



Roinn an Taoisigh  
Department of the Taoiseach

# Consultation Paper on Regulatory Appeals





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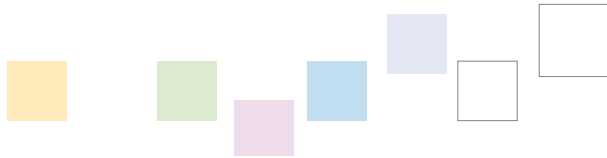




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# Foreword

by the Taoiseach, Mr Bertie Ahern, T.D.



The Government has signalled its recognition of the importance of quality regulation through a number of recent initiatives introduced as part of the implementation of the White Paper, *Regulating Better*. These have focussed on the process of developing individual regulations (through the introduction of Regulatory Impact Analysis) as well as on streamlining and improving accessibility to the Statute Book through Statute Law Revision and restatement.

In this document, we are now turning to one of the most challenging and complex commitments in the White Paper, namely to the development of an improved approach to regulatory appeals. The availability of efficient, effective and transparent appeals mechanisms is an important prerequisite for achieving quality regulation which in turn facilitates economic growth and promotes and protects the welfare of society. In recognition of this, a variety of appeals systems have been developed within the Public Service through initiatives to improve customer service and through the work of the Ombudsman.

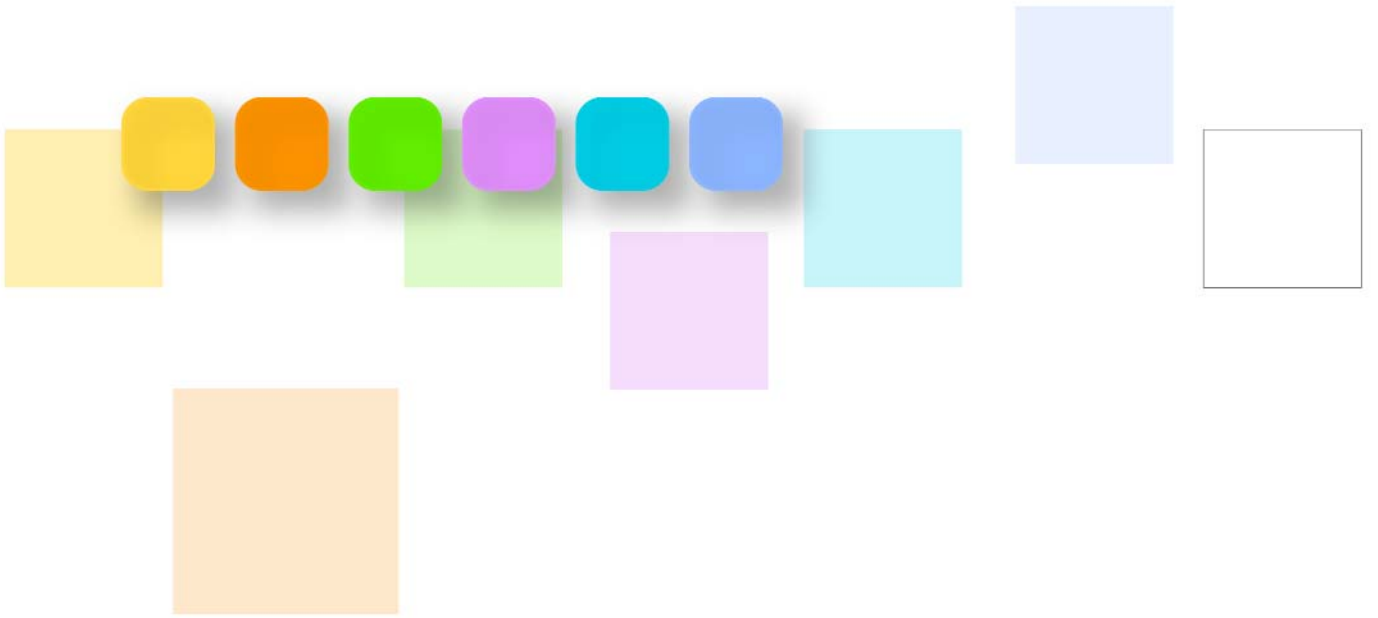
Although specific appeals systems are in place for many of the independent economic regulators, these vary considerably in their nature and scope which can lead to difficulties both for those subject to regulatory decisions and for the regulators themselves. Furthermore, these existing appeals processes sometimes tend to be time-consuming and resource-intensive for all parties involved.

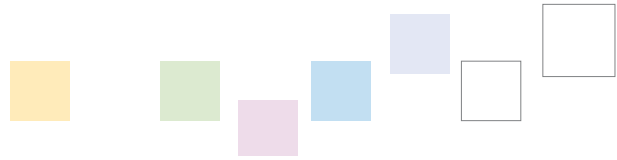
Given the complex nature of many of the issues involved in the design of appeals mechanisms, I considered it important to initiate a broad consultation process on the issue, in advance of the development of proposals for policy change. The Government is committed to inclusive consultation as part of the regulatory system since it can provide vital information and expertise to feed into the decision-making process. The area of appeals is no exception and I expect that the views of stakeholders will be crucial in informing any proposals which are developed to improve and reform appeals mechanisms.

In keeping with the focus of the White Paper, this document primarily focuses on appeals relating to the key economic and sectoral regulatory authorities. However, it is intended that the outcome of the consultation process will inform appeals processes across the Public Service as a whole. This document poses a number of important questions in relation to regulatory appeals which are intended to encourage participation and assist respondents with their submissions.

I strongly encourage any individuals or groups with an interest in the area of regulatory appeals to use this opportunity to share their views and experience with us. Working together, we can elaborate innovative proposals for an improved approach to regulatory appeals.

Bertie Ahern, T.D.  
Taoiseach





Regulatory systems and structures have been changing over recent years. The transfer of regulatory functions to independent statutory bodies necessarily involves a delegation of power from the relevant Minister. Principles of good governance require that such delegation be accompanied by clear and defined accountability mechanisms.

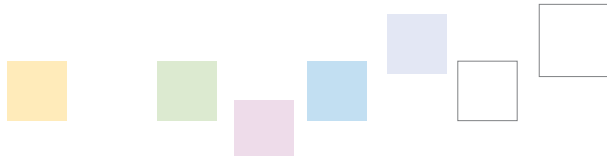
These bodies often take far-reaching decisions which can have material impacts on society, consumers, market players and on the markets themselves. It is essential that regulators deliver quickly and effectively if the public policy objectives set for them in Irish/EU law are to be met. It is also essential that regulators' decisions are open to scrutiny and challenge by affected parties who consider that they have not been properly treated in accordance with the law. The arrangements for appeals need to be based on sound legal principles and operate efficiently. While issues are under review in appeals bodies/Courts, specific services to businesses and consumers may be held back. More generally, legal certainty is important for investment and innovation.

In recognition of the importance of these matters, the 2004 Government White Paper, *Regulating Better*, set out a number of commitments in relation to regulatory appeals. The Better Regulation Group<sup>1</sup> agreed that the best way to progress these commitments was to establish a dedicated Group to examine issues surrounding appeals in more detail, with the following Terms of Reference:

- (i) To review and report to the Better Regulation Group on the existing structures and mechanisms for appealing decisions of Irish regulatory authorities; and
- (ii) To provide recommendations to the Better Regulation Group for an improved approach to the appeal of decisions by Irish regulatory authorities.

To clarify further the scope of the Group's work, the following should be noted:

- ▶ The Group's main focus was on appeals of decisions of the key economic and sectoral regulatory authorities, namely:
  - (i) the Commission for Communications Regulation (ComReg);
  - (ii) the Commission for Aviation Regulation (CAR);
  - (iii) the Commission for Energy Regulation (CER);
  - (iv) the Financial Regulator;
  - (v) the Competition Authority; and
  - (vi) the Commission for Taxi Regulation.
- ▶ A summary of these appeals mechanisms is presented in this Consultation Paper. Such appeals primarily emanate from commercial entities, rather than from individuals. Appeals by individuals generally involve additional bodies and some of the issues which arise extend beyond the focus of this paper. Chapter 2 contains a brief section on individual consumer appeals.
- ▶ The Group also gathered information on appeals mechanisms within the Public Service that are open to individuals in relation to administrative decisions as well as other sector-specific appeals mechanisms. This data informed the Group's work but is not referred to in detail in this Paper.



Based on the experience of individual members and the information gathered both domestically and internationally, the Group identified a number of issues which are relevant to the design of appeals mechanisms for regulatory authorities. The Group also elaborated a number of specific questions related to these issues which respondents to this consultation process are invited to address.

Submissions made during this consultation process will be analysed and summarised in a synthesis document and recorded on the Better Regulation website ([www.betterregulation.ie](http://www.betterregulation.ie)).

This synthesis document will assist the Group in preparing proposals to guide the development of a future approach to regulatory appeals not only within the economic regulatory sectors, but also across the wider Public Service.

#### **CLOSING DATE:**

**RESPONSES TO THIS CONSULTATION PROCESS MUST BE RECEIVED BY 31 OCTOBER 2006**

These responses can be sent by e-mail to [betterregulation@taoiseach.gov.ie](mailto:betterregulation@taoiseach.gov.ie)  
or in hard copy to: Mary Keenan

Better Regulation Unit  
Department of the Taoiseach  
Government Buildings  
Merrion Street  
Dublin 2

Submissions received may be made available publicly to facilitate further debate. Submissions may also be accessible under the Freedom of Information Act 1997 and 2003, subject to the provisions of the Act. For this reason, anonymity cannot be guaranteed to correspondents and we will not be in a position to take account of anonymously received comments and views.

## **QUESTIONS FOR CONSULTATION**

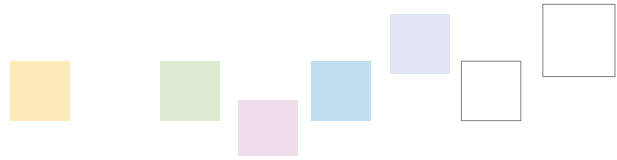
At various points in this document, a number of questions for response are set out. The questions are intended to help interested parties to structure their submissions. The questions are presented at this early point of the Paper to introduce readers to the areas which the Group has considered. However, it is recommended that readers of the paper refer to the appropriate chapter for the background to these questions as many of them are complex and context-related.

### **QUESTIONS FOR CONSULTATION**

#### **Evaluation of Current Appeals Mechanisms**

*Please specify if your response relates to a particular sector/appeals body*

1. In respect of any of the six regulators under review, do you think that individuals are well-served in terms of:
  - (a) Accessibility to information/assistance for appealing against regulators' decisions?
  - (b) Effectiveness of the service experienced?
  - (c) Recommendations as to the best way of dealing with consumer appeals?

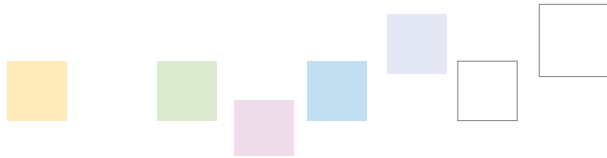


## QUESTIONS FOR CONSULTATION (Continued)

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.
3. Is the appeals mechanism operating efficiently?
4. Is the appeals mechanism cost effective for all parties and for the State?
5. Are the time and resources involved in appeals commensurate with the significance of the issue under appeal?
6. Does the appeals process deliver decisions sufficiently quickly to achieve legal certainty and avoid uncertainty for industry?
7. Do those hearing an appeal have equivalent expertise at their disposal to those making the original decision?
8. Do the processes appear to lead to a fair and balanced outcome?
9. Are the appeals procedures clear and accessible to potential appellants and to regulators?
10. Can the appeals mechanism deliver an enforceable decision or is another body required to endorse the decision and order compliance?
11. Are the provisions for setting up the appeals body, and for appeals from it, appropriate in terms of accountability?
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?
13. Are there appeals mechanisms in other jurisdictions which work well, and which should be considered in the Irish context? Please supply details.

### **Alternatives to Current Appeals Mechanisms**

14. Are there other potential advantages/disadvantages of the appeals mechanisms detailed in Table 4.1 that are not identified in the table?
15. Do you agree with the potential advantages/disadvantages attributed to the various appeals mechanisms in Table 4.1?
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?
17. What are the relative merits of an expert appeals body compared with a specialist Court?
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.
19. Should an extension of the use of the Commercial Court to other sectors be considered? Should “commercial” be interpreted as including regulatory sectors?
20. Would the hearing of appeals in Courts using assessors be an appropriate alternative to an appeals panel?

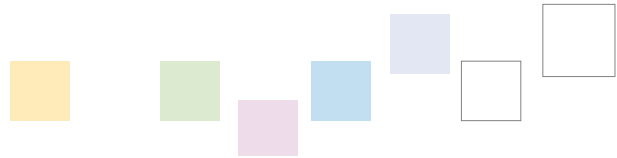


## QUESTIONS FOR CONSULTATION (Continued)

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

### Other procedural issues

25. Is there an optimum number of members for an appeals body and, if so, what is it?
26. Does this vary between a specialist Court, a specialist appeals panel, a sector-specific appeals panel and a single appeals panel, etc?
27. How should appointments to an appeals panel be made?
28. Should a mechanism be established whereby leave to appeal would need to be sought and granted? If so, what person/body should be given the power to grant or refuse leave to appeal?
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?
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?
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?
32. Should there be scope for suspending parts of a decision and who should adjudicate on this?
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?
34. Are there any outstanding issues/challenges in improving appeals mechanisms that are not reflected in this Paper? Please specify.



### BACKGROUND

1.1 On 30 January, 2004, the Government published a White Paper, *Regulating Better*, which outlined a number of commitments in relation to regulatory appeals and penalties. The White Paper included a commitment to consult with interested parties in developing proposals for an improved approach to appeals mechanisms. At its meeting of 11 March, 2005, the Better Regulation Group agreed to progress these commitments by establishing a Group to examine issues in relation to Appeals and Penalties. The first meeting of the Group took place on 9 May, 2005, and it has met on 8 occasions to date.

1.2 The membership of the Group was as follows:

- ▶ Andrew Cullen, Department of Transport, *Chairman*
- ▶ Denis Cagney, Commission for Energy Regulation (alternate Cliona McNally)
- ▶ Eamonn Carey, Department of Enterprise, Trade and Employment (replaced by Pat Nolan)
- ▶ Mary Cooke, Office of the Attorney General
- ▶ Caroline Dee Brown, Commission for Communications Regulation
- ▶ Valerie Fallon, Department of Justice, Equality and Law Reform (member of the Group in 2005 only)
- ▶ Pat Keane, Department of Environment, Heritage and Local Government (alternate Joe Harrington)
- ▶ Philip Kelly, Department of the Taoiseach
- ▶ Noreen Mackey, Competition Authority
- ▶ Martin Moloney, Financial Regulator (alternate Grace O'Mahony)
- ▶ Randall Plunkett, Department of Agriculture and Food
- ▶ Bill Prasifka, Commission for Aviation Regulation (replaced by Patricia O'Connor)
- ▶ Caoimhín Smith, Department of Communications, Marine and Natural Resources

1.3 It should be noted that inputs from members were provided in an individual capacity and do not necessarily represent the views of their organisations. The Better Regulation Unit, Department of the Taoiseach, provided the Secretariat for the Group.

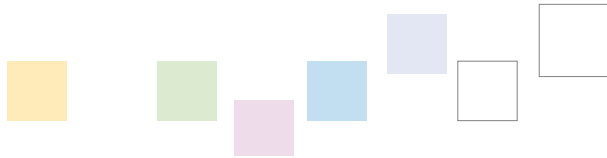
***Chairman's Note:*** *The Chair wishes to acknowledge the significant contribution and support of the Secretariat to the Group in the preparation of this Paper. The Chair also wishes to thank Tony O'Connor BL for his contribution to the Paper.*

1.4 The Group was also assisted in its work by Ciara McLoughlin, a legal researcher from the Office of the Attorney General, who conducted some research work on international approaches to regulatory appeals.

### TERMS OF REFERENCE AND SCOPE

1.5 At its first meeting on 9 May, 2005, the Group adopted the following Terms of Reference:

- (i) To review and report to the Better Regulation Group on the existing structures and mechanisms for appealing decisions of Irish regulatory authorities; and
- (ii) To provide recommendations to the Better Regulation Group for an improved approach to the appeal of decisions by Irish regulatory authorities.



1.6 The following should also be noted in relation to the scope of the Group's work:

- ▶ The Group's main focus was on appeals of decisions of the following economic and sectoral regulatory authorities, namely:
  - (i) the Commission for Communications Regulation (ComReg);
  - (ii) the Commission for Aviation Regulation (CAR);
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- ▶ A summary of these appeals mechanisms is presented in this Consultation Paper. Such appeals primarily emanate from commercial entities, rather than from individuals. Appeals by individuals generally involve additional bodies and some of the issues which arise extend beyond the focus of this Paper. Chapter 2 contains a brief section on individual consumer appeals.
- ▶ The Group also gathered information on appeals mechanisms within the Public Service that are open to individuals in relation to administrative decisions as well as other sector-specific appeals mechanisms. This data informed the Group's work but is not referred to in detail in this Paper.

1.7 The Group began by gathering information on existing appeals mechanisms across Government Departments/Offices. A significant body of data was obtained. While not all of the information gathered was directly relevant to our focus on the six economic and sectoral regulatory authorities listed above, it can serve to inform appeals processes within the Public Service more generally. Readers should note that submissions from regulatory perspectives not directly related to the economic and sectoral regulators set out above are also welcome as part of this consultation process.

1.8 In our deliberations, we noted the significant diversity and complexity of appeals mechanisms. The Group decided, therefore, that public policy-making would be better served by engaging in a public consultation process, rather than moving directly to make recommendations. The Group has prepared this Paper as a basis for the consultation. This Consultation Paper will be widely advertised and disseminated. Responses received will be analysed and a report will be prepared on the outcome of the consultation process. This will feed into proposals from the Better Regulation Group to improve appeals processes and provide guidance to those reviewing existing mechanisms or designing new appeals systems.

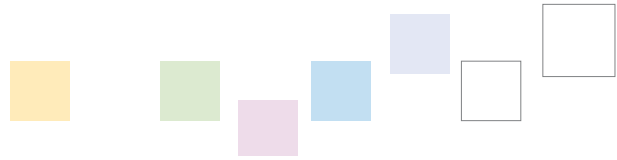
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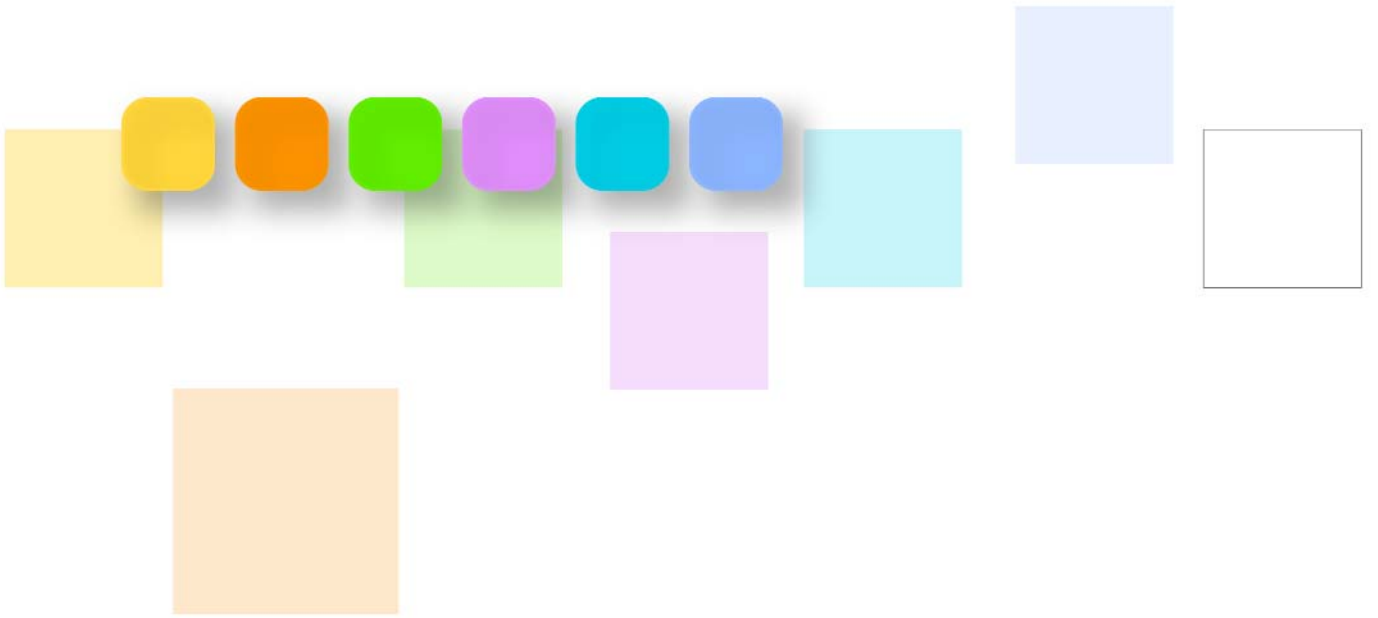
## STRUCTURE OF PAPER

1.9 This Consultation Paper details existing appeals mechanisms and identifies some key issues which inform the design of appeals processes. A number of questions arise at various points throughout the course of the Paper which are intended to help interested parties to structure their submissions in response to the consultation process. The Paper is structured as follows:

**Chapter 2** details the background to systems of appeal and describes the existing appeals mechanisms for the six economic and sectoral regulatory authorities listed in paragraph 1.6 above. The chapter also attempts to summarise them according to some key variables. The chapter concludes with a section on individual consumer appeals.

**Chapter 3** outlines criteria for evaluating appeals mechanisms. It also provides examples of mechanisms for appeals in other jurisdictions.

**Chapter 4** sets out some key issues which influence the design and operation of appeals processes, including whether a Court or other body is used to hear appeals and the composition of appeals bodies, their scope and powers.





# Chapter 2

## Existing Appeals Systems and their Context



### BACKGROUND AND CONTEXT

#### (i) *Commitments in the White Paper*

2.1 The White Paper, *Regulating Better*, sets out six core principles of good regulation<sup>2</sup>:

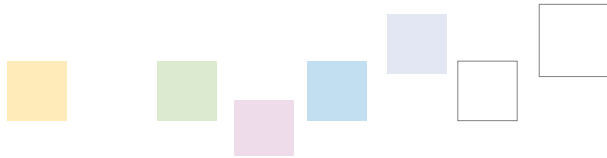
- ▶ Necessity
- ▶ Effectiveness
- ▶ Proportionality
- ▶ Transparency
- ▶ Accountability
- ▶ Consistency

It is intended that these principles should inform and underpin better regulation programmes and initiatives in public policy-making. The Group recognises the importance of these principles and has drawn on them, as appropriate, in its work.

2.2 The White Paper included a commitment to developing “*proposals for an improved approach to appeals of decisions by sectoral regulators, which will be put forward for consultation*” (Action 4.3.1). The White Paper also further outlined a number of issues which needed to be addressed in relation to regulatory appeals (see Box 2.1 below).

#### Box 2.1: Issues highlighted in the White Paper in relation to regulatory appeals

- ▶ As a result of placing greater autonomy with sectoral regulators and growing competition among a greater number of players, decisions made by sectoral regulators have been challenged. Although there are a variety of sector-specific appeals mechanisms, in some instances the only route for the questioning of regulatory decisions has been to undertake a judicial review - even though recourse to judicial review often proves to be a time-consuming and resource-intensive process;
- ▶ Regulatory appeals have also placed a considerable burden on the courts system. In a number of cases, judges have been asked by complainants to substitute their opinion for the decision of the regulator, even though this is beyond the scope of a judicial review;
- ▶ If accountability is to be fully established, an innovative approach to regulatory appeals should be adopted to facilitate an expedient, efficient and informed review of regulatory decisions. Ideally the parties undertaking the review would have expertise in relevant areas, e.g. competition law, economics and sector-specific issues, or direct access to such expertise;
- ▶ We must seek to get the correct balance between the right to appeal a regulatory decision and undue delay in decision-making and implementation. There are, therefore, a number of complex issues involved in establishing an efficient appeals procedure;
- ▶ A small number of judges have been appointed to deal with competition cases. These judges have either presided over previous competition cases or have a specific interest in the area. However, there is a need to consider whether further specialisation should be supported, for example relating to regulatory matters, due to the growing complexity of the issues involved; and
- ▶ It may be possible to improve processes through better case management, etc. More efficient administration of cases may have the desired effect.

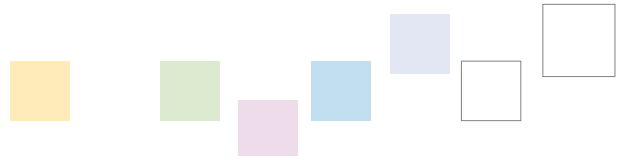


**(ii) Regulatory appeals and why they are necessary**

- 2.3 Regulatory systems and structures have been changing over recent years. The transfer of regulatory functions to independent statutory bodies necessarily involves a delegation of power from the relevant Minister. Principles of good governance require that such delegation be accompanied by clear and defined accountability mechanisms.
- 2.4 These bodies often take far-reaching decisions which can have material impacts on society, consumers, market players and on the markets themselves. It is essential that regulators deliver quickly and effectively if the public policy objectives set for them in Irish/EU law are to be met. It is also essential that regulators' decisions are open to scrutiny and challenge by affected parties who consider that they have not been properly treated in accordance with the law. The arrangements for appeals need to be based on sound legal principles and operate efficiently. While issues are under review in appeals bodies/Courts, specific services to businesses and consumers may be delayed. More generally, legal certainty is important for investment and innovation.
- 2.5 One of the concerns of the White Paper is that there should be a more consistent and strategic approach to the issue of appeals across the regulatory spectrum. Any proposals made in this regard must also be compatible with national, European and international law, and with international agreements which Ireland has ratified.

**(iii) Legal context**

- 2.6 At present, a range of appeals mechanisms exists across various regulatory authorities (these are detailed in paragraphs 2.9 - 2.40).
- 2.7 One form of appeal common to all is through the High Court by way of judicial review (more detail on judicial review is provided in paragraphs 2.42 - 2.51). The High Court may, on application, agree to determine cases by judicial review even if there is no provision in legislation. It is also open to legislators to specify that appeals are to be dealt with by way of judicial review. However, judicial review is limited to a scrutiny of the process by which a decision has been reached. It does not look at the merits of the decision itself, and the question of its adequacy as a sole appeals mechanism arises by virtue of the incorporation into Irish Law of the European Convention on Human Rights (see Appendix 3 for more information). In addition to judicial review, the statutes creating many of the regulatory bodies provide for specific separate appeals mechanisms which operate alongside judicial review. Where such appeals mechanisms exist, they provide an additional layer which assists in ensuring that these procedural rights are applied, as well as giving an opportunity, depending on the particular appeals mechanism, to have the decision overturned, replaced, etc.
- 2.8 A question which arises in this regard is whether there should be a right to appeal beyond judicial review in most if not all cases, or whether a right to appeal on the merits should only apply in specific circumstances. If the latter were to apply, such specific circumstances would need to be defined. These issues are complex and it is hoped that this consultation process might inform the general debate. A useful starting point, however, is to examine and outline the key features of existing appeals mechanisms.



### Box 2.2: Basic Rights - The Constitution

The Constitution provides that an appeal must be specifically provided for in legislation. In other words, the right to an appeal is not automatic and is not mandated by the Constitution. Nor is an appeal necessarily mandated by common law or by the European Convention on Human Rights (ECHR).

However, the principles of natural justice and fairness of procedures (which have been developed through common law and are also guaranteed by the Constitution) must be applied in the decision-making process. In addition, the procedural fairness requirements under Article 6 of the ECHR must also be applied in the decision making process.

## EXISTING APPEALS MECHANISMS IN IRELAND

### *(i) Appeals mechanisms for six independent regulatory authorities*

2.9 The paragraphs that follow detail the appeals mechanisms for six regulatory authorities. The regulatory authorities in question are as follows:

- (a) The Commission for Communications Regulation (ComReg) - Electronic Communications Appeals Panel (ECAP);
- (b) The Commission for Energy Regulation (CER);
- (c) The Commission for Aviation Regulation (CAR);
- (d) The Financial Regulator;
- (e) The Competition Authority; and
- (f) The Commission for Taxi Regulation.

### **(a) The Commission for Communications Regulation (ComReg)**

2.10 Since July 2003, appeals may be made against ComReg decisions to an Electronic Communications Appeals Panel<sup>3</sup>, in addition to judicial review or use of the Commercial List in the High Court. Any user/undertaking affected by any decision or measure made by ComReg under the EU regulatory framework for electronic communications and services may notify the Minister of their intention to appeal that decision (on the merits, as well as on procedural grounds). On receipt of a valid notification of appeal, the Minister must set up an appeals panel (an Electronic Communications Appeals Panel) to hear the appeal or refer the appeal to an existing appeals panel already created<sup>4</sup>. There is no express provision for standing appeals panels.

2.11 The grounds of appeal are wide and appellants may plead that the decision is invalidated by errors of fact, including inferences of fact and/or errors of law, issues of jurisdiction and procedure. These panels, which are independent and determine their own procedures, cannot substitute a new regulatory decision. However, a panel can find that the decision was entirely correct or correct in part. If the latter is the case, the part found to be correct stands and is effective. If the panel finds that the decision was incorrect or incorrect in part, the elements found to be incorrect do not stand. The appeals panel can also instruct the Regulator to cure a technical defect in a decision. The decision of the Regulator stands during the appeal. However, the appellant can apply to the appeals panel to have the regulatory decisions being appealed suspended for the duration of the appeal.



2.12 The appeals panel is appointed by the Minister and consists of 3 members. At least one of the members must be a 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. The panel is dissolved once it has delivered its decision unless it is still hearing another appeal.

2.13 As of 1 March, 2006, eleven appeals had been referred to ECAP:

- ▶ One appeal by Hutchinson 3G Ireland Limited was determined by an appeals panel finding in favour of the appellant;
- ▶ Six appeals concluded following a consent order for the annulment of ComReg decisions by an appeals panel. These six appeals related to findings of joint dominance by ComReg against Vodafone and O2; and
- ▶ Four appeals were withdrawn prior to a determination by an appeals panel.

Of these 11 appeals, only the Hutchinson case resulted in a detailed written judgement.

2.14 Prior to July 2003, the ability to challenge the Regulator's decision was via either judicial review by the High Court or appeal to the High Court on a point of law, as provided for under specific regulations. The latter procedure was in practice confined to a judicial review type appeal. As of 1 March, 2006, there have been 18 appeals to the High Court of which 14 have been settled prior to final hearing.

#### **(b) The Commission for Energy Regulation (CER)**

2.15 The EU Directives<sup>5</sup> in the field of electricity and gas provide that where disputes between system operators and customers arise, decisions of regulators shall stand unless and until overruled on appeal. The Directives do not give any detail as to how appeals should take place. This is a matter for the Member States. In Ireland, a person affected by some categories of decision by the CER can appeal a decision by requesting the Minister to set up an appeals panel<sup>6</sup> to hear the appeal. The CER decisions subject to this appeals process are:

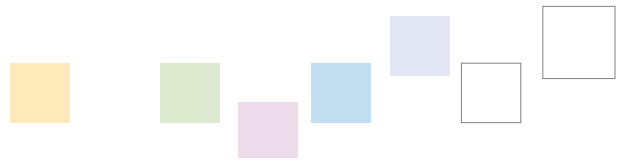
- (i) determination of a network dispute between the system operator and a customer; and
- (ii) a decision to issue, to refuse to issue or to modify either a licence to generate electricity, or an authorisation to construct a generation plant.

2.16 The legislation provides that the panel shall be independent and shall have all the powers and duties of the CER that are necessary to carry out its functions. The panel has the power to confirm the CER's decision or direct the CER otherwise. It can make determinations and issue directions under the powers conferred on the CER in relation to disputes between a system operator and a third party. All appeals under part IV of the Act must be determined within six months.

2.17 To date, no appeals panel has been set up or requested, nor has the size or composition of such an appeals panel been determined.

#### **(c) The Commission for Aviation Regulation (CAR)**

2.18 Under the Aviation Regulation Act, 2001, establishing the Commission for Aviation Regulation (CAR), provision was made for an appeals panel to be appointed by the Minister. This particular process relates only to the CAR's primary function i.e. determinations made in respect of price caps for airport charges and aviation terminal services charges. The enabling legislation also provides for a judicial review of such decisions, provided leave is sought within two months of the making of a decision.



- 2.19 Under the Ministerial appeals process, an Airport Authority, the Irish Aviation Authority or an airport user<sup>7</sup> can appeal in writing to the Minister in relation to a price cap determination. The Minister must then appoint an appeals panel, unless he is of the view that the request is vexatious, frivolous or without substance. An appeals panel may consist of between three and five members and can determine its own procedure. It may consider any issue raised by an appellant but it cannot overturn a determination made by the CAR. It can confirm the original determination of the CAR or refer the determination back to the CAR. At that stage the CAR may affirm or vary its original decision. Once it has considered an appeal, the appeals panel stands dissolved.
- 2.20 The remaining functions of the CAR, which include airline licensing, groundhandling approvals, the allocation of slots at airports, travel trade licensing and bonding and consumer protection in respect of certain air passenger rights, are governed by a variety of primary and secondary legislation, all of which (with the exception of consumer protection) were transferred to the CAR from the parent Department on its establishment. Under some of these various Acts and Statutory Instruments, there are provisions for the appeal of the CAR's decisions to the High Court. In other cases, the only avenue of challenge would be by way of judicial review, although this is not specified in the relevant legislation.
- 2.21 Following an appeal by 5 appellants in respect of the 2001 Airport Charges Determination, an appeals panel was established in late 2001, in accordance with the procedures laid down in the Aviation Regulation Act, 2001. The panel considered that, in respect of some of the issues raised in the appeals, sufficient grounds existed to warrant referral of the decision in relation to the Determination back to the CAR for review. The CAR reviewed its decision on that basis and published a revised Determination in February 2002.
- 2.22 An appeals panel was also established (in February 2006) following the second Airport Charges Determination which was published in late 2005. That panel considered the appeal and made a referral to the CAR on 4 April 2006. In line with recent amendments made to the Aviation Regulation Act, 2001, future appeals panels will have a three-month time frame to reach a decision and the CAR will have two months to make its decision on issues referred back to it.
- 2.23 In 2001, an appeal was lodged with the CAR under the Groundhandling Regulations in respect of a decision made by Aer Rianta (now the Dublin Airport Authority). In that case, the CAR found for the appellant and instructed Aer Rianta to reverse its decision.

#### **(d) The Financial Regulator**

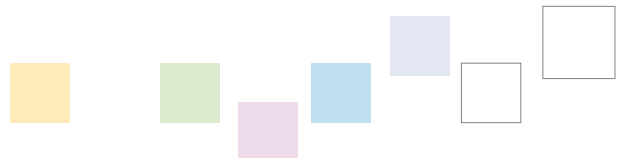
- 2.24 Appeals against certain decisions made by the Financial Regulator are heard and determined by the Irish Financial Services Appeals Tribunal. Whether the decision is appealable to the Tribunal is defined in the relevant piece of legislation from which the decision derives i.e. depending on whether it is a banking, insurance or investment matter. This Tribunal is a standing body whose members are nominated by the Government and appointed by the President. The Tribunal consists of a Chairperson and Deputy Chairperson (both from the legal profession) and between one and five lay members with expertise in the financial services area.
- 2.25 At any stage during the appeals process, the Tribunal may decide to remit the decision under appeal to the Financial Regulator for its reconsideration. Options available to the Tribunal depend on the nature of the decision being appealed. Administrative sanctions decisions may be affirmed, varied, substituted or remitted. In addition, some decisions by the Financial Regulator relating to the Administrative Sanctions Procedure may be set aside by the Tribunal. Decisions other than administrative sanctions may only be confirmed or referred back to the Financial Regulator. The Tribunal may refer a question of law to the High Court.



- 2.26 An administrative sanctions decision is automatically stayed on appeal (i.e. it is stopped from taking effect). In other cases, the Tribunal has discretion.
- 2.27 An appellant dissatisfied with the final outcome may appeal a decision of the Tribunal to the High Court. This is distinct from an appeal on judicial review. As is the case for other regulators, the High Court may agree to take judicial review cases. To date no appeals have been heard or requested.

### **(e) The Competition Authority**

- 2.28 Two types of decision of the Competition Authority can be appealed under the Competition Act. The first type relates to appeals from merger determinations of the Competition Authority and is provided for in section 24 of the Competition Act, 2002. The appeal is to the High Court. Only the merging parties can appeal. Third parties cannot. Only determinations to block a merger or allow it with conditions can be appealed. Determinations to allow a merger unconditionally cannot. The appeal may be on any issue of fact or law, but the section qualifies this by:
- (a) Obliging the High Court to presume, unless it considers it unreasonable to do so, that facts accepted or found by the Authority were correctly accepted or found; and
  - (b) Only allowing the High Court to hear witness evidence in relation to a matter if it has found that the Authority had unreasonably accepted or found as a fact the matter concerned.
- 2.29 The effect of this is that a party can only successfully appeal a finding of fact by the Authority if it is able to show that the Authority was unreasonable in finding that fact. If the High Court finds in favour of the appellant, it can annul the determination. It does not remit the case to the Authority. If a determination blocking a merger or allowing it with conditions is annulled, then the merger can go ahead unconditionally. Thus the High Court is effectively putting itself in the place of the Authority as decision-maker. If the High Court finds against the appellant, it can either confirm the Authority's determination or confirm it with modifications of its own choosing.
- 2.30 The grounds for such an appeal are more extensive than those which would be available under judicial review, in that, subject to the constraints mentioned above regarding issues of fact, any matter of fact or law can be appealed, and the High Court can, in effect, substitute its own decision for that of the Authority. It is less than a full appeal on the merits in that the High Court must presume the Authority's findings of fact to be correct, unless it is unreasonable to do so. Only in the latter case can it hear witnesses on issues of fact.
- 2.31 The second type of decision subject to an appeal is provided for in section 15 of the Act in relation to the making of a category declaration<sup>8</sup>. This appeal is also to the High Court and can be made by any person who is aggrieved by the making of the category declaration. The High Court can confirm, amend, or annul the declaration. If the declaration is annulled, it would be open to the Competition Authority to make a new declaration, taking into account the decision of the High Court. The Court has discretion to place a stay on the coming into effect of the declaration pending the outcome of the appeal.
- 2.32 The High Court may accept requests for judicial review in respect of decisions of the Competition Authority as is the case for other regulators.

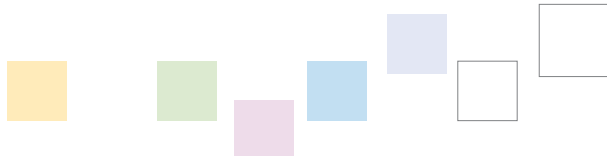


## **(f) The Commission for Taxi Regulation**

- 2.33 Currently, where a licensing authority (local authority) refuses to grant or renew a taxi, hackney or limousine licence, the applicant may appeal the decision to the relevant District Court. Responsibility for the issue of taxi licences will later this year transfer from local authorities to the Commission for Taxi Regulation.
- 2.34 Where the Garda Commissioner, or authorised officer, refuses to grant a small public service vehicle drivers licence or revokes a licence, the applicant/licence holder may appeal the decision to the District Court having jurisdiction where the person ordinarily resides.
- 2.35 In both cases above, on hearing the appeal, the Court may either confirm the refusal or suspension or revocation, or direct the relevant licensing authority to grant or renew the licence in question, or remove the suspension or revocation. Notice of the Court decision is given to the relevant licensing authority which must comply with the decision.
- 2.36 Section 35 of the Taxi Regulation Act, 2003 (not yet commenced), provides that where a licensing authority<sup>9</sup> proposes to refuse to grant or renew a licence, or proposes to suspend or revoke a licence, the licensing authority must notify the person in writing of the proposed decision and the reasons for the decision. The person must also be informed that they may submit representations to the authority within 14 days of the date of the notice. The licensing authority must consider any such representations made to it.
- 2.37 Where a person is subsequently notified of the decision of the licensing authority, the person has 14 days after the date of the notification to appeal against the refusal, etc., to the District Court within whose jurisdiction the person ordinarily carries on, or proposes to carry on, the business of providing small public service vehicle services.
- 2.38 On hearing the appeal, the District Court may either confirm the decision of the licensing authority or allow the appeal. The licensing authority must comply with the Court decision. The decision of the District Court is final. By leave of the Court, however, there can be an appeal on a specified point of law to the High Court.
- 2.39 When section 35 is commenced, it will replace the appeals procedure under the existing public service vehicle regulations made under the Road Traffic Acts.
- 2.40 There has been no appeal to date of determinations under the Taxi Regulation Act, 2003.

## ***(ii) Summary of existing appeals mechanisms***

- 2.41 Some of the appeals mechanisms described in paragraphs 2.9 - 2.40 are relatively similar, while others differ significantly on a number of grounds. Table 2.1 (on page 19) aims to summarise these appeals mechanisms according to some of their key distinguishing variables<sup>10</sup>. These variables are as follows:
- ▶ Types of decision;
  - ▶ Form of appellate body;
  - ▶ Grounds for appeal;
  - ▶ Options available where appeal is upheld; and
  - ▶ Whether it is possible for a decision to be stayed (deferred) pending an appeal.



All of these variables impact on the efficiency and effectiveness of the mechanism and whether it establishes legal certainty through providing final and reliable regulatory decisions which can then be implemented.

### (iii) Judicial Review

2.42 Judicial review exists as a legal remedy where a body determining rights or liabilities has acted contrary to, or in excess of, its legal authority. This remedy is concerned not so much with the decision itself, but with the decision-making process of the body. In layman's terms, judicial review involves the High Court reviewing the fairness and reasonableness of the process by which a decision was made, in the light of principles established by the Courts. The High Court may strike down decisions in certain circumstances (as set out in paragraph 2.43 below). The High Court may also require the decision-maker to reconsider all or part of its original decision.

2.43 Judicial review is always available, even where a specific appeals mechanism is provided for. It should be noted, however, that in judicial review proceedings, the Courts can only overturn the decision on the grounds that:

- ▶ there was bias on the part of the decision-maker;
- ▶ the decision-maker acted outside his or her powers;
- ▶ the decision was manifestly unreasonable;
- ▶ irrelevant matters were taken into account;
- ▶ relevant matters were not taken into account; or
- ▶ there was a breach of natural or constitutional justice.

2.44 The Court operates on the basis that the original decision-maker has been empowered to make certain decisions, and the Court may note particular expertise on the part of the original decision-maker. Unless the decision-maker has failed because it was biased, or failed to meet one of the other standards set out in paragraph 2.43, the Court will leave the original decision stand.

2.45 For example, in a case where a licence has been refused, the High Court does not take a licence application and review it again *de novo* to decide whether it should be granted or not. It reviews all the relevant papers about the decision to refuse the application to determine whether the process used was fair and reasonable.

2.46 There are various procedural guarantees under Article 6(1) of the European Convention on Human Rights<sup>11</sup>. The European Court of Human Rights has found that procedural defects in the decision-making process are permissible as long as there is a right of appeal to a court<sup>12</sup> with "full jurisdiction". A question arises as to whether this "full jurisdiction" requirement is satisfied by the availability of judicial review alone (with no separate statutory appeals mechanism), in the light of the limitations of the judicial review process<sup>13</sup>.

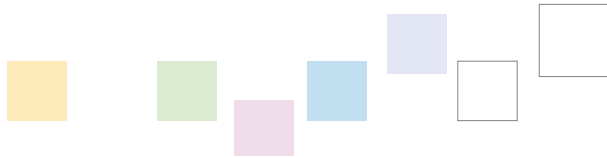
2.47 The judicial review remedy lies within the inherent jurisdiction of the High Court and can perhaps be very loosely described as a parallel process, which lies alongside, and must be distinguished from, any statutory appeals process provided for in any sectoral regulatory area. However, the judicial review remedy itself may be modified by statute. This exists in certain areas such as planning law and immigration law. The legislation governing both the CAR and the CER limit to two months the timeframe in which an application for leave to apply for judicial review may be made.

**Table 2.1: Matrix of appeals mechanisms in addition to judicial review**

Body	Appeals Body				Grounds for Appeal				Options available to Appeals Body where appeal is upheld			Can decision be stayed pending appeal?
	Standing Appeals Body	Appeals panel formed for each case	General Court (apart from judicial review)	Specialist Court	Procedural flaw or legal issue	Review of merits	New evidence	Issue returned to Regulator for reconsideration	New Decision by Appeals Body	New Decision appealable to Courts		
ComReg		✓ <sup>1</sup>			✓	✓		✓ <sup>2</sup>	✓ <sup>3</sup>		✓ <sup>4</sup>	
Competition Authority			✓		✓	✓	✓ <sup>5</sup>		✓	✓ <sup>6</sup>	✓ <sup>7</sup>	
CAR		✓ <sup>8</sup>			✓	✓		✓			✓ <sup>9</sup>	
Financial Regulator	✓		✓		✓	✓	✓	✓	✓ <sup>10</sup>	✓ <sup>10</sup>	✓ <sup>11</sup>	
CER		✓			✓	✓						
Commission for Taxi Regulation			✓		✓	✓						

**NOTES TO TABLE:**

- On receipt of a valid notification the Minister shall establish one or more appeals panels and may, where considered appropriate, refer a valid appeal to an existing panel.
- Where an appeal is allowed and the original decision is annulled in whole or in part, ComReg must rescind the appealed decision if it was not suspended pending the outcome of the appeal. If the decision was suspended, it continues to have no effect. ComReg is free to make/or not make a new decision.
- To cure technical defects only.
- Decision stands unless suspended by an appeals panel. The Regulator shall implement the decision in accordance with the determination of the appeals panel.
- In exceptional cases in merger appeals.
- There is an appeal from the High Court to the Supreme Court on a question of law.
- Where the appeal relates to the making of a category declaration, the Court has the power to stay the decision. In the case of merger determinations, as the only decisions which can be appealed are those blocking a merger or allowing it subject to conditions, the notion of a stay doesn't arise.
- This only applies in the case of price cap determination functions.
- In the case of judicial review, an application may be made to stay the decision and it is open to the Court to agree to this.
- These options only apply to a decision made by the Financial Regulator concerning administrative sanctions.
- An administrative sanctions decision is automatically stayed on appeal. In other cases, the Tribunal has discretion.



- 2.48 Despite the limited application of judicial review, it has been used as an alternative to a statutory right of appeal in some sectors. For example, it has been used to appeal decisions of ComReg (previously ODTR) on 9 occasions between 1998 and 2006<sup>14</sup>. Judicial review proceedings were also initiated to appeal decisions of the CAR. One case was settled before a determination was made and another case was withdrawn. There are currently two judicial review procedures pending for decisions made by the CAR. However, it has never been used as an alternative to the statutory right of appeal in respect of any decision of the CER, the Commission for Taxi Regulation, the Competition Authority or the Financial Regulator.
- 2.49 In some instances, judicial review may conceivably be used as a delaying tactic, especially where the regulator's decision is stayed pending the outcome of the judicial review. In its 2001 report, *Regulatory Reform in Ireland*, the OECD expressed a view that judicial review can be time-consuming and costly and may serve to prolong the appeals process in many instances. Its Report states that "challenges to regulations must be done by judicial review, a costly and time-consuming process<sup>15</sup>" (see also Box 2.3 below).

### Box 2.3: Summary of findings of the OECD in relation to judicial review

"Through judicial reviews and appeals, judges increasingly make key regulatory decisions. This has raised concerns about judicial trespass into the field of the legislature...this complex issue requires continuing attention to the selection, appointment and training of judges". (page 57)

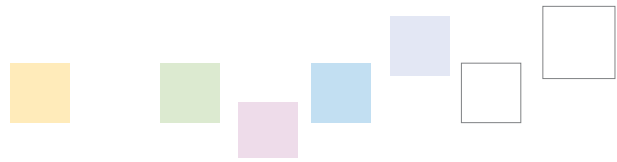
"Application to a court of competent jurisdiction is regarded by business as slow, complex and expensive. Ireland has been slow to develop private arbitration and other dispute resolution mechanisms." (page 57)

"Challenges to regulations must be done by judicial review, a costly and time-consuming process. Judicial review cannot be regarded as an effective quality control mechanism in view of the 500 to 600 regulations made each year." (page 136)

"A single judge sitting in a particular court can become a *de facto* regulator with little accountability constraints. Judges performing this task lack technical expertise or experience in solving such problems. In addition, since review by the Courts increases uncertainty and delay in regulatory policies, it may undermine the responsiveness and transparency of the regulatory system." (page 142)

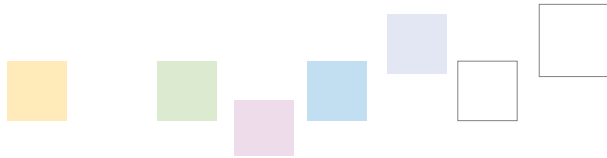
Source: OECD *Regulatory Reform in Ireland*, 2001

- 2.50 More recent experience in the Irish Courts, and of the operation of appeals mechanisms, has suggested that judicial review of regulatory decisions may, in fact, be more efficient than was suggested by the OECD. It should also be noted from the summary of appeals mechanisms in paragraphs 2.9 - 2.40 that judicial review is not the only remedy available in any of the sectors described earlier in this chapter. For all the regulators included, there is an alternative appeals mechanism as well as judicial review, although it should be noted that not all categories of decisions/rulings made by the regulators are subject to these appeals mechanisms.
- 2.51 A final point which should be highlighted in this context is that appeals panels may not necessarily guarantee faster appeals. For example, in some cases, judicial review can be a faster mechanism of appeal given the number of stages potentially involved in an appeals process (see paragraph 4.18 and Appendix 4).



#### ***(iv) Appeals for Individual Consumers/Citizens***

- 2.52 While this Paper is mainly concerned with appeals by commercial undertakings, the Group gathered and reviewed material on appeals mechanisms that are open to individuals in respect of public bodies.
- 2.53 Regulatory action affects the costs, quality and availability of regulated services for consumers. However, because businesses providing services implement most regulatory decisions, they tend to be more likely than consumers to appeal against regulators' decisions. Rather than appealing regulatory decisions, individual consumers instead look to regulators to enforce the delivery of service by regulated businesses, including quality and pricing matters. Therefore some of the issues referenced in this section are not confined strictly to appeals by consumers in relation to regulatory decisions but relate more to the processes by which consumers can seek legal redress in relation to the provision of products and services.
- 2.54 Apart from the Competition Authority, all of the regulators under review have some responsibilities to encourage/enforce quality of service (including charges and conditions) for consumers of some of the bodies they regulate. The way regulators implement this is by:
- (i) Including quality of service conditions in licences or in specific decisions - e.g. the Universal Service Provider for telephones (Eircom) must meet specified time-limits in dealing with requests to have phones installed;
  - (ii) Carrying out research and providing information to customers about services in their sectors - e.g. the 'It's your money' service of the Financial Regulator;
  - (iii) Requiring regulated bodies to develop customer charters/codes of conduct to deal effectively with customer service issues; and
  - (iv) Dealing with complaints.
- 2.55 Regulators generally only deal with complaints which the service provider has failed to resolve. This tends to be justified on a couple of grounds - firstly, regulators are funded by levies and/or the taxpayer and it is suggested that the resources of regulators should only be used when other means of redress have been exhausted. Secondly, any service provider, whether public or private, has a responsibility to its customers to design that service properly and to deliver it effectively. This may involve appropriate staff training and effective customer complaints systems which feed back into design and operations. Were complaints to go directly to the regulator, the resolution of complaints may be viewed as an external issue rather than an integral part of a quality-controlled service.
- 2.56 Arrangements for the handling of complaints vary from sector to sector, as do appeals processes from regulators' decisions on such complaints. One example is the system established for appeals in relation to the delivery of financial services. Alternatively, consumers may take complaints in any sector to the Courts.
- 2.57 Statutory arrangements applying in respect of other regulated sectors are varied. There are other instances where the main regulator is not responsible for all consumer issues - e.g. where responsibility is held by the National Consumer Agency.
- 2.58 It is important that consumers get good service delivery. Whether this is best guaranteed by extensive statutory regulatory action is open to question. Some of the practical issues to be considered are discussed in the report of the High Level Interdepartmental Committee on the Recommendations contained in the Consumer Strategy Group Report<sup>16</sup>.



## QUESTIONS FOR CONSULTATION

1. In respect of any of the six regulators under review, do you think that individuals are well-served in terms of:
  - (a) Accessibility to information/assistance for appealing against regulators' decisions?
  - (b) Effectiveness of the service experienced?
  - (c) Recommendations as to the best way of dealing with consumer appeals?



# Chapter 3

## Evaluating Appeals Mechanisms



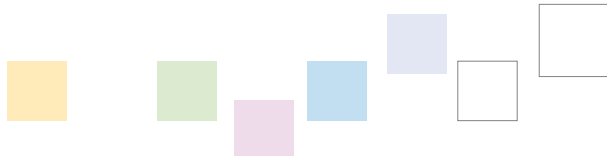
### EVALUATION OF EXISTING APPEALS MECHANISMS

3.1 The Group considered whether there is a set of principles or criteria which can be used to evaluate appeals mechanisms. For example, the six principles set out in the White Paper: necessity, accountability, transparency, effectiveness, proportionality, and consistency could be used, although not all of them are directly applicable if they are defined in the same way as in the White Paper (see Appendix 2 for definitions). The Group decided to develop some questions for consultation based around these principles (see below).

#### QUESTIONS FOR CONSULTATION ARISING WHEN CONSIDERING APPEALS MECHANISMS IN THE CONTEXT OF THE SIX PRINCIPLES OF BETTER REGULATION

Please specify in your response the sector(s) of interest to you and the viewpoint from which you are replying - i.e. as a consumer of regulated services, or a regulated service provider.

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.
3. Is the appeals mechanism operating efficiently?
4. Is the appeals mechanism cost effective for all parties and for the State?
5. Are the time and resources involved in appeals commensurate with the significance of the issue under appeal?
6. Does the appeals process deliver decisions sufficiently quickly to achieve legal certainty and avoid uncertainty for industry?
7. Do those hearing an appeal have equivalent expertise at their disposal to those making the original decision?
8. Do the processes appear to lead to a fair and balanced outcome?
9. Are the appeals procedures clear and accessible to potential appellants and to regulators?
10. Can the appeals mechanism deliver an enforceable decision or is another body required to endorse the decision and order compliance?
11. Are the provisions for setting up the appeals body, and for appeals from it, appropriate in terms of accountability?
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?



## INTERNATIONAL EXPERIENCE

- 3.2 The research conducted during the preparation of this paper suggests that other jurisdictions face similar concerns and difficulties in relation to appeals, and that there are no easy solutions to the complex issues which arise. However, there may be appeals mechanisms in other jurisdictions which are relevant in considering what best practice should apply to appeals mechanisms in an Irish context. Respondents to this consultation exercise are invited to identify other international models which they consider appropriate.
- 3.3 The UK Competition Appeals Tribunal is an interesting example (see Box 3.1). This Tribunal has the standing of a court and its decisions are enforceable judgments and form legal precedent. It is presided over by a judge and it has a panel of experts who assist the judge. Persons appealing to the Tribunal are, at one and the same time, exercising their right of appeal to the court and gaining the benefit of an appeal to an expert body. The advantage of an appeal to a court is that it can, if necessary, combine judicial review with an appeal on the merits. Other pros and cons of this approach are listed in Table 4.1 (on page 30).

### Box 3.1 : UK Competition Appeals Tribunal

The UK Competition Appeals Tribunal (CAT) was created by Section 12 and Schedule 2 to the Enterprise Act, 2002, which came into force on 1 April 2003.

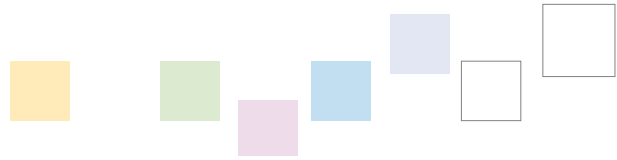
The CAT hears appeals from both competition and regulatory decisions. It has the status of a division of the High Court, but an expert panel assists the judges.

The current functions of the CAT are:

- ▶ To hear appeals on the merits in respect of decisions made under the Competition Act, 1998 by the Office of Fair Trading (OFT) and the regulators in the telecommunications, electricity, gas, water, railways and air traffic services sectors;
- ▶ To hear actions for damages and other monetary claims under the Competition Act, 1998;
- ▶ To review decisions made by the Secretary of State, OFT and the Competition Commission in respect of merger and market references or possible references under the Enterprise Act, 2002;
- ▶ To hear appeals against certain decisions made by OFCOM<sup>17</sup> and the Secretary of State relating to the exercise by OFCOM of its functions under Part 2 (networks, services and the radio spectrum) and sections 290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the Communications Act, 2003.
- ▶ To hear appeals in respect of decisions made by the OFT under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (as amended).

#### How does the CAT deal with cases?

Cases are heard before a panel consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law and/or related fields.



### Box 3.1 : UK Competition Appeals Tribunal (Continued)

#### Appeals from the CAT's decisions

A further appeal lies from decisions of the CAT either on a point of law or in penalty cases as to the amount of any penalty. Any such appeal lies to the Court of Appeal in relation to CAT proceedings in England and Wales; in relation to CAT proceedings in Scotland, to the Court of Session; and in relation to CAT proceedings in Northern Ireland to the Court of Appeal in Northern Ireland. Such a further appeal may only be made with the permission of the CAT or the relevant appellate court.

Further information is available at <http://www.catribunal.org.uk/>.

- 3.4 Another international model which may be of interest is the Australian Administrative Appeals Tribunal which was established to provide independent merits review of administrative decisions. The Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick (see Box 3.2).

### Box 3.2: Australian Administrative Appeals Tribunal

The Tribunal was established by the Administrative Appeals Tribunal Act, 1975 (the AAT Act) and commenced operations in 1976.

#### Functions and powers

The Tribunal is an independent body that reviews a broad range of administrative decisions made by the Australian Government, including Ministers and officials, authorities and other tribunals. The Tribunal also reviews administrative decisions made by some State government and non-government bodies in limited circumstances. On the facts before it, the Tribunal decides whether the correct - or, in a discretionary area, the preferable - decision has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision. Proceedings of the Tribunal are conducted with as little formality and technicality, as possible and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Tribunal permit.

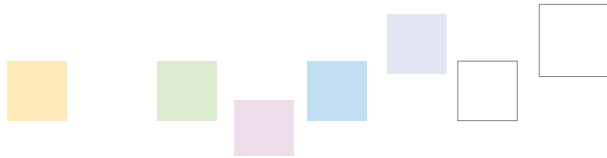
The Tribunal does not have a general power to review any decision made under Commonwealth legislation. The Tribunal can only review a decision if an Act, regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. The Tribunal has jurisdiction to review decisions made under more than 400 separate Acts and legislative instruments.

A decision of the Administrative Appeals Tribunal can be appealed to the Federal Court on a question of law.

#### Organisation

The Tribunal consists of a President, presidential members (including Judges and Deputy Presidents), Senior Members and Members. The President must be a judge of the Federal Court of Australia. All Deputy Presidents must be lawyers. Senior Members may be lawyers or have relevant specialist knowledge or skills. Members have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation.

Further information is available on <http://www.aat.gov.au>



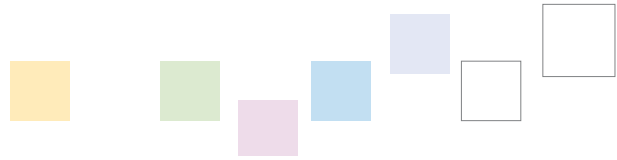
- 3.5 There has also been some useful comparative research in relation to appeals mechanisms in the communications sector (See Box 3.3 below for further detail). In a number of countries, there is specific provision in law to ensure that decisions can be implemented within a specific time frame. Provision has been made to allow the possibility to appeal directly to the highest court for certain decisions of OPTA (the Netherlands' autonomous administrative authority that regulates postal and electronic communications). Other approaches taken by countries to speed up the appeals process are as follows:
- (i) the omission of one stage for appeals against certain regulatory decisions (Germany and Finland);
  - (ii) the abolition of preliminary procedures (Romania);
  - (iii) the imposition of timeframes for decisions of the appeals body, the independence of the Appeals Board explicitly stated, and members appointed for three years (Malta); and
  - (iv) the introduction of a provision that procedures shall be expeditious (Slovenia).
- 3.6 However, sectoral regulation depends on the nature of the market. Specific legal or contextual issues might limit the applicability of international solutions in the Irish context.

### Box 3.3: International approaches to electronic communications appeals

**The Independent Regulators Group (IRG)<sup>18</sup> reported on National Appeals Procedures** for the electronic communications sector in December 2004 and compared different national appeal procedures for regulatory decisions in IRG member states.

Key findings of the report are as follows:

- ▶ In most countries the appeals body is a court.
- ▶ In most countries there is no statutory limit imposing obligations on the appeals bodies to deal with an appeal within a specified period of time.
- ▶ In most countries the court assessing dominance under competition law is also the relevant court for market reviews.
- ▶ In the majority of countries all appeals against decisions of the National Regulatory Authority (NRA) are concentrated in one appeals body.
- ▶ In a number of countries the appeals body has the competence to replace the NRA's decision with a decision of its own.
- ▶ In most countries the appeal goes directly to the appeals body, without prior administrative appeals procedures. However, in some countries, there is an internal appeal with the NRA before the case is brought before the external appeals body.
- ▶ In nearly all countries key regulatory decisions taken by the NRA stand pending appeal, unless the appeals body suspends enforcement.
- ▶ Generally, the appeals bodies deal with requests to suspend enforcement, but in some countries the decision lies with the NRA or can be taken either by the appeals body or the NRA.
- ▶ The major problem of appeals systems under the old regulatory framework was the duration of the appeals procedures. Almost all IRG members indicated that the main criticism of their previous appeals systems was the length of the appeals procedures. Only six countries indicated that they did not face any problems with lengthy appeals procedures.



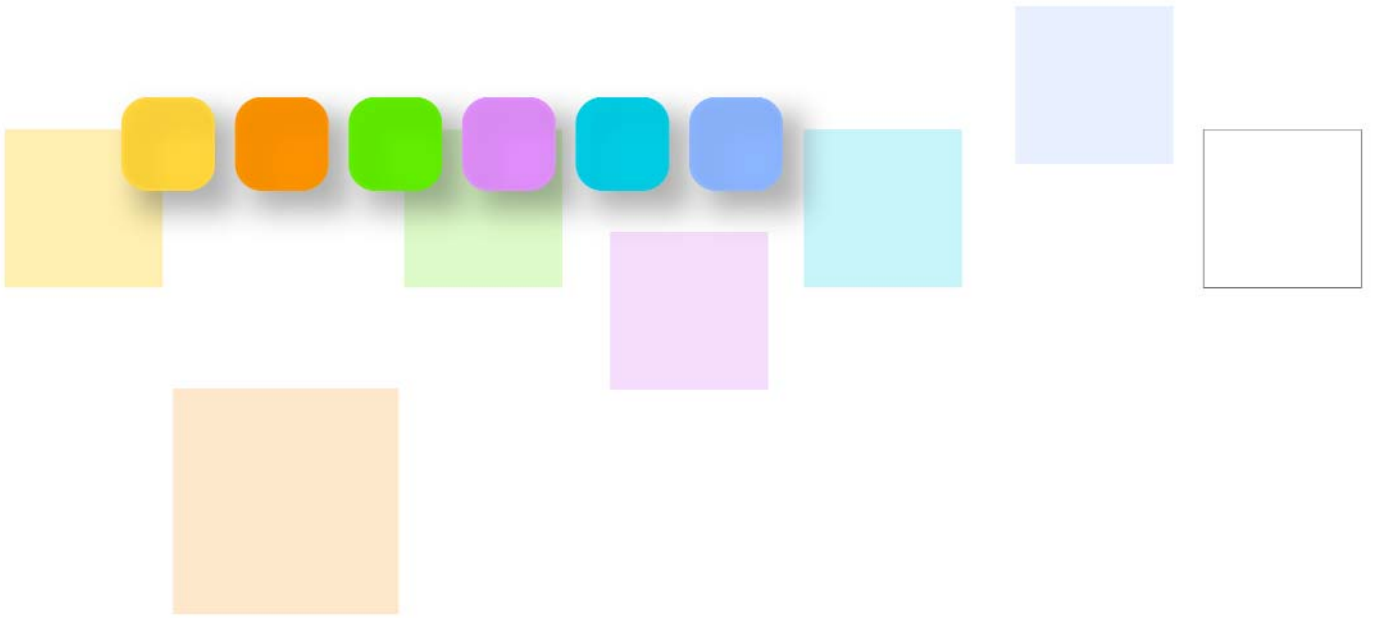
### Box 3.3: International approaches to electronic communications appeals (Continued)

- ▶ Overall, a wide divergence of timeframes for the resolution of appeals can be observed. As the duration of an appeal often depends on a number of factors, it is difficult to give specifics, but under the old regulatory framework appeals bodies needed between roughly two months and several years to reach a final decision. In some countries the overall duration of certain proceedings exceeded 5 years.
- ▶ The major reason indicated for the lengthy appeals procedures was that appeals bodies were confronted with a high number of appeals. In a number of countries nearly all of the NRAs' decisions have been appealed.
- ▶ In a number of countries changes have been made in the new laws to address the criticism expressed. These changes include:
  - (i) the introduction of the possibility to appeal directly to the highest court;
  - (ii) the omission of one stage for appeals against certain regulatory decisions;
  - (iii) the abolition of preliminary procedures;
  - (iv) the imposition of timeframes for decisions of the appeals body; and
  - (v) the introduction of a provision that procedures shall be expeditious.
- ▶ It remains to be seen whether these changes will have a significant impact on the duration of appeals procedures.

It should also be noted that the response of the European Regulators Group<sup>19</sup> and the Independent Regulators Group to the European Commission's Call for inputs into the review of the EU Framework on Electronic Communications states that "in some member states judicial appeals processes vary considerably, in particular in their length, in the thresholds applied for consideration of suspension of regulatory decisions and in the account taken of relevant Commission guidance and comments. These variations have the potential to detract from effective implementation of the Framework and of the aim of appropriate harmonisation of regulatory approaches. Further alignment is highly desirable, in both the shorter and longer term".<sup>20</sup>

#### QUESTION FOR CONSULTATION:

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





# Chapter 4

## Issues and Challenges in Developing Appeals Systems



### INTRODUCTION

- 4.1 As the previous chapter indicates, a variety of mechanisms exist to appeal regulatory decisions in Ireland. These vary from sector to sector and are often provided for on a case-by-case basis in the legislation establishing or governing the particular regulatory body. Some of the key differences between these appeals mechanisms include:
- (i) whether the appeals body is a Court or an appeals panel;
  - (ii) the grounds on which an appeal can be made;
  - (iii) actions open to the appeals body where appeals are allowed; and
  - (iv) whether the decision of the regulator can be stayed pending the appeal.
- 4.2 There are also a number of structural and procedural elements to be considered when designing appeals systems. Some of these elements have been identified by the Group based on the experiences of its members and are presented and discussed in this chapter. Respondents are invited to provide their views on these issues and, if possible, to structure their views around the questions posed at various points in this chapter. However, this is not an all-inclusive or exhaustive exploration of all the issues involved, nor it is intended as such. For this reason, the Group also invites comments on other elements of appeals processes which are not covered in this paper.

### FORM OF APPEALS BODY

#### *(i) Court, Appeals Panel or Tribunal*

- 4.3 In some sectors appeals are heard by Courts, while in others they are heard by appeals panels. A relevant factor in considering whether the establishment of an appeals panel could contribute to the efficiency and effectiveness of the appeals process is that only Courts can issue an enforceable order. Therefore, if the appeals body is not a Court, it will need to apply to the Court for an interim order pending an appeal or to enforce its decision. An alternative option is to attempt to speed up the process by providing for appeal to the Courts in the first instance, thus achieving one-step appeal and enforcement.
- 4.4 One possibility is to create a Tribunal similar to the UK Competition Appeals Tribunal (see Box 3.1 on page 24), where cases are heard by judges supported by experts in a particular field/sector. A similar model to the Australian Administrative Appeals Tribunal could also be considered (see Box 3.2 on page 25).
- 4.5 We summarise some of the potential advantages and disadvantages of alternative appeals mechanisms in Table 4.1. This Table is not intended to be all-inclusive or exhaustive.

**Table 4.1: Potential advantages and disadvantages of alternative appeals mechanisms**

**POTENTIAL ADVANTAGES**

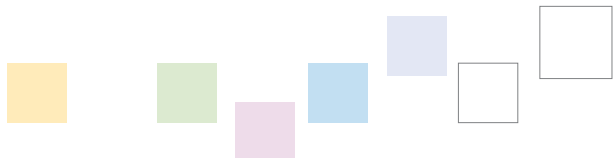
<b>A. Expert Appeals Panel</b>	<b>B. Specialist Court</b>	<b>C. Court advised by expert panel</b>	<b>D. General Court</b>
<ul style="list-style-type: none"> <li>▶ If the appeals panel is limited to one sector, it is likely to have the technical expertise that a general court may lack.</li> <li>▶ Could provide appeals process that is cheaper, faster and more informal (if a permanent panel is available to hear cases, this should facilitate a more speedy hearing of cases).</li> <li>▶ Is usually intended to be more informal than a Court although this does not always apply in practice since the right to legal representation remains.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Develops specialist expertise more readily than a general Court.</li> <li>▶ Judges would not be subject to conflicts of interest.</li> <li>▶ Has the power to issue interlocutory orders.</li> <li>▶ Removes one layer of appeal and in theory speeds up decision-making process and adds more legal certainty to decisions (assuming that there are adequate resources and a sufficient number of judges and support staff).</li> <li>▶ The permanent nature of a Court allows for consistency and its administrative structure allows it to efficiently handle high volumes of appeals.</li> <li>▶ Can hear an appeal and requests for interim relief directly without referral via an administrative body.</li> <li>▶ Can combine appeal with judicial review if necessary.</li> <li>▶ Its decisions are directly enforceable because it has power to issue orders.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Has specialist expertise without needing the permanent availability of the expert panel.</li> <li>▶ Has the power to issue interlocutory orders.</li> <li>▶ Removes one layer of appeal and in theory speeds up decision-making process and adds more legal certainty to decisions.</li> <li>▶ The permanent nature of a Court allows for consistency and its administrative structure allows it to efficiently handle high volumes of appeals.</li> <li>▶ Can hear an appeal and requests for interim relief directly without referral via an administrative body.</li> <li>▶ Can combine appeal with judicial review if necessary.</li> <li>▶ Its decisions are directly enforceable because it has power to issue orders.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Judges would not be subject to conflicts of interest.</li> <li>▶ Has the power to issue interlocutory orders.</li> <li>▶ Removes one layer of appeal and in theory speeds up decision-making process and adds more legal certainty to decisions.</li> <li>▶ The permanent nature of a Court allows for consistency and its administrative structure allows it to efficiently handle high volumes of appeals.</li> <li>▶ Its decisions are directly enforceable because it has power to issue orders.</li> </ul>



**Table 4.1: Potential advantages and disadvantages of alternative appeals mechanisms (Continued)**

**POTENTIAL DISADVANTAGES**

A. Expert Appeals Panel	B. Specialist Court	C. Court advised by expert panel	D. General Court
<ul style="list-style-type: none"> <li>▶ Could be limited by availability of independent non-conflicted experts.</li> <li>▶ Lengthens decision-making process by allowing recourse to an additional stage of appeal.</li> <li>▶ Lengthens the decision-making process because only a Court has a power to issue an interlocutory order allowing the regulator's decision to be stayed pending hearing of appeal.</li> <li>▶ One panel may not be efficient at handling high volume of appeals.</li> <li>▶ The need to constitute panels as needs arise might cause delay and having different panels hear matters in parallel may detract from consistency. A standing full time panel may address these concerns.</li> <li>▶ Cannot convene directly unless there is a permanent standing panel - this delays appeal hearings and ability to hear requests for interim relief pending full appeal hearing.</li> <li>▶ There may be constraints in its ability to handle high volumes of cases.</li> <li>▶ Its decisions are not directly enforceable because it does not have the power to issue orders and recourse to a court for an enforceable order could add to the delay of implementing the decision</li> <li>▶ Where the Appeals Panel is not a permanent Panel, there is potential for a delay between the appeal notification and the setting up of a panel.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Without time limit for hearing to be concluded, the same delays seen historically may still result. Case management requirements which include time limits as currently applied in commercial court and in competition cases may address this.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Without time limit for hearing to be concluded, the same delays seen historically may still result. Case management requirements which include time limits as currently applied in commercial court and in competition cases may address this.</li> </ul>	<ul style="list-style-type: none"> <li>▶ Lack of potential for specialisation.</li> </ul>





## QUESTIONS FOR CONSULTATION:

14. Are there other potential advantages/disadvantages of the appeals mechanisms detailed in Table 4.1 that are not identified in the table?
15. Do you agree with the potential advantages/disadvantages attributed to the various appeals mechanisms in Table 4.1?

### *(ii) Specialist judges - the Irish experience*

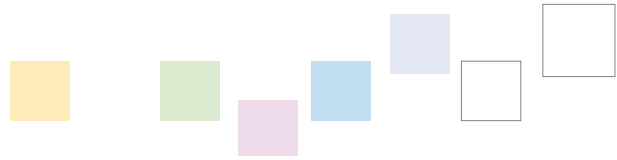
- 4.6 In Ireland, appeals are, in certain cases, heard by existing Courts, such as the District Court, High Court or Supreme Court. The OECD has expressed concern that there may be a lack of technical expertise/experience of judges conducting judicial review of certain regulatory decisions<sup>21</sup>. However, some specialisation of judges is already in place (e.g. the system of judges with expertise in competition matters being appointed to deal with competition cases in accordance with the Competition Act, 2002, see Box 4.1 below).

#### **Box 4.1: The Competition List of the High Court**

In 2005, the Rules of the Superior Courts were amended by the insertion of a new Order 63B.<sup>22</sup> This Order makes special provisions in relation to competition cases in the High Court. In particular, Order 63B rule 4, entitled "Competition List", provides that all competition cases are to be listed in this list. Prior to this, competition cases in the High Court did not have a special list of their own, but were listed together with other civil actions. The competition list is presided over by a judge specially assigned by the High Court to hear competition cases. This judge is not, however, limited to the hearing of competition cases. The new Order 63B also makes provision for case management in competition cases. This is presided over by the judge in charge of the competition list.

A further innovation is provided for by Order 63B rule 23 which allows the Court, in competition cases, to appoint a person "to assist the Court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person (in this rule hereinafter called an "expert") has skill and experience". The expert is to attend as much of the hearing as the judge directs, and is to be available after the hearing to assist the judge.

- 4.7 A similar approach has been taken to the hearing and management of commercial cases in the High Court (see Box 4.2 overleaf). It should be noted that the Commercial Court has very efficient and effective case management procedures but the categories of cases it accepts are often (but not always) determined by the value of the claim (at least €1,000,000) rather than particular specialist areas of activity. However, as a consequence of the regularity of certain types of cases being dealt with, the Commercial Court can be viewed as a specialist Court in those certain areas. This is in contrast to (or at least somewhat different from) specialist courts which exist in some other jurisdictions.



## Box 4.2: Commercial Court

### Background

The requirement for a dedicated Commercial Court specialising in meeting modern business commercial needs was identified in the 27th Report of the Committee on Court Practice and Procedure. The Committee recommended the establishment of a Court which would enable the speedy resolution of commercial disputes and facilitate the conduct of Court business through the use of the latest technology.

Prior to the commencement of the Commercial Court in January 2004, the progress in a commercial action in the High Court towards readiness for trial was a matter for the parties. An exchange of legal documents took place with a view to reaching a stage where the case was ready for hearing. The only intervention by the High Court was to adjudicate on any pre-trial issue which could not be agreed between the parties.

There are no meaningful statistics relating to the duration of commercial proceedings prior to January 2004. It is widely accepted, however, that this category of litigation would typically have taken the parties two or three years to bring to the stage of readiness for trial. A trial date could then be up to six months into the future. In addition, occasionally cases which were allocated hearing dates were not heard on that date due to inadequate judicial resources.

### Objective

The primary objective of this initiative was the establishment of a dedicated Commercial Court which would, although operating as a division of the High Court, acquire a separate identity utilising more efficient procedures and offering early hearing dates. The new venture was to be designed to provide a means for commercial entities to litigate their differences without delay before specialised judges in a modern environment.

Provision was made for the new Commercial List in the High Court on 12 January 2004. Two judges with particular experience in commercial matters were appointed to try cases in the list. The judge in charge of the Commercial List has power, on the application of a party to commercial proceedings, to allocate the proceedings for disposal in the List. This Commercial Division of the High Court will have its own list based on a general value threshold of €1m. The scope of the Commercial List includes business transactions of a very wide variety where the value of the claim is €1m or more. The List also deals with intellectual property cases (patents, trademarks, copyright and designs).

Also included are judicial review cases which relate to major commercial matters. The procedural regime enables the court to provide an opportunity to the parties at an early stage to avail of alternative dispute resolution mechanisms, such as mediation or arbitration.

### Effects of the workings of the Court

The system of rigorous case management employed by the Commercial Court had not been a key feature of Irish litigation prior to establishment of the Court. This situation has been completely reversed by the Commercial Court. The Court has used its wide-ranging powers to:

- ▶ apply strict deadlines for the exchange of pleadings and documents;
- ▶ impose cost penalties for failure to comply with deadlines;
- ▶ direct that all papers be furnished to the judge prior to a hearing so as to enable them to be read in advance and so provide for a shortened hearing;
- ▶ actively encourage arbitration and mediation;
- ▶ narrow and identify the key issues in question resulting in shorter hearings or cases settling earlier;
- ▶ permit evidence by way of live video link from outside the jurisdiction;
- ▶ accept the written evidence of expert witnesses in lieu of directing their attendance in Court;



#### Box 4.2: Commercial Court (Continued)

- ▶ allocate prompt hearing dates;
- ▶ guarantee that a judge is always available to hear the case; and
- ▶ employ the latest technology in order to streamline processes.

#### Parties

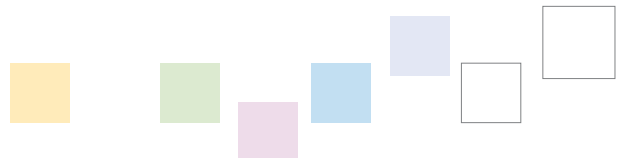
The primary benefit to parties to a case is the dramatic decrease in waiting times. The parties to a commercial action, while primarily seeking a positive outcome to the litigation, are also seeking certainty in as short a time as possible. The Commercial Court guarantees an active involvement in the management of a case so as to ensure an early trial date. In addition, a judge is guaranteed to be available to hear the action once the date has been allocated. This has removed the uncertainty associated with a protracted case.

While there are no detailed statistics for cases of a commercial nature prior to January 2004, it is reasonable to assume that of the 134 cases which have come under the control of the Commercial Court since January 2004, very few would have been brought to a conclusion outside the Commercial Court. In addition it is likely that few, if any, would have been allocated a hearing date at this stage. Of the 69 cases outstanding, 45 are less than six months in being and this period does not take into account the closure of the Court for two months in the summer. The average time period from entry into the Commercial Court to the final conclusion of a case is a mere ten weeks.

Between 12 January 2004 and 12 January 2006, 149 cases were entered into the Commercial List. Of these 80 cases were disposed of and 69 cases are still outstanding. 21 cases have been refused entry. The average waiting period from entry to the List to the conclusion of action is 11 weeks.

*Source: Material supplied by the Courts Service*

- 4.8 The President of the High Court also operates a system of informal lists to hear specialised judicial review hearings in areas such as planning and refugee appeals. Such cases are allocated to judges with appropriate experience and it would be open to the President of the High Court to extend this practice to other areas were he or she to consider it appropriate and desirable.
- 4.9 The extension of this Commercial List approach to appeals more generally could be considered, particularly since some of the categories under which cases can be admitted to the List are quite broad.<sup>23</sup> However, it should be noted that in 2005 an application for admission to the Commercial List by one party was resisted by another party in the case on the grounds that private individuals may not have the resources available to enable compliance with the case management regime applicable in the Commercial Court. In the event, the Group understands that admission to the Commercial List was refused on other grounds. It is understood that the current position of the President of the High Court is that the establishment of informal lists operated by judges with appropriate experience as described above offers the most effective means of dealing with judicial reviews in specialised areas.



### **(iii) Mediation/arbitration**

- 4.10 As referenced in Box 4.2, the Commercial Court system actively encourages the resolution of cases through mediation or arbitration. These non-adversarial approaches, which aim to reach solutions to disputes through discussion and agreement rather than through formal disciplinary or litigation processes, are increasingly being used in a variety of areas including labour disputes, family law cases and landlord-tenant disputes. Consideration should, therefore, be given to using mediation or arbitration as alternatives to the formal appeals mechanisms for regulators' decisions. These alternatives may be more appropriate to certain categories of decisions or disputes, but could, if used appropriately, reduce some of the costs and time delays generated by conventional appeals processes.

#### **QUESTION FOR CONSULTATION:**

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?

### **(iv) Use of experts/assessors**

- 4.11 An innovative approach introduced during a competition case in 2004<sup>24</sup> was the use of expert assessors to assist the Court in understanding complex or technical issues particularly where differing and conflicting information is being provided by either side in a case. In the 2004 case, Mr Justice Kearns appointed an expert economic assessor *"who should attend so much of the hearings and submissions as might be necessary to assist the Court, both then and afterwards in properly understanding and clarifying where necessary the economic evidence given, so as to enable the Court to discharge its obligation to carry out a proper economic analysis in the case."*<sup>25</sup> The expert's costs and expenses would form part of the costs in the case. The Competition and Mergers Review Group in its 2002 Report recommended the appointment of such assessors in competition law cases. More specific Court rules in relation to assessors which apply only to competition proceedings were introduced in March 2005.
- 4.12 A similar provision exists in the communications sector where experts can be used to inform the Appeals Panel which *"may inquire into and inform itself on any matter in such manner as it thinks fit subject to rules of natural justice."*<sup>26</sup>

### **(v) Expert Appeals Panel or Specialist Courts**

- 4.13 Recent experience in the communications sector also provides some insights into the respective merits of expert appeals panels and specialist Courts. All telecommunications appeals were via the Courts until the new Framework Regulations were introduced in 2003. These Regulations introduced an appeals panel, whose decision may be reviewed in turn by the Courts (via judicial review). Experience to date has suggested that appeals will not necessarily be heard more quickly than through the Courts. As of 1 March 2006, there have been 18 appeals to the High Court of which 14 have settled prior to final hearing. Since the introduction of the Regulations<sup>27</sup>, 11 appeals to an expert appeals panel have been made, with one detailed judgement and with the other cases being settled between ComReg and the appellants. See also paragraph 4.19 and Appendix 4.



## QUESTIONS FOR CONSULTATION:

17. What are the relative merits of an expert appeals body compared with a specialist Court?
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.
19. Should an extension of the use of the Commercial Court to other sectors be considered? Should “commercial” be interpreted as including regulatory sectors?
20. Would the hearing of appeals in Courts using assessors be an appropriate alternative to an appeals panel?

### **(vi) Sector-specific appeals bodies or a single cross-sectoral appeals body**

- 4.14 The White Paper raises the possibility of having a single, cross-sectoral appeals body applying to a number of regulatory authorities (see Box 4.3) as an alternative to having an appeals body for each sector. There has been much debate surrounding this issue and the relevant extract from the White Paper in relation to this possibility is set out below.

#### **Box 4.3: Single Appeals Body**

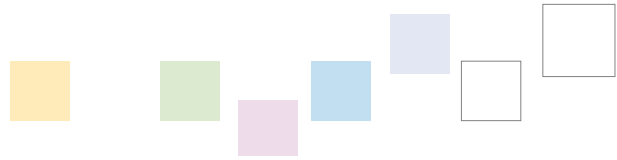
In the case of utilities regulators, one possibility might be to establish a single regulatory appeals body. Such an appeals body could call on a number of expert panelists with relevant knowledge and experience of sector specific issues and/or competition law and policy, and/or economics, to adjudicate appeals. The regulatory appeals panel might facilitate a more expedient and cost effective alternative to judicial review. Access to further court appeals would remain an option, but only on points of law.

Powers of the single regulatory appeals body might include:

- ▶ Confirming or setting aside all or part of the regulator’s decision;
- ▶ Imposing, revoking or varying the amount of any penalty;
- ▶ Granting or cancelling an individual exemption or varying any condition or obligation which relates to that exemption;
- ▶ Giving such directions, or taking such other steps as the sectoral regulator could have given or taken; and
- ▶ Making any other decision which the sectoral regulator could have made.

*Source: Government White Paper, Regulating Better*

- 4.15 As well as the advantages highlighted in Box 4.3, there are also a number of potential disadvantages to a single composite body. First, given the disparate nature of the functions that independent regulators deal with - from the licensing of travel agents to the building of new power stations - the extent of the potential synergies may be overstated. Secondly, the value of the expertise of individual members may be lost if dissipated across a broad sectoral panel. There may be limited availability of independent, non-conflicted experts and finding people with expertise across a wide spectrum may not be possible. Thirdly, there are different time limits applicable to decisions made in different sectors determined by EU Law, in particular those harmonising Directives where the implementation of decisions in a timely manner will be essential.



## QUESTION FOR CONSULTATION:

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?

### ***(vii) Standing or ad hoc appeals body***

- 4.16 The tenure of the appeals body is also a consideration. One option is for a body to be appointed for a specific time period e.g. three or five years. Another is for an appeals panel, from which members are chosen, to hear a particular case, after which the appeals body disbands (as is the case with ECAP). There may be potential financial costs in having a standing body in existence even where there are no cases to be heard.
- 4.17 When it is opted to specially constitute an appeals body from a panel of members for each case, the following procedural issue arises: whether the rules of procedure for the hearing of an appeal should be made by each appeal body constituted (as is currently the case with ECAP), or whether the rules should be made by a committee with an overall supervisory role.

### ***(viii) Time limits for appeals process***

- 4.18 Some regulatory appeals mechanisms provide for a specific time period within which appeals must be heard. If it is decided that this should be the case across all appeals, this leads to additional questions such as how to identify that time period and how rigid it should be. If an overall time limit is set, this should realistically reflect the various stages potentially involved in an appeal. It is relevant, therefore, to note that the overall time-frame for hearing an appeal can involve a number of different phases, including:
  - (i) the time limit to bring the appeal;
  - (ii) the time for an appeal to be assigned a forum for hearing;
  - (iii) the time for the first hearing to occur;
  - (iv) the time for a stay to be heard if requested;
  - (v) the time for the full hearing; and
  - (vi) the time for a judgment to be issued, if not given at the full hearing.
- 4.19 It should be noted that in a judgment (which was upheld) of September 2005 relating to an appeal by Hutchinson 3G Ireland Limited against ComReg, the Appeals Panel points out that while it was alert to the guideline timescale of four months<sup>28</sup>, it was also mindful of the importance of fully adhering to the procedural requirements and the imperatives of natural justice. In light of the experience gained in this appeal, the Panel has indicated that it feels that the guideline timescale of 4 months will be difficult to achieve except, perhaps, in the simplest of cases<sup>29</sup>. However, as only one detailed judgment has been given by an electronic appeals panel, care needs to be taken before lessons are extrapolated from experience to date with ECAP.



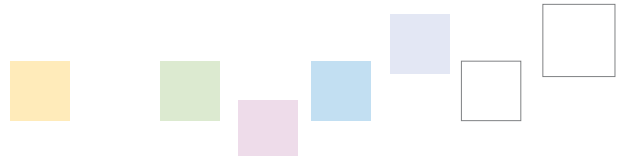
- 4.20 The White Paper notes that appeals structures can be used in a vexatious or delaying manner and refers to the possibility of developing disincentives to discourage vexatious appeals, e.g. introducing requirements for those taking appeals to lodge a sum of money, and to be liable for costs where appeals are found to be unnecessary or vexatious. However, any specific proposals in relation to financial disincentives must be carefully targeted and designed, and may need to be considered in more detail at a later date.

#### QUESTIONS FOR CONSULTATION:

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

#### COMPOSITION OF APPEALS BODY

- 4.21 Due to Ireland's relatively small size, finding independent experts or experts who have not previously advised the parties to an appeal may pose a significant challenge. It is important to ensure that those hearing appeals have sufficient expertise, and are non-conflicted. However, the appeals process must be both time and cost efficient. In some cases, international expertise has been used but this can be cumbersome. Specific training might be an option to develop capacity and additional expertise amongst panel members.
- 4.22 Another issue related to membership is the optimum number of members for an appeals panel. This will depend to some degree on whether the body is permanent or *ad hoc* and whether it is cross-sectoral or covers just one sector. If a specialist Court is considered appropriate, the optimum number of judges must be identified. Where an appeals panel is formed from a larger set of available experts, there may be an optimum number for membership of the larger and smaller panel.
- 4.23 It is usual for the Government, or an individual Minister, to appoint members of an appeals panel directly. This can be through conventional public appointment procedures, or based on advice from relevant officials and experts.
- 4.24 Where a Court is concerned, there is a specific set of procedures governing the appointment of judges. However, there may be issues as to how levels of expertise are evaluated for the purpose of establishing specialist Courts or panels to advise Courts, such as the in UK Competition Appeals Tribunal model (see Box 3.1 on page 24).



## QUESTIONS FOR CONSULTATION:

25. Is there an optimum number of members for an appeals body and, if so, what is it?
26. Does this vary between a specialist Court, a specialist appeals panel, a sector-specific appeals panel and a single appeals panel, etc?
27. How should appointments to an appeals panel be made?

## POWERS OF AN APPEALS BODY/COURT

### *(i) Scope and grounds of appeal*

- 4.25 There are a number of potential grounds for appeal. Some questions to be considered in this context are
- (i) whether these grounds should be limited;
  - (ii) whether the appeals body should only hear appeals of a procedural or legal nature; and
  - (iii) whether appeals should be heard on the merits of a decision or whether the introduction of new evidence should be permitted.
- 4.26 If an expert appeals body is the chosen option, it could be decided to limit recourse to the Courts to points of law only. An appeals body with the power to review procedural issues could have the benefit of reducing reliance on the Courts because this might reduce the likelihood of parties going to Court. However, the legal right to seek a judicial review in the Courts is not eliminated by having an administrative body that can also review such procedural matters.
- 4.27 Before a judicial review of a decision is undertaken, leave to seek judicial review must be sought and granted. Similar “screening” processes also exist in other types of appeals (see Box 4.4). If it were decided to limit grounds, facts or reliefs in an appeal from the decision of a regulator, consideration could be given to establishing a similar “screening” process to assess whether the appeal should be allowed to go ahead or should be limited in some way. If this option were taken some person or body would have to be designated to exercise the power to grant or refuse leave to appeal, or to grant it subject to restrictions.

### Box 4.4: Some approaches in Irish law to leave to appeal

- ▶ In criminal law, a prospective appellant who has been convicted must apply in the first instance to the trial judge for a certificate that the case is a fit case for appeal<sup>30</sup>. If a certificate is refused (which is the most usual scenario) the convicted appellant may apply to the Court of Criminal Appeal for leave by way of an appeal against the refusal<sup>31</sup>.
- ▶ Under Order 84 of the Rules of the Superior Courts, 1986, leave to apply for judicial review may be sought without notifying the affected parties unless ordered by the Court. However, the facts, grounds and reliefs for the judicial review must be set out in a prescribed format and the Order granting leave may limit the facts to be reviewed, the grounds relied upon and the reliefs sought in a judicial review.



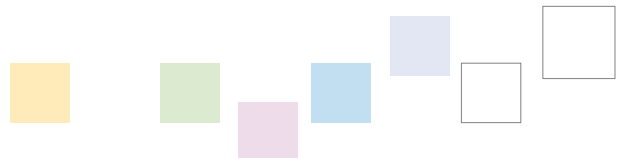
- 4.28 The ascertainment of facts by a regulator in many cases requires a specialist's knowledge and understanding. Consideration must also be given to whether appeals should be allowed in relation to the facts/information on which the decision was based or whether appeals should be confined to conclusions drawn by the regulator from these facts.

#### QUESTIONS FOR CONSULTATION:

28. Should a mechanism be established whereby leave to appeal would need to be sought and granted? If so, what person/body should be given the power to grant or refuse leave to appeal?
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?

#### *(ii) Decision powers of appeals body*

- 4.29 A final area for consideration is the nature of the decision that the appeals body can make, where it finds in favour of the appellant. There are essentially two options:
- (1) the appeals body can remit the case to the regulator for a new decision, or
  - (2) it can replace the decision with its own.
- 4.30 A decision to remit is frequently made where the appellate body has found a procedural flaw in a decision. In such instances, the case would be sent back to the original decision-maker "to hear and determine in accordance with law" - in other words, the decision-maker must apply the correct rules in arriving at its decision. In such a case, the new decision might be exactly the same as the original one, but the procedural flaw would have been corrected.
- 4.31 Less usually, an appeals body might be granted the power to remit a decision where it considers that the decision of the regulator was wrong based on the merits. This power would allow the appeals body to act as a safeguard against decisions that were procedurally sound, but where the appeals body felt a significant misjudgment had occurred. This approach would allow a careful re-assessment of the matter by the regulator. However, this leaves open the possibility that the regulator would take the same decision again with the possibility of further appeals and a prolonging of the process.
- 4.32 The option of allowing the appeals body to have the power to replace the decision of the regulator with its own decision has the merit of shortening the appeals process. A second argument in favour of giving the appeals body a full right to replace a regulator's decision is that the appeals body may be considered to be more independent than the regulator due to concerns about the potential for regulatory capture. However, it is not clear that a lack of independence on the part of regulators is perceived to be a significant problem in the Irish regulatory system.
- 4.33 Arguments against this approach are:
- (a) it might simply replace one view of the correct decision with another, as the balance of opinion on the appeals body as to the preferable approach to regulation may simply be different from the balance of opinion on the regulatory body; and
  - (b) it might encourage an excessive use of appeals as a speculative attempt to reopen general regulatory policy issues. The resulting uncertainty in regulatory approach and fracturing of



decision making is not likely to be good for planning or for attracting investment into the regulated sector.

- 4.34 It is also suggested that the standing of the regulator to decide and represent regulatory policy might be weakened if its decision could be replaced upon appeal. In other words, the appeals body might then be viewed as the *de facto* regulator, making the regulator itself effectively obsolete. It must also be noted that regulators are usually accountable to the Oireachtas, whereas appellate bodies usually are not.
- 4.35 As may be seen, a number of issues arise in relation to what form the decision of an appeals body should take, and it may be appropriate to vary this from sector to sector. Respondents to this consultation process are invited to comment on the matter, supplying reasons where possible.

#### QUESTION FOR CONSULTATION:

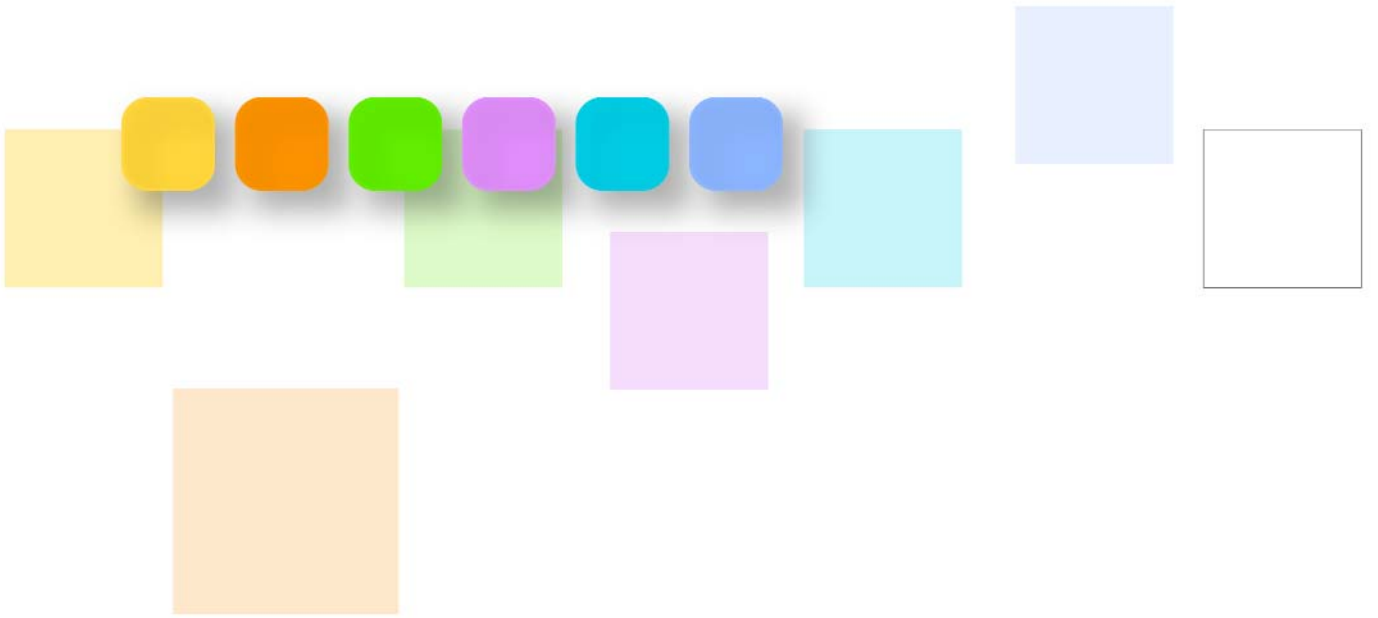
30. Should an appeals body have the power to remit the case to the regulator for a new decision, or the power to replace the regulator's decision with its own? Should this vary from sector to sector?

#### ***(iii) Status of existing decision***

- 4.36 A matter which must also be decided in designing an appeals mechanism is whether or not the decision made by the regulator should stand for the duration of the appeals process or should be suspended. A possible advantage of allowing the regulator's decision to stand is that this could act as a disincentive for firms to appeal in order to delay the implementation of a decision. However, a disadvantage of this approach is that where the appeal is upheld, the effects of the decision standing might have already taken effect and proven to impact negatively or unjustly on the market or individual actors in the market. In such cases, there should be a case for a remedy for a successful appellant but the type of remedy and who should decide this must be determined.
- 4.37 There may be particular sectors or classes of decisions where suspension is more appropriate. Alternatively, parts of a decision might be suspended until an appeal is determined. Where suspension is an issue, it must be decided who should decide on the suspension: the appeals body, the regulator or a Court, or whether it should be provided for in legislation.

#### QUESTIONS FOR CONSULTATION:

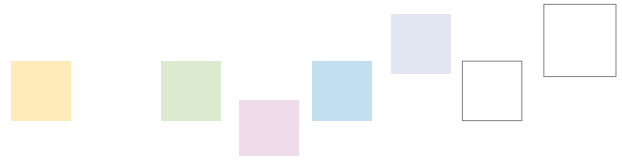
31. Should the regulator's decision stand during the appeals process? What would be the implications of such an approach? Should certain types of decisions stand?
32. Should there be scope for suspending parts of a decision and who should adjudicate on this?
33. Where a decision has not been suspended and an appeal is upheld, what type of remedy should be available for the appellant and who should decide this?
34. Are there any outstanding issues/challenges in improving appeals mechanisms that are not reflected in this Paper? Please specify.





# Appendix 1

## Glossary of Abbreviated Terms



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<b>CAR</b>	Commission for Aviation Regulation
<b>CAT</b>	Competition Appeals Tribunal (UK)
<b>CER</b>	Commission for Energy Regulation
<b>ComReg</b>	Commission for Communications Regulation
<b>ECAP</b>	Electronic Communications Appeals Panel
<b>ECHR</b>	European Convention on Human Rights
<b>ERG</b>	European Regulators Group
<b>EU</b>	European Union
<b>IRG</b>	Independent Regulators Group
<b>NRA</b>	National Regulatory Authority
<b>ODTR</b>	Office of the Director of Telecommunications Regulation
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>OFCOM</b>	Office of Communications (UK)
<b>OFT</b>	Office of Fair Trading (UK)

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# Appendix 2

## Definitions of White Paper Principles



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### Six principles of good regulation as identified in the Government White Paper, *Regulating Better*:

**Necessity** Is the regulation necessary? Can we reduce red tape in this area? Are the rules and structures that govern this area still valid?

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**Effectiveness** Is the regulation properly targeted? Is it going to be properly complied with and enforced?

---

**Proportionality** Are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?

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**Transparency** Have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?

---

**Accountability** Is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?

---

**Consistency** Will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

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Source: *Government White Paper, Regulating Better*, p. 2



# Appendix 3

## Further information on Article 6 of the European Convention on Human Rights



The European Convention on Human Rights came into force in domestic law by virtue of the ECHR Act 2003 which was commenced on December 31st 2003.

Article 6(1) of the Convention (Right to a Fair Trial) provides as follows:

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.*

### **Procedural guarantees under Article 6(1)**

The elements of Article 6(1) either as expressly stated or as held by the European Court of Human Rights include the following:

- ▶ Right of access to a Court
- ▶ An independent tribunal
- ▶ An impartial tribunal
- ▶ Established by law
- ▶ Fair hearing (including equality of arms and can include right to adversarial proceedings, right to be represented and legal aid, right to be present and participate, disclosure of relevant documents, right to call and challenge evidence, right to introduction of expert evidence and fair allocation of costs)
- ▶ Public hearing
- ▶ Right to a reasoned judgment
- ▶ Public judgment
- ▶ Determination within a reasonable time
- ▶ Right to enforcement of judgment

In any consideration of regulatory matters which could potentially constitute civil rights or obligations for the purposes of Article 6(1) of the ECHR, regard must be had to the various procedural guarantees in Article 6(1).

In *Le Compte v. Belgium (1981) 4 EHRR 1, ECtHR*, the Court held that in cases where Article 6 applies, it is permissible for the decision-making administrative bodies not to be compliant with the procedural safeguards in Article 6 as long as there is a right of appeal to a Court with “full jurisdiction”. In other words, appeals mechanisms (depending on their format) in respect of regulatory decisions can cure procedural defects occurring at an earlier stage.

In order to have full jurisdiction that Court (appeals body) must comply with the relevant Article 6(1) procedural safeguards.



# Appendix 4

## Further Information on Appeals in the Communications Sector



### ComReg/ODTR statistics regarding judicial review and appeals to ECAP (1998-2006)

#### Comparison of time periods for possible stages of review of decisions:

The experience to date has been compared to show how long it takes for a decision to be appealed, including the time limit to bring the appeal, the time for an appeal to be assigned a forum for hearing, the time for the first hearing to occur to assess the appeal procedures, the time for a stay application to be heard if requested, the time for the full hearing and the time for a judgement to be issued if not given at the full hearing. All of these time-frames factor into the efficiency of the appeals mechanism. The data indicates that for challenges to ComReg/ ODTR decisions, High Court procedures (by judicial review, appeal on a point of law or a hearing in the Commercial List of the High Court) have generally been faster than those of ECAP. The data below reflects in more detail the experience in each case.

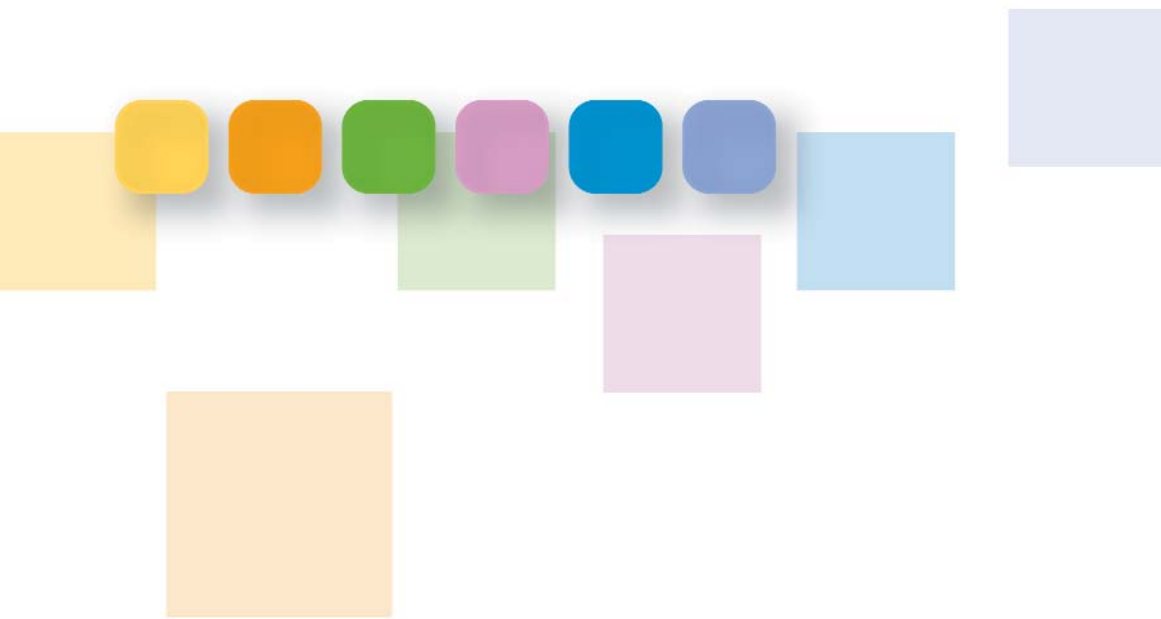
Type of Challenge	Time limit to bring judicial review	Time to establish panel to hear appeal and stay †	Time to preliminary hearing	Time to hear stay application	Time to full hearing	Time to final ruling
<b>A. High Court judicial review and Commercial List (data 1998-2006)</b>	6 months	Court already exists	-3 months (1 case) -2 months (1 case) -6 days (1 case) -1 day (1 case)	Immediate upon summary application	-2 months (1 case) -2.5 months (1 case)	5.5 months (1 case)
<b>B. High Court appeal on a point of law by Plenary Summons (data 1998-2002)</b>	Varies per legislation from 10-30 days	Court already exists	No data	Immediate upon summary application	-11 months (1 case) -7 months* (1 case)* Note that this was appeal of the above to the Supreme Court	No data
<b>C. Appeal to ECAP (data 2004-2006)</b>	28 days per Regulations	-1 month (2 cases) -2 months (4 cases) -3 months (4 cases) -None established (1 case)	-5.5 months (1 case) -4 months (5 cases) -5 months (4 cases)	-4 months (1 case) -None (1 case settled within 3 months and stay never heard)	-11 months (2 cases) -9 months (3 cases) -8 months (3 cases)	-13 months (1 case)



- 1 The Better Regulation Group was established in 2004 to oversee the implementation of the Action Plan arising from the White Paper.
- 2 See Appendix 2 for definitions of the six core principles of good regulation.
- 3 The legal basis for this appeals mechanism is the European Communities (Electronic Communications Networks & Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), which transposed the EU Framework Directive.
- 4 In the event that court proceedings are ongoing, the Minister may decide not to refer the appeal to a Panel.
- 5 The relevant legislation here is S.I. No. 60 of 2005, European Communities (Internal Market in Electricity) Regulations 2005.
- 6 This is provided for in the Electricity Regulation Act ,1999.
- 7 The term "user" has a broad meaning and includes any person
  - (a) for whom any services or facilities are provided at Dublin Airport (which are subject to airport charges);
  - (b) using any of the services for the carriage by air of passengers or cargo provided at Dublin Airport; or
  - (c) otherwise providing goods or services at Dublin Airport.
- 8 A category declaration is a declaration made in writing by the Competition Authority that a certain category of agreements, decisions or concerted practices is not prohibited by the Competition Act, 2002, because it complies with certain specified conditions. A category declaration is the Irish equivalent of an EU Block Exemption.
- 9 A licensing authority can be a local authority, the Gardaí or the Commission for Taxi Regulation and is to be determined by the Commission.
- 10 There is a right to judicial review in all cases. It is not, therefore, included in Table 2.1.
- 11 See Appendix 3 for further information on Article 6 of the European Convention on Human Rights.
- 12 In this case a "court" does not have to be a court as we normally understand that term.
- 13 See *Le Compte v. Belgium [1981] 4 EHRR 1, ECtHR*.
- 14 This figure rises to 18 if the appeal by Orange is included (this appeal was on a point of law by plenary summons, initially to the High Court and on appeal to the Supreme Court) and 8 other cases from 1999 to 2001 all of which were settled without a full hearing commencing. References to the Orange appeals are *Orange v ODTR (1) 1998 no. 12160P*. *Orange v ODTR Appeal to Supreme Court 224 & 278/1999 & 14/200*.
- 15 OECD 2001, *Regulatory Reform in Ireland*, Paris: OECD p. 136.
- 16 The full report of the High Level Interdepartmental Committee on the Recommendations contained in the Consumer Strategy Group Report can be accessed at the following web link: <http://www.entemp.ie/publications/commerce/2006/consumerstrategy.pdf>.
- 17 OFCOM is the independent regulator and competition authority for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services.
- 18 The Independent Regulators Group (IRG) represents 33 independent regulators drawn from the European Union, European Free Trade Area and a number of EU candidate countries.



- 19 The European Regulators Group (ERG) consists of European National Regulatory Authorities in the communications sector (NRAs). Its members are the twenty-five EU Member States. The four EFTA States (Switzerland, Norway, Iceland and Liechtenstein) and the four EU candidate countries (Bulgaria, Romania, Turkey and Croatia) participate as observers. The ERG was created to act as an advisory group to help the European Commission develop the internal market for electronic communications and services and ensure the consistent application of the regulatory framework. The ERG takes into account, in its work, the objectives given to NRAs in Article 8 of the Framework Directive (2002/21/EC) to promote competition, contribute to the development of the internal market and promote the interests of EU citizens. The Independent Regulators Group (IRG) is an unofficial forum of NRA Heads.
- 20 Page 3 of IRG/ERG Response to the Call for inputs into the review of the EU Framework on Electronic Communications (IRG/ERG01 of 23 February 2006).
- 21 See Box 2.3
- 22 The Rules of the Superior Courts (Competition Proceedings) 2005 (S.I. No. 130 of 2005)
- 23 Rule 1 (b) of Order 63A of the Rules of the Superior Court provides that cases can be listed which involve: *“proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the High Court Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the High Court Commercial List”*. Rule 1 (g) provides that *“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 decision or determination or give such direction, where the Judge of the High Court Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the High Court Commercial List”*.
- 24 Competition Authority v. O'Regan and Others [2004] IRLHC 330
- 25 Ibid
- 26 European Communities (Electronic Communications Networks and Services)(Framework) Regulations (S.I. No. 307/2003) Regulation 8 (6)
- 27 Ibid
- 28 This guideline timescale of four months was set out in the Regulations governing the appeals process, i.e. European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003 (S.I. No. 307/2003)
- 29 The EU Commission commented on this in its 11th Report on the Implementation of the Telecommunications Regulatory Package 2005 Final Report (COM (2006) 68, Brussels, 20.02, 2006, SEC (2006) 193) Annex, the Staff Working Paper Volume I at pages 147-148 reports regarding appeals *“The Regulations transposing the framework in Ireland provide for an appeals mechanism on an ad hoc basis, with an appeals panel being set up only when an appeal against a ComReg decision is received. Certain observations can be made on the operation of the new appeals procedure. Mindful of the need to ensure due process, it appears that the members of the appeals panels have taken a cautious and detailed approach to the cases referred to them, with proceedings substantially exceeding the four month target set for them”*.
- 30 S.31 (i) of the Courts of Justice Act, 1924 and see paragraphs 22-30 to 22-70 of *“Criminal Procedure”* by Professor Dermot Walsh with consultant editor Patrick MacEntee SC [2002].
- 31 S.31 (ii) of the Courts of Justice Act, 1924.



[www.betterregulation.ie](http://www.betterregulation.ie)