equally applicable to ECAP, which has similar powers.
Specialist courts, general courts and courts advised by expert panels are said to remove one layer of appeal and in theory speed up decision-making processes and add more legal certainty to decisions.	It is unclear why this is not equally applicable to expert appeal panels, such as ECAP. The Minister has very limited discretion to refuse to admit an appeal and establish an appeals panel.
The permanent nature of specialist courts, general courts and courts advised by expert panels is said to allow for consistency and their administrative structures allow for the efficient handling of high volumes of appeals.	It is unclear why this is not equally applicable to expert appeal panels, such as ECAP, which, although it is established on an ad hoc basis, is in fact constituted from a standing pool of experts, each of whom presumably is capable of acting consistently with established ECAP practice. Historically, there has never been a high number of merit-based appeals in any particular sector including electronic communicators. There is no reason to believe that there will be a high number of appeals in any this or any other regulated sector in the future. In fact as regulatory intervention decreases over time (as it is intended to) appeals should become even less frequent. However, even if there were a large number of

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	<p>appeals, it is not clear why the courts would be better prepared to handle these than expert appeal panels. In fact it is arguable that specialist appeal panels drawn from a wide body of available experts should be able to deal with high volumes of appeals more efficiently than the courts.</p>
<p>It is said that specialist courts and courts advised by expert panels can hear appeals and requests for interim relief directly without referral via an administrative body.</p>	<p>It is not clear why this is not largely applicable to ECAP also. The Minister has very limited discretion to refuse to admit an appeal and establish an appeal panel.</p>
<p>Decisions of specialist courts, general courts and courts advised by expert panels are directly enforceable because they have the power to issue orders</p>	<p>This is equally applicable to expert appeal panels such as ECAP which has the power to issue orders.</p>

Vodafone would also question many of the disadvantages attributed to ECAP in Table 4.1 of the Consultation Paper.

Alleged Disadvantages of Expert Appeal Panels (such as ECAP)	Vodafone Comment
<p>It is said that expert appeal panels could be limited by availability of independent non-conflicted experts</p>	<p>It is not plausible to argue that there is an insufficient pool of experts from whom the Minister can constitute a panel for the purposes of hearing and determining an appeal and that these could not be made available at relatively short notice. Experts can be obtained abroad if absolutely necessary. Indeed it is commonly the case that appellants and ComReg seek international experts to assist them with appeals.</p>
<p>It is said that the decision making process is lengthened by allowing recourse to an additional stage of appeal.</p>	<p>It is not clear what additional stage of appeal is being referred to, at least insofar as ECAP is concerned. ECAP is a one-stop-shop for a merits-based appeal.</p>
<p>It is said that the decision making process is lengthened because</p>	<p>This is not true. In the case of ECAP, the Framework Regulations provide it with an</p>

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<p>only a court has the power to issue an interlocutory order to stay a regulator's decision pending the outcome of the appeal</p>	<p>express power to suspend a decision of ComReg pending the determination of the appeal.</p>
<p>It is said that an expert appeals panel may not be efficient at handling a high volume of appeals (mentioned twice)</p>	<p>Firstly, there is no evidence that appeals panels are likely to be inefficient or at least less efficient than the courts. In fact, it is arguable that expert panels could be more efficient than the courts in this respect. In any event, it is most unlikely that any sectoral appeals panel or even a cross-sectoral appeals panel would face a high number of appeals simultaneously.</p>
<p>It is said that the need to constitute ad hoc expert panels might cause delay and having different panels hear matters in parallel may detract from consistency. A standing full time panel may address these concerns.</p>	<p>It should not be difficult to address any concerns regarding delays in establishing expert panels on an ad hoc basis or regarding consistency between panels. In any event, Vodafone has no objection in principle to the establishment of a standing panel.</p>
<p>There is no ability to obtain interim relief before an appeal panel is established.</p>	<p>The rapid establishment of the appeal panel is generally a matter within the control of the Minister of Communications, Marine and Natural Resources and should be possible even on an ad hoc basis. However, Vodafone would not be averse to a standing panel being established to deal with this criticism.</p>
<p>It is said that decisions of appeal panels are not directly enforceable because it does not have the power to issue orders itself and obtaining court orders will result in delay.</p>	<p>This is not true. In the case of ECAP, it can issue binding orders and recourse to a court is unnecessary.</p>

Question 16.

Is there scope for using mediation/arbitration as an alternative to formal appeals mechanisms? Are there particular sectors where such alternative approaches could have particular applicability/value?

5.32 We do not believe that mediation or arbitration are appropriate alternative dispute resolution mechanisms in the context of the legislative and regulatory framework relating to electronic communications. ComReg's decisions under this framework are generally made public and may affect a wide range of interests. In these circumstances, it is not appropriate that a private mediation would be conducted

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between an affected undertaking and ComReg; nor is it likely that arbitration would offer any particular advantage over existing appeal mechanisms.

Question 17.

What are the relative merits of an expert appeals body compared with a specialist Court?

- 5.33 As stated above, we believe that the ECAP which is an expert appeals body shares many of the advantages attributed to specialist courts. However, there are some advantages that are unique to such expert appeal panels. For example:
- (a) appeal panels can be (and ECAP is) very sector specific - the advantages that such specialisation gives rise to should not be underestimated; and
 - (b) expert appeal bodies such as ECAP tend to operate in a less formal and a more flexible manner than the courts would be expected to, allowing them to adapt quickly to technological and commercial developments and resolve disputed more efficiently.

Question 18.

Would a Court supported by a panel of experts (along the lines of the UK Competition Appeals Tribunal) be appropriate in any of the sectors in question? Please explain why/why not.

- 5.34 We do not believe that there is any need to establish a Court supported by a panel of experts (along the lines of the UK Competition Appeals Tribunal) in Ireland.
- 5.35 It is not clear why the existing regulatory appeals mechanisms might be considered so ineffective and inefficient as to warrant the introduction of a new appeals system based on a specialist court assisted by experts; nor is it clear what additional benefits would be brought or what perceived problems would be addressed by such a specialist court. It has not been suggested that the current appeal panels suffer from a lack of legal (or any other) expertise. Indeed, we are not aware of any material shortcomings at all with the current appeal mechanism. No credible evidence has been produced to demonstrate that the introduction of a specialist court would solve any particular shortcomings of the existing system or that this would be preferable to simply modifying the existing procedures.
- 5.36 Given the body of precedent that has been developed and the experience that has been gained of the existing appeal mechanism, and the legal certainty that has been created as a result, we believe it would be unwise to introduce any other form of appeal mechanism unless the reasons for this were compelling.
- 5.37 Furthermore, we believe that there is not a sufficient number of appeals in practice (across all sectors) to warrant the establishment of an entirely new specialist court to deal with them.

Question 19.

Should an extension of the use of the Commercial Court to other sectors be considered? Should “commercial” be interpreted as including regulatory sectors?

5.38 We do not believe that the Commercial Court would be an appropriate forum in which to appeal regulatory decisions. The Commercial Court does not have any particular expertise in regulatory matters or with the technical issues that typically arise in electronic communications disputes.

Question 20.

Would the hearing of appeals in Courts using assessors be an appropriate alternative to an appeals panel?

5.39 To the extent that an ECAP is not already comprised of members with sufficient expertise to determine matters, the system permits appeal panels to engage their own external experts to assist with understanding the issues and the evidence in any given case. This process was employed in particular in the Mobile Termination Appeal, when an external economics advisor was appointed to assist the panel with specific matters of a technical and economic nature which arose in the course of its deliberations.

5.40 We do not believe that it would be an appropriate alternative to permit a court to appoint ‘assessors’ in electronic communications appeals. It is preferable that the adjudicators themselves have expertise in the diverse areas of commerce, economics, finance, technology and law which are relevant to the issues which arise on appeal. Further external assistance should only be sought exceptionally.

Question 21.

(a) **What are the relative merits of a single appeals body for a number of sectors compared with having a separate appeals body for each sector?**

(b) **Would it be possible and beneficial to have a single appeals body operating different rules for different sectors?**

5.41 Due to the highly diverse nature of the industries involved, the various regulatory and legal frameworks that apply and the range of issues on which any such body would have to rule, Vodafone does not believe it is desirable to have a single appeals body which would have cross-sectoral jurisdiction. Where there are separate appeals bodies for each sector, expertise can develop in relation to the legal, commercial, financial, technological and regulatory issues that arise therein and administrative practices can evolve within the relevant legal frameworks. It is likely that the level of expertise that is required to determine complex regulatory disputes efficiently, cost effectively and without undue delay would not be available to a single appeals body whose competence would be spread over a broad range of regulated areas and legal

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frameworks that may have little in common. It is difficult to see what additional benefits could arise from such a appeals system.

Question 22.

What are the relative merits of a standing appeals body compared with an appeals panel formed for the duration of a particular appeal?

- 5.42 The only advantage we can foresee with such a format is that the initial period between lodgement of appeal and the first appeal hearing or preliminary hearing might be foreshortened and not delayed by efforts to find suitable persons to constitute the appeals panel. However, this can easily be overcome by establishing a pool of persons who are readily available to join an appeals panel at relatively short notice, as now appears to be the case in ECAP.
- 5.43 Standing appeal panels are likely to be of most benefit in regulated sectors which experience a large number of appeals. In Ireland, there have been relatively few appeals to date. The cost implications of maintaining a standing appeal panel in these circumstances would have to be carefully considered.
- 5.44 Vodafone has no strong views on whether a standing appeals panel should be established in the electronic communications sector, although given the low numbers of appeals that are made, we believe that it is probably satisfactory to operate the system on an ad hoc basis. That said, Vodafone is certainly not averse to the possibility of a standing panel, provided that the current broad and diverse expertise available to the ECAP is retained.

Question 23.

Should appellants be bound to appeal within certain timeframes? If yes, what is a realistic time period to set and are there any other considerations?

- 5.45 It is reasonable that some time limit be set for initiating appeals. However, any such period must, in the interests of maintaining fair procedures, allow adequate time for the regulator's decisions to be properly analysed, for relevant legal and economic experts to be engaged and briefed, for evidence to be gathered and for grounds of appeal to be properly formulated.
- 5.46 Currently, persons aggrieved by decisions of ComReg under the New Regulatory Framework are given 28 days from the date of the decision to notify the Minister and ComReg in writing of their intention to appeal and the grounds of their appeal in full, together with the reasons, considerations and arguments on which such grounds are based.
- 5.47 This is simply not an adequate timeframe within which appellants can be expected to operate, particularly given the complexity of the issues that are normally in dispute and the comprehensive nature of the legal documentation that has to be lodged. At a minimum, this period should be set at 8 weeks (as is the case with the UK Competition Appeals Tribunal).

Question 24.

Are there mechanisms which could avoid vexatious or delaying appeals while at the same time ensuring that the right of appeal of citizens/undertakings is not unduly compromised?

5.48 As noted above, mechanisms already exist under the Framework Regulations to deal with frivolous or vexatious appeals. There have been no such appeals to date in the electronic communications sector. Indeed, the fact that all appeals to date have resulted in ComReg's decisions being either withdrawn or annulled, demonstrates clearly that undertakings are not abusing the appeals system.

Question 25.

Is there an optimum number of members for an appeals body and, if so, what is it?

5.49 The current ECAP appeals panel consists of 3 persons and this would seem to be a reasonable number to allow for a range of skills, to maintain costs at a reasonable level and to facilitate a majority opinion if required. It is always open to an appeals panel, at their own discretion to obtain input from additional experts.

5.50 In Vodafone's view, the 3 member ECAP panels have worked very satisfactorily. A robust case for the additional value/efficiency resulting from any change to the number of panel members would have to be made to warrant altering the current mechanism.

Question 26.

Does this vary between a specialist Court, a specialist appeals panel, a sector-specific appeals panel and a single appeals panel, etc?

5.51 In Vodafone's view, the optimum number of adjudicators in any type of appeals system is 3.

Question 27.

How should appointments to an appeals panel be made?

5.52 Vodafone has no strong views on this, provided panel members are independent and have the requisite breadth of expertise to hear and determine the appeal in question. Appointment by the Minister using conventional public appointment procedures or civil servant advice has been satisfactory in the case of appointments to the ECAP. A requirement for 7 years minimum legal experience on the part of at least one member of the panel is a prudent provision that should be retained.

Question 28.

Should a mechanism be established whereby leave to appeal would need to be sought and granted?

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- 5.53 No. Article 4 of the Framework Directive requires that parties affected by decisions of NRAs should have the right to appeal to a body that is independent of the parties involved. A mechanism whereby leave to appeal would need to be sought and granted could interfere with this right of appeal.

Question 29.

Should appeals be allowed in relation to the facts on which the regulatory decision was based, or should appeals be confined to conclusions drawn by the regulator from these facts?

- 5.54 Clearly, it is the case that errors made by regulators in relation to factual matters can influence the decisions they make. It is important that appeal panels are given the right to conduct a comprehensive merits based appeal and to do this they ought to have an opportunity to consider the facts of any given situation and determine whether the regulator's view of these is correct, at least insofar as that view influenced the Decision made. Where regulators base their decisions on the wrong facts or on an incorrect interpretation of the facts or where they ignore important and relevant facts, it is critical that effective appeal panels be permitted to make an assessment of this.

Question 30.

Should an appeals body have the power to remit the case to the regulator for a new decision, or the power to replace the regulator's decision with its own? Should this vary from sector to sector?

- 5.55 In Vodafone's view, an appeals body should have the power to remit a decision to the regulator for a new decision where it considers that the decision was not correct either procedurally or on the merits. The appeals body should not, however, have the power to replace the regulator's decision with its own decision.
- 5.56 In the electronic communications sector, ECAP does not have the power to substitute its own decision for that of the regulator (except in order to cure technical defects in a ComReg decision).

Question 31.

Should the regulator's decision stand during the appeals process? What would be the implications of such an approach? Should certain types of decisions stand?

- 5.57 Vodafone does not consider that there should be an automatic suspension of a regulator's decision for the duration of an appeal process. However, Vodafone believes that, as is currently the case in the electronic communications sector, appellants should have the right to apply to the appeals body to seek to have the regulator's decision suspended pending the outcome of the appeal. The appeals body must have the ability to suspend a regulator's decision where the appellant(s) can

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demonstrate that allowing the decision and/or any resulting regulatory obligations to stand for the duration of the appeal process would be unfair or cause serious or irreparable harm or lead to structural changes in the market which would be difficult or impossible to reverse.

Question 32.

Should there be scope for suspending parts of a decision and who should adjudicate on this?

5.58 Yes. Vodafone believes that the appeals body is the most appropriate authority to determine whether all, or parts, of a Decision should be suspended pending the outcome of an appeal process. The regulator is not an appropriate authority to determine this as it is itself a party to the appeal process and could not therefore be considered to be an independent adjudicator.

Question 33.

Where a decision has not been suspended and an appeal is upheld, what type of remedy should be available for the appellant and who should decide this?

5.59 In certain limited circumstances, damages may be an adequate remedy, although one always has to bear in mind that any damages payable by ComReg are likely to be ultimately passed back to the industry, including the successful appellant through ComReg's industry levy. In most circumstances, however regulatory discussions have deep structural effects and often require new administrative practices and even contractual arrangements with third parties to be put in place. It is often not possible or practical to reverse such arrangements and therefore suspension should always be an available option.

Question 34.

Are there any outstanding issues/challenges in improving appeals mechanisms that are not reflected in this Paper? Please specify.

5.60 Vodafone considers that the ECAP mechanism is currently working efficiently and effectively and will only improve as an appeals mechanisms over time. Adjustments will be made to the appeal process as experience is gained. We are confident that the system is flexible enough to address any challenges as they arise. Radical change of the existing system at this time is not, in our view, in the interests of any undertaking in the electronic communications sector, the regulator or ultimately consumers.