



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Guidelines and Rules applying to the Adjudication Regime under Part 7 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023

Response to Consultation 24/14

Response to Consultation

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Commission for Communications Regulation

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Additional Information

Related Publications	Document Number
Guidelines for Adjudication Proceedings	ComReg 25/03a
Rules for Adjudication Oral Hearings	ComReg 25/03b
Submissions in Response to Consultation 24/14	ComReg 24/14s
Information Notice – Consultation on Draft Rules and Guidelines made pursuant to the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023	ComReg 24/14
Draft Guidelines for Adjudication Proceedings	ComReg 24/14a
Draft Rules for Adjudication Oral Hearings	ComReg 24/14b

This document is prepared for the information of market participants who participated in this consultation. Final versions of the guidelines on the conduct of adjudication proceedings published by ComReg pursuant to section 89(2) of the 2023 Act, and the rules for the conduct of oral hearings made by ComReg pursuant to section 86(17) of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the “2023 Act”), are published as ComReg Documents 25/03a and 25/03b respectively.

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1 Executive Summary

- 1.1 Part 7 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the “**2023 Act**”) introduces an independent adjudication process into the regulatory regime enforced by the Commission for Communications Regulation (“**ComReg**”).
- 1.2 Part 7 of the 2023 Act was commenced on 9 June 2023 and is supplemented by the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (Part 7) Regulations 2023 (S.I. No. 500 of 2023) (the “**Regulations**”), which were made by the Minister for Communications, Climate Action and Environment on 23 October 2023 (the “**Minister**”).
- 1.3 ComReg is mandated by section 89(2) of the 2023 Act to publish guidelines on the conduct of adjudication proceedings.
- 1.4 ComReg is mandated by section 86(17) of the 2023 Act to make rules for the conduct of oral hearings.
- 1.5 On 21 February 2024, ComReg set out its proposed guidelines on the conduct of adjudication proceedings (the “**Guidelines**”) in its consultation entitled “Guidelines for Adjudication Proceedings” (ComReg 24/14a), and its proposed rules for adjudication oral hearings (the “**Rules**”) in its consultation entitled “Rules for Adjudication Oral Hearings” (ComReg 24/14b) (together, the “**Consultation**”).
- 1.6 ComReg received submissions (together, the “**submissions**”) to the consultation from five (5) respondents:
 - Eircom Limited (trading as ‘eir’ and ‘open eir’), collectively referred to as ‘eir Group’ or ‘eir’ (“**Eir**”)
 - Sky Ireland Limited (“**Sky**”)
 - Three Ireland (Hutchison) Limited (“**Three**”)
 - Virgin Media Ireland Limited (“**Virgin**”)
 - ALTO, alternative operators in the communications market (“**ALTO**”)
- 1.7 ComReg has reviewed and duly considered the submissions. This Response to Consultation sets out ComReg’s position with respect to the matters raised in the submissions.
- 1.8 Having considered the submissions, ComReg has implemented various amendments to the text of the Guidelines and Rules as consulted upon. ComReg will adopt and publish the Guidelines and Rules as so amended.

1.9 In particular, ComReg amended the Guidelines to take account of the submissions in respect of the following matters:

- 1.9.1 **Independence:** ComReg amended the language of section 2 of the Guidelines to confirm and emphasise the independence of Adjudicators and the effective internal separation between the functions of ComReg and the functions of Adjudicators, as required by Regulation 13 of the Regulations and section 77 of the 2023 Act. In particular, ComReg deleted the word “*substantively*” from that section. ComReg introduced further textual amendments to clarify that neither staff of the Adjudication Unit nor assistants to Adjudicators will participate in the making of decisions by Adjudicators. Further changes emphasise that staff of the Adjudication Unit and assistants to adjudicators will not participate in the making of the decision of the Adjudicator under section 90(2) of the 2023 Act, that staff of the Adjudication Unit will take actions in relation to adjudication proceedings only on foot of directions from the Adjudicator / Chief Adjudicator, and that their involvement in an Adjudication will be limited to providing administrative assistance to Adjudicators.
- 1.9.2 **Commercial sensitivity:** ComReg amended the Guidelines to make clear that the Adjudicator shall have all due regard for the protection of commercially sensitive information when providing a copy of a referral report to a third party for the purpose of requesting further information. ComReg also amended the various provisions in relation to publication of decisions to allow notified persons and ComReg to review an adjudication decision prior to publication to consider whether they wish to request redactions, the final decision on which will rest with the Adjudicator. Notified persons will also have the opportunity to request redactions prior to publication of an adjudication decision confirmed by the High Court prior to publication on ComReg’s website pursuant to section 110 of the 2023 Act. The final decision on those later stage redactions will rest with ComReg.
- 1.9.3 **Oral hearings and case management:** ComReg increased the notice period required in advance of an oral hearing from 28 days to 42 days. ComReg decreased the notice period required in advance of a case management hearing from 28 days to 14 days. ComReg also amended the Guidelines to allow the parties to request a case management hearing, and to provide for directions on physical, remote or hybrid hearings.
- 1.9.4 **Publication:** ComReg amended the Guidelines to clarify that decisions of Adjudicators will be published only after the adjudication proceedings have been determined, whether as the result of (i) a

decision by the Adjudicator that no breach has occurred, or (ii) a decision by the Adjudicator on the sanction to be imposed following a finding that a breach has occurred, as well as following confirmation of the decision by the High Court.

- 1.9.5 **Submissions on sanction:** ComReg amended sections 7.4 and 7.5 of the Guidelines to clarify that the Adjudicator will provide confirmation to the notified person in the event that ComReg does not deliver written submissions in relation to sanction.

1.10 ComReg made the following amendments to the Rules:

- 1.10.1 ComReg has made it clear that an Adjudicator may refuse to permit a party to call a witness or expert whose evidence the Adjudicator considers not to be relevant to, and/or necessary to hear in order to resolve, any matter properly to be inquired into in the adjudication. (see Rule 4.8.3); and

- 1.10.2 A rule has been included to confirm that the Rules do not compel the disclosure of documents which a person would be entitled to refuse to produce on the grounds of legal professional privilege, nor do the Rules authorise the inspection or copying of any document containing such information that is in a person's possession, power or control (see Rule 4.9.4);

- 1.11 To the extent that the respondents identified other issues and requested further amendments to the Guidelines and/or Rules beyond those amendments which have been adopted, ComReg has set out below its position on those matters, together with its explanation as to why those issues do not necessitate further amendments to the Guidelines and/or Rules.

- 1.12 The final Guidelines and Rules are published with this Response to Consultation. The submissions received by ComReg in response to the consultation are published in ComReg Document 24/14s.

- 1.13 The final Guidelines and Rules will take effect from 14 December 2024, the date on which they are published on ComReg's website.

2 Issues raised in response to consultation on the Guidelines

2.1 Independence of Adjudication Unit and Adjudicators

- 2.1 Four respondents, Eir, Virgin, Three and ALTO, raised concerns in relation to independence. The principal concerns expressed regarding independence were: (i) the effective separation between the adjudication regime and ComReg; (ii) the role of the Adjudication Unit and the assistance to be provided to Adjudicators under section 81 of the 2023 Act; (iii) the role of the Chief Adjudicator; and (iv) the independence of individual Adjudicators.

Respondents' views:

Adjudication Unit

- 2.2 While Three acknowledged that Adjudicators will need practical support and that ComReg's proposals in that regard seemed appropriate, a key concern raised generally in the submissions regarding independence related to the Adjudication Unit.
- 2.3 Virgin flagged its *"serious concerns that [the] independence of the Adjudication process is insufficient"* and noted that a process lacking independence would show deference to the regulator, i.e. ComReg. Virgin submitted that the Guidelines *"could (and should) assist in this regard by more clearly codifying the requirements of Independence in relation to the Adjudication process."* Virgin also submitted that the Unit should be *"separate and independent of ComReg"* and that the Guidelines would be improved *"if ComReg were to emphasize more clearly that the role of the Adjudication Unit is purely administrative in nature and would have no role in terms of influencing decision making."*
- 2.4 Eir submitted that the Adjudication Unit was an *"unnecessary proxy that is not in line with the 2023 Act or the Regulations"*. Eir submitted that ComReg had incorrectly proposed to assign Adjudicators' responsibilities to the Unit without the Adjudicator's prior authorisation as required by section 85(8) of the 2023 Act. Eir also submitted that ComReg failed to outline the separation between the Unit and ComReg as required by Regulation 13 of the Regulations.
- 2.5 Eir further submitted that the establishment of a permanent or temporary unit dedicated to assist adjudicators was not in line with section 81(1) of the 2023 Act, which provides that ComReg may *"from time to time"* require an employee or appoint such persons as it considers necessary to assist adjudicators in the performance of functions under the 2023 Act. Eir queried the need for the

creation of the Unit given that, in Eir's view, it is unlikely that the volume of adjudications will warrant a dedicated permanent Adjudication Unit, which it described as being "*in ComReg*".

- 2.6 All three respondents took issue with section 2.1 (as consulted upon) of the Guidelines having provided that "*staff of the Adjudication Unit will not participate **substantively** in adjudication proceedings or in the making of decisions by Adjudicators...*" and submitted that the word "*substantively*" is not provided for in the 2023 Act and appeared to contradict Regulations 12 and 13 of the Regulations:

2.6.1 Three submitted that while the Guidelines state that ComReg staff assisting the Adjudicators "*will not be subject to the direction of any member or employee of the Commission in relation to the performance of their functions in assisting Adjudicators,*" this might not prevent the assistants reporting into "*conflicted management functions for the purposes of wider employment management*". Three suggested this would not meet the "*effective internal separation*" standard required by the Regulations.

2.6.2 Eir submitted that: "*ComReg needs to make it clear that staff that assist the adjudicators whether in the Adjudication Unit or otherwise, will have absolutely no role in the decision-making process as required under legislation, eir considers that this includes that staff to the adjudicators could not draft, make or propose recommendations to the adjudicator on such decisions.*"

2.6.3 Eir also identified the text at section 2.1 of the Guidelines that staff of the Adjudication Unit "*will not be subject to the direction of any member or employee of the Commission in relation to the performance of their functions in assisting Adjudicators*" and queried how this would be ensured and how the Adjudication Unit "*that sits within ComReg will be run without oversight or influence from ComReg staff*".

Assistants to Adjudicators under section 81 of the 2023 Act

- 2.7 Eir questioned whether assistants to the Adjudicator would be "*solely responsible to the Chief Adjudicator, or to the adjudicator or adjudicators to which they have been individually assigned, in relation to providing assistance in accordance with subsection (1)*", as required by section 81(4) of the 2023 Act in circumstances where it is not clear whether the Chief Adjudicator will run the Adjudication Unit and so where assistants may also be responsible to the head of the Adjudication Unit.

- 2.8 Eir (incorrectly, in ComReg's view, for the reasons set out at section 2.13.6) interpreted the Adjudication Unit as an impediment to an Adjudicator's entitlement under Section 81(7) of the 2023 Act to be consulted on decisions

concerning the appointment and assignment of a person to provide assistance to that Adjudicator.

- 2.9 Eir submitted that it appeared that ComReg was attempting to create a dynamic where assistants to Adjudicators and the Chief Adjudicator would always be ComReg staff, which Eir considered to be problematic in terms of ensuring the independence of Adjudicators as required under section 77 of the 2023 Act.

Independence of Adjudicators

- 2.10 ALTO submitted that elements of Chapter 3 of the 2023 Act itself, which concern the appointment of certain kinds of adjudicators connected to or employed by ComReg, offends against natural justice and the *nemo iudex in sua causa* requirement (that no person should be a judge in their own case). ALTO urged ComReg to only empanel “*entirely independent adjudicators or divisions of adjudicators*” and in this regard referred to the regime applied by the Competition and Consumer Protection Commission.
- 2.11 Virgin submitted that Comreg should “*make additional comments*” on the importance of independence in relation to the roles of Adjudicator and Chief Adjudicator. Virgin referred in that regard to sections 77 and 90 of the 2023 Act and submitted that ComReg should specifically reference Regulations 13 and 14 of the Regulations providing for the independence of Adjudicators.
- 2.12 Three submitted that in order to comply with Regulation 13(a) of the Regulations and section 77 of the 2023 Act, requiring “*effective internal separation between the functions of ComReg and the functions of Adjudicators*” and the independence of Adjudicators, ComReg staff should not be appointed as Adjudicators.

ComReg's analysis:

- 2.13 In relation to the above, ComReg would note the following:
- 2.13.1 The Adjudication Unit will be an administrative support function with the sole purpose of assisting the adjudicators. Its staff will not engage in the decision-making process in adjudications.
- 2.13.2 Section 77(2) of the 2023 Act requires ComReg to “*put in place*” measures to ensure the independence of adjudicators. The Adjudication Unit is one such measure.
- 2.13.3 For clarity, ComReg has included further wording in relation to independence at a new section 2.1 of the Guidelines which derives from Regulation 13 of the Regulations, as set out below.
- 2.13.4 ComReg has amended what is now section 2.2 of the Guidelines by deleting the word “substantively” and clarifying that the involvement of

staff of the Adjudication Unit in an Adjudication will be limited to providing administrative assistance to Adjudicators.

- 2.13.5 Section 81 of the 2023 Act is an enabling provision which does not preclude ComReg from establishing a unit of assistants to support the adjudicators. ComReg has taken account, however, of what appears to be the respondents' overarching concern that the Adjudication Unit should be separate from and independent of ComReg. To further assuage the respondents' concerns, ComReg has amended what is now section 2.3 of the Guidelines to make clear that any person assisting an Adjudicator under section 81(1) of the 2023 Act will not participate in the decision-making functions of the Adjudicator, as set out below.
- 2.13.6 Section 81(7) of the 2023 Act is engaged only where an adjudicator has "*made a determination that specific assistance is required in a particular matter.*" A pre-staffed administrative unit does not in any sense interfere with or impede the capacity of Adjudicators to determine that specific (further) assistance is required in particular adjudications or matters under section 81(7) of the 2023 Act.
- 2.13.7 Further, to the extent suggested otherwise in the respondents' submissions, it is not currently envisaged by ComReg that it will nominate members of ComReg's staff or ComReg Commissioners to be Adjudicators or the Chief Adjudicator. ComReg also notes that, while it may review this position in time, the first tranche of persons nominated by ComReg to be appointed by the Minister as Adjudicators included no ComReg Commissioners or staff and consequently the current panel of 15 Adjudicators includes no ComReg Commissioners or staff.
- 2.13.8 Section 81 of the 2023 Act expressly envisages that Adjudicators may be assisted in the performance of their powers and functions under the 2023 Act. To the extent, therefore, that the 2023 Act prescribes particular actions to be taken or documents to be received by Adjudicators, it follows that it is permissible for Adjudicators to be 'assisted' in those prescribed functions (whether by the Adjudication Unit or by assistants more generally). Sections 2.4, 3.5, 6.1 and 6.4 of the Guidelines have, however, been amended to clarify that staff of the Adjudication Unit will take actions only on foot of directions from the Adjudicators or Chief Adjudicator as set out below.
- 2.13.9 Furthermore, the establishment of an administrative function in the form of the Adjudication Unit between the authorised officer and the Adjudicators enhances the independence of the process on the whole by removing any direct contact between Authorised Officers and Adjudicators.

2.13.10 Finally, the Guidelines are drafted in accordance with the 2023 Act and the Regulations. ALTO's submission as to the constitutionality of certain sections of the 2023 Act is not a matter for this consultation. For the avoidance of doubt, however, ComReg notes that, in designing the Guidelines and the Rules, regard has been had not only to the express provisions of the 2023 Act and the Regulations, but also to broader constitutional requirements and the Supreme Court's decision in *Zalewski v. Adjudication Officer & ors* [2021] IESC 24.

ComReg's position:

2.14 Having regard to the preceding analysis, the respondents' submissions, the relevant provisions of the 2023 Act and the Regulations ComReg has amended the following provisions of the Guidelines in relation to independence:

2.1 – Independence of Adjudicators

The Commission shall at all times ensure the effective internal separation between the functions of the Commission and the functions of Adjudicators and that the structure, policies, practices and functions of, and working arrangements within the Commission are consistent with section 77 of the 2023 Act.

2.2 – Adjudication Unit

...

While staff of the Adjudication Unit may provide administrative assistance to Adjudicators, they will not participate substantively in the making of decisions by Adjudicators and, in the case of employees of the Commission assigned to staff the Adjudication Unit, will not be subject to the direction of any member or employee of the Commission in relation to the performance of their functions in assisting Adjudicators.

2.3 – Appointment of assistants to Adjudicators

*The Commission may nominate employees, or appoint other persons, to act as assistants to an Adjudicator or Adjudicators pursuant to section 81 of the 2023 Act. Such persons may be assigned to staff the Adjudication Unit. The Chief Adjudicator will direct such employees or persons to assist an Adjudicator or Adjudicators as considered appropriate. **A person assisting an Adjudicator or Adjudicators under section 81(1) of the 2023 Act shall not participate in the making of the decision of the Adjudicator or Adjudicators under section 90(2) of the 2023 Act.***

2.4 – Adjudication Portal

The Adjudication Unit, on for and on behalf of the Chief Adjudicator, will administer and manage an electronic database in respect of all matters referred for adjudication which will be known as the “Adjudication Portal”. Access to the Adjudication Portal for individual matters referred for adjudication will be made available to notified persons and/or their agents in order to facilitate the electronic transmission and exchange of notices and documents referred to in these Guidelines.

2.2 Provision of Documents upon Referral for Adjudication

- 2.21 Section 3.4 of the Guidelines sets out the documents to be provided by an authorised officer to the Adjudication Unit when referring a matter for adjudication. Those documents must “as soon as practicable” thereafter be provided to the notified person and must include a copy of “*all material relied upon by the authorised officer in forming his or her opinion*”.

Respondents’ views:

- 2.22 Three submitted that the Guidelines should specify the timeframe within which the notified person should receive the documents specified so as to allow the notified person sufficient and reasonable time to consider them. Three also submitted “*that it should be on the same day that the referral is made to the Adjudication Unit*”.
- 2.23 Sky sought clarity as to whether the “opinion” formed by the authorised officer is an opinion that “*there are reasonable grounds for suspecting a breach, as opposed to an opinion on non-compliance as we have today. The opinion on non-compliance should be for the Adjudicators.*”.
- 2.24 Sky also submitted that it should be made clear that an authorised officer will only provide the relevant notices of suspected non-compliance to the notified person “*so that there can be no confusion as to what particular offences have been forwarded to the Adjudication Unit for review. This suggestion is to cover the situation where only a portion of alleged non-compliance matters are passed to the Adjudication Unit, and we believe this suggested amendment will lead to certainty as to the matters under referral.*”.
- 2.25 Finally, Eir noted that section 3.4 of the Guidelines provided for the documents in question to be provided to the Adjudication Unit. Eir submitted that these documents should be sent to the Adjudicator directly under section 71 of the 2023 Act: “*There is no requirement provided under legislation that would allow ComReg’s adjudication unit to handle or review these documents before they are sent to an adjudicator. It does not appear the proposed process will save*

time or improve the efficiency of the process”.

ComReg's analysis:

- 2.26 Section 71(2) of the 2023 Act provides that an authorised officer shall, “**as soon as practicable**” after providing the Adjudicator with the information specified in subsection (1), give the notified person the documents referred to at subsections 71(2)(a) and (b). The Guidelines have reflected the wording of those provisions.
- 2.27 The “opinion” referred to at section 3.4 of the Guidelines is the authorised officer’s opinion that, in light of his or her suspicion that there has been a regulatory breach, the matter should be referred to adjudication and it will be the role of the Adjudicator to make a decision on breach in accordance with the 2023 Act. Section 3.4 of the Guidelines has been amended as set out below to clarify this point.
- 2.28 Section 63(1) of the 2023 Act defines a ‘*notice of suspected non-compliance*’ as “*a notice in writing informing the person on whom it is served of the details of a regulatory breach of which the person is suspected*”. All such notices are, by definition, served on the notified person. The referral report detailing the suspected regulatory breach concerned will be provided to the notified person under section 3.4(i) of the Guidelines in order to, *inter alia*, provide certainty as to the matters under referral.
- 2.29 The core, solely administrative functions of the Adjudication Unit are provided for at section 2.2 of the Guidelines. Where documents are sent to or from the Adjudication Unit, the Adjudication Unit is acting on behalf of the Adjudicators or Chief Adjudicator and under their sole direction. Section 3.4 of the Guidelines has been amended as set out below to clarify this point.

ComReg’s position:

- 2.30 Having regard to the preceding analysis and to sections 71(2) and 63(1) of the 2023 Act, ComReg considers that it is not necessary or appropriate to provide at section 3.4 of the Guidelines for a specific time period within which the relevant documents in question must be provided to the notified person. In making any such provision, ComReg would encroach on a matter specifically reserved to the Adjudicators under the 2023 Act and it is, in any event, a matter which is best left to the discretion of the Adjudicators. Equally, ComReg does not consider that any amendment to the effect that only “relevant” notices of suspected non-compliance will be provided to the notified person is necessary for the effective operation of the adjudication regime.
- 2.31 However, given that some respondents expressed doubt on the point, ComReg

has amended Section 3.4 of the Guidelines as set out below in order to clarify that the “opinion” referenced is that of the authorised officer referring the matter for adjudication. ComReg has also amended Section 3.4 to clarify that staff of the Adjudication Unit will take actions on foot of directions from the Adjudicators or Chief Adjudicator. Similar textual amendments have also been made to sections 3.5, 4.2, 6.1 and 6.4 of the Guidelines. Separately, although not provided by the 2023 Act nor commented upon in the submissions received, ComReg has had regard to the rights of notified persons pursuant to European case law to wider disclosure of relevant material beyond the terms of the 2023 Act. ComReg has inserted supplementary text at section 3.4(d) to make provision for disclosure of such material to notified persons in accordance with ComReg’s *Access to File Policy*, which will be published by ComReg in due course and updated from time to time.

3.4 - Provision of documents upon referral

*When referring a matter for adjudication, the authorised officer will provide the following documents to the Adjudication Unit, **acting for and on behalf of the Chief Adjudicator**:*

- (a) the notice of suspected non-compliance served by the authorised officer under section 63, and any supplementary notice of suspected non-compliance served by the authorised officer under section 64;*
- (b) the referral report;*
- (c) a copy of all material relied upon by the authorised officer **for the purposes of referring the matter for adjudication** ~~in forming his or her opinion~~;*
- (d) **any relevant material disclosed in accordance with the Commission’s Access to File Policy, which will be published in due course, and as updated from time to time**; and*
- (e) any submissions made by the notified person during the investigation.*

As soon as practicable after providing those documents to the Adjudication Unit, the authorised officer will provide the following to the notified person or its agents ~~by email where possible, or where not possible, by ordinary prepaid post~~:

- (i) copy of the referral report; and*
- (ii) a copy of, or access to, any material (other than material that has already been provided to the notified person) relied upon by the authorised officer for the purpose of referring the matter for adjudication (subject to redactions as appropriate).*

2.3 Settlements and Adjudications on consent

- 2.31 Section 4.4 of the Guidelines sets out the sanctions which can be imposed by an Adjudicator where a notified person served with a consent notice confirms in writing the matters set out in the settlement report.

Respondents' views:

- 2.32 One respondent, Sky, submitted that it was unclear whether the sanctions imposed in an adjudication on consent would be in addition to any settlement agreed with ComReg: *"It seems odd from a process perspective that the Commission can agree a settlement with a party, but that settlement agreement can be replaced by an Adjudicator. Some clarity on the settlement process would be appreciated."*
- 2.33 More generally, Sky submitted that it appeared from the language of section 4.4 that it is no longer open to ComReg to settle matters during an investigation without a formal referral for adjudication and queried whether this would be the case going forward.

ComReg's analysis:

- 2.34 The language in section 4.4 reflects the language in section 84 of the 2023 Act. Where a settlement report is referred for adjudication on consent, section 84 qualifies the Adjudicator's discretion to impose sanctions beyond those agreed and expressed in the settlement report: the Adjudicator's power to impose sanctions is limited by the words *"in accordance with the report."*
- 2.35 ComReg expects, therefore, that the settlement terms agreed as between notified persons and ComReg, and thereafter referred for adjudication on consent, will be given effect (and not subsequently varied) by Adjudicators as a matter of course.
- 2.36 The effect of section 68(3)(c) of the 2023 Act is that it is necessary to formally refer a matter for adjudication in order to conclude any settlement process pursuant to section 68 of the 2023 Act, whether during or following an investigation.

ComReg's position:

- 2.37 Having had regard to the submissions, section 68(3)(c) of the 2023 Act, and the above analysis, ComReg considers that it is unnecessary to amend the text of section 4.4 of the Guidelines.
- 2.38 In relation to Sky's comment that it appears from the language of section 4.4

of the Guidelines that it is no longer open to ComReg to settle matters without a formal referral to adjudication, ComReg notes that it is empowered to agree resolutions with notified persons pursuant to section 62(1) of the 2023 Act, which is an alternative procedure available and remains separate to formal adjudication proceedings.

2.4 Notification by Adjudicator on referral

2.41 Section 5.1 of the Guidelines provides:

As soon as practicable after a referral for adjudication is made, the Adjudicator will, through the Adjudication Unit, serve on the notified person a copy of section 83 of the 2023 Act and a notice in writing (an “adjudication notice”) stating that the notified person may make written submissions to the Adjudicator on the referral report within the period of 30 days beginning on the date of service of the notice, or such further period, not exceeding 15 days, as the Adjudicator may specify in the notice. The Adjudicator will, as soon as practicable after receipt of such written submissions on the referral report, provide the Commission with a copy of those submissions.

Respondents' views:

- 2.42 One respondent, Sky, submitted that the Adjudicator should have discretion to extend the further period for making a written submission beyond 15 days: *“There may be occasions where the Adjudicator, due to unavoidable circumstances, is required to adjust the dates for such matters. A fixed limit on this important period is not in the interest of either party.”*
- 2.43 Sky also submitted that the adjudication notice *“will be accompanied by any current applicable guidelines and procedures, in a similar manner used by other fora at the outset of a new case.”*

ComReg's analysis:

- 2.44 Section 83(c) of the 2023 Act provides that, in the case of a referral under section 71 of the 2023 Act, written submissions on the referral report may be made to the Adjudicator within 30 days of the date of service of the adjudication notice or such further period, not exceeding 15 days, as the Adjudicator may specify in the notice. These time limits are therefore prescribed by the 2023 Act and imported on that basis into section 5.1 of the Guidelines.
- 2.45 The Act does not require ComReg to provide applicable guidelines and procedures when serving an adjudication notice on a notified person. Further, the Guidelines and Rules will be publicly available on ComReg's website.

ComReg's position:

- 2.46 Having had regard to the submissions, the provisions of section 83(c) of the 2023 Act, and the above analysis, ComReg considers that it is unnecessary to amend the text of section 5.1 of the Guidelines.

2.5 Concerns relating to confidentiality

- 2.51 Three respondents raised concerns about the Adjudication Portal (as described at section 2.4 of the Guidelines) and the confidentiality of commercially sensitive information uploaded to it in circumstances where ComReg staff will work in the Adjudication Unit. Other confidentiality concerns related to the disclosure of the referral report to “*any other person*” under section 5.2(c) of the Guidelines, and submissions that notified persons should have an opportunity to specify confidential information contained within a settlement report for redaction both generally and with a view to preventing disclosure under a Freedom of Information request.

Respondents’ views:

- 2.52 Sky sought further engagement in relation to the security of the Adjudication Portal: *“it is essential that further engagement is carried out with industry on the specific security and confidentiality elements of the portal, given the confidential and/or sensitive nature of submissions and the frequency of data incidents in recent times in similar databases. We would expect that best-in-class controls would be applied to such a critical platform and look forward to confirmation of same in due course.”*
- 2.53 In relation to the disclosure of the referral report under section 5.2(c) of the Guidelines, deriving from section 85(1)(c) of the 2023 Act, Sky noted: *“While we note that the Adjudicator may provide third parties with a copy of the referral report and that the Guidelines state that such disclosure shall take “due regard” to confidentiality, we submit that stronger obligations should be placed on the Adjudicator in terms of ensuring that third parties are reminded of any relevant offences for breaches of confidentiality and that appropriate non-disclosure requirements are considered and put in place.”*
- 2.54 Eir was concerned as to whether the Adjudication Portal, which it noted is to be managed by the Adjudication Unit, *“will provide confidentiality for commercially sensitive material”*. Eir also noted the *“due regard for the protection of commercially sensitive information”* which must be had when sharing the referral report under section 85 of the 2023 Act: *“It is not clear that this “due regard” can be upheld if ComReg staff working in the proposed Adjudication Unit will have access to all information in the proposed adjudication portal. The requirement to give due regard to commercially sensitive information applies to information given to ComReg by the adjudicator also, as set out under section 85(5).”*
- 2.55 Eir also submitted that ComReg has not explained how the Adjudication Unit will manage the portal in light of the requirement for an Adjudicator’s prior authorisation before a person who receives the referral report under section

85(1)(c) of the 2023 Act may disclose its existence or content to any other person: *“Eir notes that the adjudicator can request that an employee of ComReg that is an assistant of the adjudicator to make communications on his or her behalf (section 85 (8)). However, ComReg must demonstrate how it will ensure its unit has this prior instruction from an adjudicator and prior authorisation”*.

- 2.56 Finally, Three submitted that where a case is settled by agreement, the notified person should receive a draft settlement report before it is referred to allow them an opportunity to specify any confidential information that should be redacted generally and specifically which should not be released in the future under Freedom of Information requests.

ComReg's analysis:

- 2.57 The Adjudication Unit will adopt appropriate measures to ensure its functional independence from ComReg and, in respect of the Adjudication Portal, to ensure that ComReg will not have access to the Adjudication Portal or information otherwise held by the Adjudication Unit, save to the extent that it is formally provided with such access at the direction of the Adjudicator. Adjudicators, not ComReg, will decide on the commercial sensitivity of documents uploaded to the Adjudication Portal.
- 2.58 In addition to the controls and procedures applying to the Adjudication Unit and its management of the Adjudication Portal, ComReg recognises the importance of ensuring appropriate regard is had to the confidentiality of the referral report when shared under section 5.2(c) of the Guidelines. ComReg notes the existing protections pursuant to section 85(6) of the 2023 Act, which provides that a person who receives a copy of the referral report shall not, without the prior authorisation of the Adjudicator, disclose the existence or content of the report to any other person, together with section 85(7) of the 2023 Act, which creates an offence of contravening section 85(6). While it is not appropriate for ComReg to prescribe how Adjudicators will protect the confidentiality of such information, that being solely a matter for Adjudicators in the exercise of their functions under the 2023 Act, ComReg has amended section 5.2(c) of the Guidelines with a view to protecting any commercially sensitive information in the referral report as set out below.
- 2.59 In relation to Three's submission regarding settlement agreements, the 2023 Act does not provide for the final settlement report referred to at section 68(3)(a) of the 2023 Act to be provided in draft to the notified person for comment prior to referral for adjudication on consent and ComReg is minded to follow the express procedure set out by the 2023 Act. As a matter of practicality, however, the notified person can expect that the essential terms of any settlement report will have been discussed and agreed as between

ComReg and the notified person in the course of the settlement process prior to referral for adjudication on consent. Confidential information within the settlement report is protected *inter alia* by section 101(2) of the 2023 Act, which provides that, save in accordance with law, an Adjudicator, an authorised officer, ComReg and its respective servants or agents shall not, without reasonable excuse, disclose to any person any confidential information obtained by virtue of the exercise of powers conferred by or under the 2023 Act.

ComReg's position:

- 2.60 Having had regard to the submissions, sections 85(6) and 85(7) of the 2023 Act, and the above analysis, ComReg has amended section 5.2(c) of the Guidelines as follows:

5.2 – Powers of Adjudicator following referral

The Adjudicator may do any of the following where he or she considers it necessary to resolve an issue of fact or otherwise to enable the Adjudicator to make an adjudication:

...

- (c) *request further information from any other person, and may, for the purposes of doing so, provide, ~~with due regard for the protection of commercially sensitive information,~~ a copy of the referral report to the person. **When providing a copy of the referral report, the Adjudicator shall have all due regard for the protection of commercially sensitive information therein and the person to whom the referral report is provided** ~~(who must not, without the prior authorisation of the Adjudicator, disclose the existence or content of the report to any other person); and/or~~*

- 2.61 Having had regard to the submissions in relation to the confidentiality of information uploaded to the Adjudication Portal and the confidentiality of information contained in settlement reports, section 101(2) of the 2023 Act and the above analysis, ComReg considers that it is not necessary to further amend the Guidelines as relating to those matters.

2.6 Case Management & Oral Hearings

- 2.61 Section 6 of the Guidelines deals with case management hearings, including the directions that can be made by Adjudicators at such hearings, the consequences of a party failing to comply with previous directions of Adjudicators and matters related to the conduct of oral hearings.

Respondents' views:

- 2.62 One respondent, Sky, submitted that case management and directions should be a feature of every Adjudication: *"to ensure that there is a fair and expeditious process and to minimise the costs to each of the parties. At the very least, each of the parties should be in a position to request a case management hearing. It should not be something that only the Adjudicator or Adjudicators can initiate."*
- 2.63 In relation to the directions that can be made at case management hearings, Sky suggested two further directions as follows: *"We consider that the inclusion of directions applying to (1) utilising remote hearings, and (2) the setting of specific timetables for parties to adhere to in terms of submissions etc, would be useful and would ensure that users are aware that the Adjudicator has the authority to implement these where necessary."*
- 2.64 Sky also submitted that the Guidelines should make specific reference to the Adjudicator's consideration of adjournments of oral hearings due to exceptional circumstances, on application by the parties.

ComReg's analysis:

- 2.65 Adjudicators have discretion under the Guidelines to determine on a case-by-case basis whether it is appropriate to conduct a case management hearing or hearings. The Guidelines do not preclude the parties from requesting case management in particular cases. However, ComReg has amended the Guidelines to clarify that Adjudicators may direct case management either of their own motion or at the request of a party.
- 2.66 In relation to the additional directions sought by Sky, Adjudicators are already empowered to make such directions pursuant to their general powers as are considered necessary or appropriate to facilitate the conduct of adjudication proceedings in a manner which is fair, expeditious, and likely to minimise the overall costs of the adjudication proceedings (under section 6.2 of the Guidelines), and their power to make directions in relation to the matters specified in sections 6.2(a); 6.2(f); 6.2(p); and 6.2(r) of the Guidelines. Although Rule 3.5.1 makes provision for remote hearings at the Adjudicators' discretion, Guideline 6.2(i) has been amended to clarify that case management directions can be made *"in relation to how an oral hearing is to be conducted*

including whether it is to take place in person, remotely or on a hybrid basis and any arrangements (including accessibility arrangements) that are necessary or appropriate in that regard".

- 2.67 Finally, Rule 3.9.1 provides that an Adjudicator may, at his or her discretion or on the application of any party, adjourn an oral hearing to a specific date and/or place. It will be open to the Adjudicator to grant an adjournment by reason of exceptional circumstances if he or she considers it necessary or appropriate to do so.

ComReg's position:

- 2.68 Based on the analysis above, and in order to more expressly differentiate the applicable notice period for a case management hearing under sections 6.1 and an oral hearing under section 6.4, sections 6.1, 6.2 and 6.4 of the Guidelines have been amended as follows:

6.1 - Case management hearings

*An Adjudicator may, **of his or her own motion or at the request of a party**, conduct a case management hearing or hearings if the Adjudicator considers that such a hearing or hearings would assist in determining the adjudication proceedings in a manner which is fair, expeditious, and likely to minimise the overall costs of the adjudication proceedings. Where the Chief Adjudicator has assigned multiple Adjudicators to a division for the purpose of a particular adjudication, one Adjudicator of that division may sit alone for the purpose of conducting the case management hearing. The Adjudication Unit **on behalf of the Chief Adjudicator** will, insofar as practicable, provide the parties with no less than **1428** days' advance notice of the day, time and location assigned for any case management hearing.*

6.2 - Case management directions

At a case management hearing, or at any point during adjudication proceedings, having heard the parties, an Adjudicator may issue such directions as the Adjudicator considers necessary or appropriate to facilitate the conduct of the adjudication proceedings in a manner which is fair, expeditious, and likely to minimise the overall costs of the adjudication proceedings, including, but not limited to, directions:

...

- (i) ***in relation to how an oral hearing is to be conducted including whether it is to take place in person, remotely or on a hybrid basis and any arrangements that are necessary or appropriate in that***

regard;

6.4- Conduct of oral hearing by Adjudicator

*Other than in the case of a referral for adjudication on consent, an Adjudicator may conduct an oral hearing to resolve an issue of fact or otherwise to enable him or her to make an adjudication. If an Adjudicator decides to conduct an oral hearing, the Adjudication Unit **acting for and on behalf of the Chief Adjudicator** will, insofar as practicable, provide the parties with no less than **4228** days' advance notice of the day, time and location assigned for such hearing.*

- 2.69 Having had regard to the submissions and the analysis above, ComReg considers that it is unnecessary to amend the Guidelines and Rules in relation to the adjournment of oral hearings.

2.7 Publication of decisions on breach, administrative sanctions and adjudications confirmed by the High Court

- 2.71 Section 7.4 of the Guidelines (as consulted upon) provided that, save where publication would, in the opinion of the Commission, prejudice the achievement of the objectives of the 2023 Act, ComReg will publish a copy of the Adjudicator's decision on breach on its website, subject to such redactions as it considers necessary.

Respondents' views:

- 2.72 While appearing to accept the rationale for the publication of a decision on administrative sanctions (as provided at section 8.3 of the Guidelines) and the subsequent publication following confirmation by the High Court (as provided at section 10.3 of the Guidelines), Sky queried the rationale for the publication of a decision on breach and whether a decision on breach would be published prior to the parties being given an opportunity to make submissions in relation to administrative sanctions:

2.72.1 "We request further clarity in the Guidelines in terms of the publication of the Decision made under section [7.4]. We would like to understand if the publication of any such Decision is made prior to the submissions by parties allowed and detailed in section 7.5. For example, will parties be in a position where a decision could be made public without any chance to make comment or clarification? The opportunity to make comment or clarification prior to publication is afforded within the current ComReg ADR process. While we wholly understand and

accept the publication of the decision on administrative sanction that is set out in section 8.3 and the subsequent publication following the confirmation of the High Court as detailed in section 10.3, the rationale for the first publication is not clear, if such publication is prior to any submissions by ComReg or the notified party.

2.73 Relatedly, Three noted that sole discretion lies with ComReg to decide what information should be withheld or redacted and suggested:

2.73.1 “In the interest of fairness, the guidelines should specify that the notified party is consulted or given an opportunity to identify to the Commission the information that they consider to be confidential prior to the determination by the Commission of the contents of the report to be published.”

ComReg’s analysis:

2.74 Section 110 of the 2023 Act provides for the publication by ComReg of an adjudication confirmed by the High Court as follows:

2.74.1 “The Commission shall publish an adjudication confirmed by the Court under section 109 (save where such publication would, in the opinion of the Commission, prejudice the achievement of the objectives of this Act) subject to such redactions as the Commission may consider necessary and appropriate in order to protect the rights of the parties or any other person, to protect commercially sensitive information, or for any other good and sufficient reason, on the website of the Commission as soon as practicable after the adjudication is confirmed.”

2.75 Section 93(5) is the basis for publication by ComReg of decisions on breach under section 90(2) of the 2023 Act and decisions on sanction under section 91 of the 2023 Act. That section provides that “a copy of the adjudication shall be published on the website of the Commission”, “adjudication” having been defined in section 59 of the 2023 Act as a decision on breach and/or a decision on administrative sanction, or either such decision.

2.76 ComReg does not intend to publish decisions on breach under section 7.4 of the Guidelines and then, separately and later, publish decisions on sanction under section 8.3 of the Guidelines in relation to the same matter. The Guidelines have therefore been amended to clarify that, only where an adjudicator finds no breach under section 90(2) of the Act, will publication under section 7.8 be made by ComReg. Otherwise, no publication will occur until such time as a decision on sanction has been made under section 91 of the 2023 Act (section 8.3 of the Guidelines), and again following confirmation by the High Court under section 110 of the Act (section 10.3 of the Guidelines).

Publication under each of these sections is subject to the applicable provisions of the 2023 Act in relation to redactions, which are reflected in the updated text at sections 7.8, 8.3 and 10.3 of the Guidelines respectively.

ComReg's position:

Based on the analysis above, ComReg has repositioned section 7.4 of the Guidelines to section 7.8, and has amended the Guidelines to clarify that publication under section 7.8 will only take place where a decision of no breach has been made.

2.77 The new section 7.8 of the Guidelines provides as follows:

Publication of decision finding no breach

~~Save where publication would, in the opinion of the Commission, prejudice the achievement of the objectives of the 2023 Act, In circumstances where the Adjudicator makes a finding of no breach, the Commission will publish a copy of the Adjudicator's decision on any administrative sanction on the website of the Commission, subject to such redactions as the AdjudicatorCommission may consider necessary and appropriate in order to protect the rights of the parties or any other person, to protect commercially sensitive information, or for any other good and sufficient reason. Prior to publication, the Commission and/or the notified person (in this section, each a "Requester") will be entitled to review the Adjudicator's decision for the purposes of considering whether such redactions as may be required for the purposes of section 93(6) of the Act have been made. The Requester will make any request for further redactions in writing to the Adjudicator no later than 7 days after the date on which the notified person receives a copy of the Adjudicator's decision under section 91(4) of the Act. The Adjudicator will ordinarily only consider such requests where the Requester has identified the information requested for redaction, the basis upon which such information in the opinion of the Requester ought to be redacted, and the occasions(s) during the Adjudication proceedings on which the Requester submitted that the information in question ought not be specified in the Adjudicator's decision, whether pursuant to a request for confidential treatment under section 6.7 of these Guidelines or otherwise. The final decision as to whether such information will be published will rest with the Adjudicator.~~

2.80 Analogous amendments are made to section 8.3 of the Guidelines to extend the same right of review and request for further redactions prior to publication of decisions on breach and sanction. Section 10.3 of the Guidelines, dealing with publication of adjudications confirmed by the High Court, is amended as

follows:

*Publication of adjudication **confirmed by the High Court***

*Save where publication would, in the opinion of the Commission, prejudice the achievement of the objectives of the 2023 Act, the Commission will publish an adjudication confirmed by the High Court subject to such redactions as the Commission may consider necessary and appropriate in order to protect the rights of the parties or any other person, to protect commercially sensitive information, or for any other good and sufficient reason, on the website of the Commission as soon as practicable after the adjudication is confirmed. **Prior to publication, the notified person will be entitled to review the confirmed adjudication for the purposes of considering whether such redactions as may be required for the purposes of section 110 of the Act have been made. The notified person will make any request for further redactions in writing to the Commission within 7 days from the date on which the Court confirms the adjudication pursuant to section 109(10) of the Act. The Commission will ordinarily only consider such requests where the notified person has identified the information requested for redaction, the basis upon which such information in the opinion of the notified person ought to be redacted, and the occasion(s) during the adjudication proceedings on which the notified person submitted that the information in question ought not be specified in the Adjudicator's decision, whether pursuant to a request for confidential treatment under section 6.7 of these Guidelines or otherwise. The final decision as to whether such information will be published will rest with the Commission.***

2.8 Submissions on Sanctions

- 2.81 Sections 7.5 and 7.6 of the Guidelines specify the procedure by which a notified person may make submissions in relation to administrative sanctions following ComReg's submission, if any.

Respondents' views:

- 2.82 Three submitted that, as currently drafted, the Guidelines are unclear in respect of the manner in which the notified person will be made aware of the Commission not having delivered submissions and accordingly the time which the notified person will be afforded make its submissions. Three: "*suggest[ed] the inclusion of a step in the guidelines where the adjudicator informs the notified person [that ComReg has made submissions], and that their 15 days begins on receipt of that information.*"
- 2.83 Sky submitted that when a notified party is making a submission on the

administrative sanction, they should: *“have the additional invitation to make submission on the adjudication process itself that led to the administrative sanction decision. We believe that the drafting of section 7.6 is quite limiting in that the notified party appears to only be able to make submissions on three points, (1) the Section 94 criteria, (2) the amount of the penalty and (3) the Section 98(1) guidelines. We respectfully submit that this would be an appropriate juncture for notified parties to make submissions on the decision process itself, to enable such submissions to be noted.*

ComReg's analysis:

- 2.84 ComReg acknowledges the issue identified by Three and, accordingly, has implemented amendments to the Guidelines as set out below.
- 2.85 Notified persons are entitled to present evidence and make submissions in support of their case during the oral hearing, following which the Adjudicators will make their decision on breach. The 2023 Act does not provide for submissions in respect of the adjudication process itself, which is in any event a substantive question which falls to be addressed before another forum (whether the Adjudicators or the courts) and in that context it would not be appropriate for ComReg to purport to make guidelines in that regard.
- 2.86 The submissions invited under section 7.6 are limited to submissions in relation to administrative sanctions in accordance with section 91(5) of the Act.

ComReg's position:

- 2.87 Sections 7.4 and 7.5 of the Guidelines have been amended as follows:

7.4 - The Commission may, within 15 working days from the date on which the Adjudicator invites it to make submissions (or such further period as may be allowed by the Adjudicator), make written submissions to the Adjudicator in relation to:

- (a) the application of the criteria relating to financial penalties specified in section 94 of the 2023 Act;*
- (b) the amount of any financial penalty that may be imposed;*
and
- (c) the application of any guidelines made by the Commission under section 98(1)(b) to (e) of the 2023 Act.*

Where the Commission considers that there are, or have been, serious or repeated breaches of conditions by the notified person found to have committed or to be committing a regulatory breach, the Commission may recommend to the Adjudicator in writing that either or both of the notified person's general authorisation to provide

electronic communications networks or services (other than number-independent interpersonal communications services) or some or all of the person's rights of use for radio spectrum and of use for numbering resources be suspended or withdrawn on a temporary or permanent basis.

*The Adjudicator will provide the notified person with a copy of any written submissions made by the Commission **or will otherwise confirm that the Commission did not make any written submissions.***

7.5 - The notified person may:

- (a) ~~where the Commission does not make submissions on any administrative sanction,~~ within 15 working days from the date by which the **Adjudicator confirms to the notified person that the Commission has not made** ~~was invited to make~~ submissions;*
- (b) where the Commission makes submissions on any administrative sanction, within 15 working days from the date on which the notified person is provided with a copy of those submissions; or*
- (c) within such further period as may be allowed by the Adjudicator;*

make written submissions to the Adjudicator in relation to:

- (i) the application of the criteria relating to financial penalties specified in section 94 of the 2023 Act;*
- (ii) the amount of any financial penalty that may be imposed; and*
- (iii) the application of any guidelines made by the Commission under section 98(1)(b) to (e) of the 2023 Act.*

2.88 Having had regard to the submissions received from Sky, to section 91(5) of the 2023 Act, and to the above analysis, ComReg considers that it is unnecessary and inappropriate to amend to the Guidelines to provide for submissions on the adjudication process itself.

2.9 Applicability of sanctions

- 2.91 Section 7.7 of the Guidelines specifies the sanctions available to Adjudicators pursuant to section 98(1) of the 2023 Act. Those sanctions include the facility for the Adjudicator to:

“suspend or withdraw the notified person’s authorisation to provide electronic communications networks or services (other than number-independent interpersonal communications services) or some or all of the notified person’s rights of use for radio spectrum and of use for numbering resources.”

Respondents’ views:

- 2.92 Three submitted that it is necessary to obtain an authorisation to provide a number-independent interpersonal communication services (unless that is merely incidental to some other service), and that there are many “regulatory provisions” that apply to those services. In that context, it queries the differentiation between number-dependent and number-independent services:

2.92.1 *“We note that it is necessary to obtain an authorisation to provide a number-independent interpersonal communication services (unless that is merely incidental to some other service), and that there are many “regulatory provisions” that apply to those services. We see no reason why providers of these services should have been excluded in this way and we request that ComReg clarifies how non-discrimination between number dependent and number independent service providers will be maintained under the sanctions.*

Will this mean that a service provider who provides both number dependent and number independent services could not have its authorisation suspended if their breach was only in the provision of the number independent service? i.e. if an authorised service provider supplies a number independent messaging service and a voice call service then a breach in relation to their messaging service would not permit a sanction that included suspension of their authorisation.

We note that Section 98 (1)(e) provides for the publication of guidelines on the suspension or withdrawal of an authorisation, and it would be helpful for ComReg to do so to clarify this matter.”

ComReg's analysis:

- 2.93 Pursuant to Article 12(2) of the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ("the Code"), number-independent interpersonal communications services do not require an authorisation. It is therefore envisaged by the 2023 Act that an Adjudicator would be empowered to suspend or withdraw authorisations provided for number-based electronic communications networks or services only (as opposed to number-independent services) or rights of use for radio spectrum or numbering resources, by way of administrative sanctions.
- 2.94 In any event, the Adjudicators' powers in respect of imposing sanctions of that nature, as set out at section 7.7 of the Guidelines, are expressly derived from and provided by the 2023 Act.

ComReg's position:

- 2.95 Based on the analysis above, ComReg considers that it is not necessary to amend section 7.7 of the Guidelines.

2.10 Further guidance sought including guidelines in relation to administrative sanctions

- 2.101 Section 98(1)(b) of the 2023 Act provides that ComReg may, subject to the 2023 Act and any regulations and rules made thereunder, and having regard to the fairness and efficiency of the procedures under Part 7 of the 2023 Act, prepare and make guidelines in relation to any matter provided for by or under Part 7, including in relation to the imposition of administrative sanctions (including the factors applicable to any financial penalty to be imposed under section 91, and the method of calculation of financial penalties).

Respondents' views:

- 2.102 Some respondents submitted that ComReg ought to prepare such guidelines in relation to administrative sanctions:
- 2.102.1 Three submitted: *"this is a complex area where any sanctions imposed must be proportionate and non-discriminatory. We suggest it would be impossible for an adjudicator to impose proportionate and non-discriminatory sanctions in the absence of these guidelines. This matter should be consulted on by ComReg as a priority and a draft of guidelines should be made available for consideration as part of this process."*

2.102.2 Virgin submitted: *“that it would be useful if the Guidance was expanded to cover the imposition of administrative sanctions, including the factors applicable to any financial penalty and the method of calculation of financial penalties, which is one of the items that the 2023 Act indicates ComReg may prepare Guidelines on.”*

2.103 One respondent, Virgin, requested further guidance in relation to:

2.103.1 the scope of the current Guidelines. Virgin submitted that the scope should be broadened beyond the minimum requirements of section 89(2) of the 2023 Act and commented that the language of the Guidelines is taken *verbatim* from the 2023 Act: *“It would be useful to stakeholders if ComReg were to provide more comprehensive Guidelines regarding its expanded enforcement powers, and to supplement verbatim language from the 2023 Act with guidance on how to best interpret the 2023 Act and how ComReg will discharge its expanded enforcement powers in practice.”*

2.103.2 a diagram/schematic summarising the end-to-end process, which Virgin submitted should include a description of the different stages of the adjudication regime and the participants during each stage.

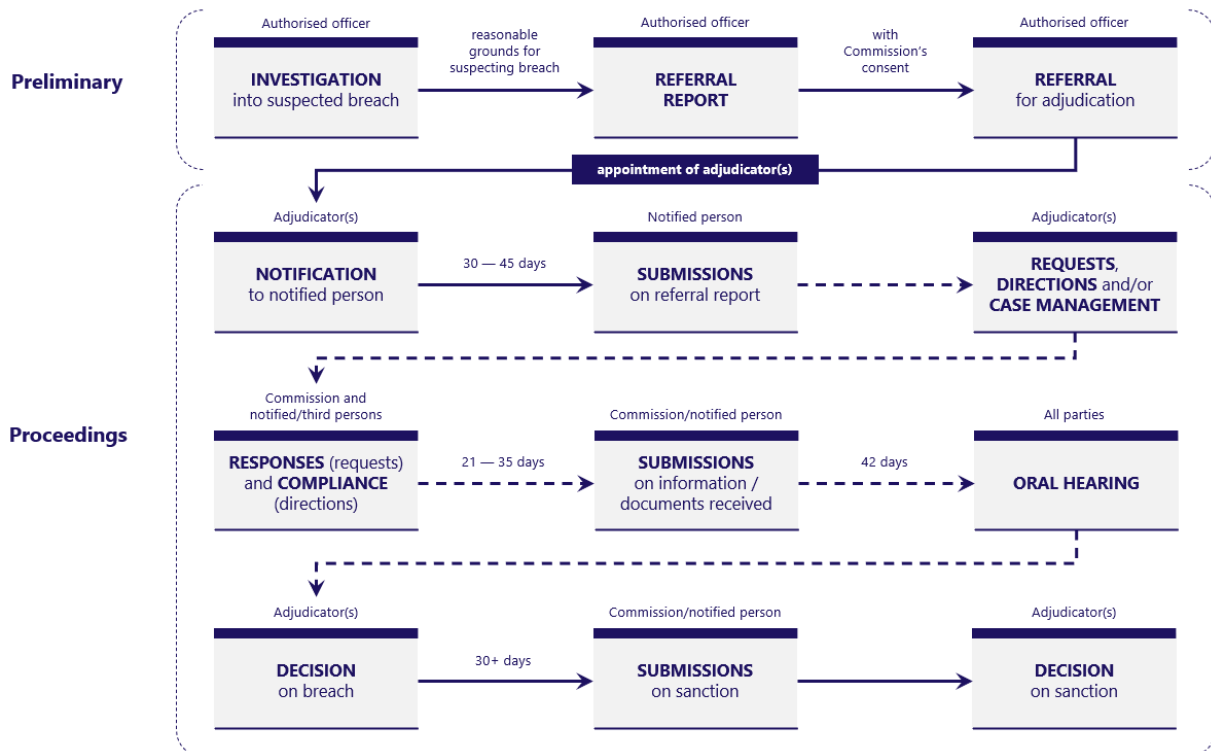
2.103.3 expected timescales for different stages, which Virgin submitted should not be binding.

ComReg’s analysis:

2.104 The matter of administrative sanctions will be dealt with in separate guidelines. ComReg will consult on draft guidelines in due course.

2.105 The 2023 Act prescribes in significant detail the procedure to be followed in adjudication proceedings. Where possible, therefore, the Guidelines adopt the procedural language provided by the Act, subject to appropriate structural variations designed to promote greater accessibility and clarity in terms of the adjudication process.

2.106 ComReg has produced the following schematic setting out the timelines it is anticipated will apply to the various steps in an Adjudication. The schematic is for indicative purposes only. There will be instances where it will be appropriate for certain steps to take a shorter or longer period than is set out below.



2.107 The timescales provided by the 2023 Act are replicated in the Guidelines. Where the 2023 Act is silent as to the timing of a given step, such timings are, in ComReg's view, a matter for the discretion of the Adjudicator.

ComReg's position:

2.108 Having had regard to the submissions, to section 98(1)(b) of the 2023 Act, and to the above analysis, ComReg considers that it is unnecessary to amend the Guidelines and Rules in the manner suggested by the respondents.

2.11 Miscellaneous

2.111 One respondent, Sky, submitted that a time limit for the appointment of Adjudicators should be specified in addition to the criteria for determining whether an individual Adjudicator or a division of Adjudicators would be appointed.

2.111.1 **ComReg's position:** One of the functions of the Chief Adjudicator under Regulation 8 of the Regulations is to assign adjudications to an Adjudicator or to a division. Neither the 2023 Act or the Regulations prescribe the time period within which those matters are to occur and, accordingly, they are matters for the sole discretion of the Chief Adjudicator. Regulation 9 of the Regulations

specifies the rules concerning adjudications by Adjudicators sitting together.

- 2.112 One respondent, Virgin, requested clarity on what the role of the “Authorised Officer” would entail, including guidance relating to their powers.

2.112.1 **ComReg’s position:** The role of the authorised officer is beyond the scope of these Guidelines, being “*guidelines on the conduct of proceedings*”, which ComReg is empowered to make under section 89(2) of the 2023 Act.

- 2.113 Virgin also requested that ComReg would clarify in the Guidelines that the referral by an authorised officer under section 70 of the 2023 Act would only be complete when all information detailed in Sections 70 (referral) and 71 (referral report) of the 2023 Act have been submitted in full.

2.113.1 **ComReg’s position:** Section 3.2 of the Guidelines, reflecting section 70 of the Act, provides that, prior to referring a matter for adjudication, the authorised officer must complete a referral report. The referral cannot, therefore, be made without the referral report having been prepared pursuant to section 70 of the Act.

- 2.114 One respondent, Three, suggested that section 5.2 of the Guidelines be amended, as follows, as “an important balancing check” and so as not to leave matters to the subjective opinion of the Adjudicator:

The Adjudicator may do any of the following where ~~he or she considers it necessary~~ it is necessary and proportionate to do so to resolve an issue of fact or otherwise to enable the Adjudicator to make an adjudication

2.114.1 **ComReg’s position:** Section 85(1) of the 2023 Act sets out the actions open to an Adjudicator which he or she considers necessary to resolve an issue of fact or otherwise enable the Adjudicator to make an adjudication. The question as to whether such actions are necessary is a matter for the Adjudicator’s discretion and it will be open to the Adjudicator to consider questions of necessity and proportionality.

- 2.115 Sky submitted that a time period for publication of a decision on administrative sanction should be specified at section 8.3 of the Guidelines.

2.115.1 **ComReg’s position:** The Act does not prescribe the time period within which a decision on administrative sanction is to be published on ComReg’s website and, accordingly, no such amendment has been made to the Guidelines. It is envisaged, however, that such

decisions will be published relatively quickly after receipt.

- 2.116 One respondent, Sky, queried whether any costs orders made by an Adjudicator under section 9 of the Guidelines would be “*open to cost adjudication in the usual manner (if disputed).*”

2.116.1 **ComReg’s position:** ComReg notes that orders for costs in proceedings before an adjudicator are dealt with in section 88 of the 2023 Act which does not address whether an order for costs can be the subject of adjudication by a legal costs adjudicator. Accordingly, ComReg does not consider it appropriate to address this in the Guidelines.

- 2.117 One respondent, Sky, submitted that the Guidelines should include a requirement that the notified party would be made aware of any expected application date in advance of the High Court confirmation of an adjudication under section 109 of the 2023 Act, or any adjourned date, “*in order to co-ordinate their attendance if they choose to do so.*”

2.117.1 **ComReg’s position:** Notice of the application will be served on the notified person within 7 days of lodgement of the application. Such notice will include the return date of the hearing in the usual way and the parties will be able to track the progress of the case, including any adjournments, on the Courts website.

3. Issues raised in response to consultation on the Rules

3.1 Rules relating to witnesses and evidence

- 3.1 One respondent, Virgin, submitted that the Rules should state that the rules of evidence apply to oral hearings as set out in Section 86(14) of the 2023 Act. Virgin quoted Rule 4.1.1, which states that: *“The rules of evidence applicable in civil proceedings before the High Court shall apply to any adjudication before an Adjudicator, save as otherwise prescribed in these Rules”* and asked that ComReg *“indicate what deviations from the legislation are being made and why (or what circumstances such deviations would be made).”*

3.1.1 **ComReg’s response:** ComReg does not understand Virgin’s submission that the Rules ought to state that the rules of evidence apply to oral hearings in circumstances where the Rules already do so and indeed this text is quoted by Virgin.

- 3.2 Eir submitted that 14 days’ notice provided at Rule 4.3.1 is not long enough when summoning a witness to appear before an Adjudicator to give evidence or to produce books, documents or records in such person’s power: *“eir notes that practitioners under S.I. No 483/2023 are required to provide 14 days’ notice or a letter of consent in lieu of notice if they wish to issue a subpoena. However, as the topic of the adjudication hearing is likely to require detailed information, perhaps regarding several customers, eir requests that a longer time period of notice is given to assist in resource planning where required. There should be an option in the guidelines to request that witnesses are given more notice if based on valid reasons. This is to ensure that practically providers can participate fully in such hearings and fair procedure is upheld.”*

3.2.1 **ComReg’s response:** ComReg notes that 14 days is the minimum notice period required and this period may be extended by the Adjudicator, in the exercise of his or her discretion.

- 3.3 Sky submitted that, where it is intended by parties to call a witness of fact: *“that a schedule of witnesses and any witness statements be provided to all involved 10 days in advance of the hearing.”*

3.3.1 **ComReg’s response:** The Rules already provide at Rule 4.7.1 for witness statements to be provided to the Adjudicator and the other party *“in advance of the hearing and in accordance with any direction made by the Adjudicator in that regard”*. This is a matter for the Adjudicator’s discretion.

- 3.4 Virgin submitted that Rule 4.8.2 limits the right of the parties to cross-examination: *“This is at odds with Section 86 (9) and 86 (10) in the 2023 Act which [does not] impose such limits. Virgin Media accordingly suggests that amendments are made to the draft [Rules] to align them with the 2023 Act.”*

3.4.1 **ComReg's response:** Sections 86(9) and 86(10) of the 2023 Act cannot be read as conferring an absolute right of the parties to cross-examine witnesses and call evidence in defence and reply. ComReg notes, for example, that a High Court judge is entitled to disallow any questions put in cross-examination of any party or other witnesses which appear to him or her to be vexatious and/or not relevant pursuant to Order 36 rule 37 RSC, and that supervisory jurisdiction is engaged by virtue of section 86(6) of the 2023 Act.

3.4.2 A new Rule 4.8.3 will, however, clarify that the Adjudicator may, at his or her discretion, refuse to hear a witness only where the Adjudicator considers the witness' evidence is not relevant or unnecessary:

Rule 4.8.2

Parties will be entitled to examine and cross-examine witnesses in accordance with the practice applicable in the High Court subject to the supervisory jurisdiction of the Adjudicator.

Rule 4.8.3

An Adjudicator may, at his or her discretion, who may limit the matters on which evidence is adduced or refuse to permit a party to call a ~~examine or cross-examine~~ a witness or expert whose evidence the Adjudicator considers not to be relevant to, and/or necessary to hear in order to resolve, any matter properly to be inquired into in the adjudication.

3.5 Virgin submitted that provision should be made in the Rules for legal privilege pursuant to section 86(15) of the 2023 Act.

3.5.1 **ComReg's response:** ComReg will include a new Rule 4.9.4 providing for the protection of legal professional privilege in accordance with section 86(15) of the 2023 Act as follows:

Nothing in these Rules compels the disclosure of any information that a person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person's possession, power or control.

3.6 Virgin queried Rule 4.13.1, which provides for a single joint expert, and noted: "While this seems reasonable it may not always suit a notified party at the time, particularly if experts have different viewpoints. Accordingly, Virgin Media suggests for simplicity the addition of a statement in the Guidelines saying that the practice in relation to experts must align with practice in the High Court in respect of expert evidence."

3.6.1 **ComReg's response:** ComReg recognises that it may not always be appropriate for a single joint expert to be appointed and for that reason Rule 4.13.1 leaves the matter to the Adjudicator's discretion.

3.2 Miscellaneous

- 3.21 Virgin noted that Section 86(16) in the 2023 Act provides that the Minister may make regulations in respect of oral hearings and suggested that the Rules should make explicit that they are subject to any such regulations.

3.21.1 **ComReg's response:** As identified by Virgin, the Rules are subject to any regulations made by the Minister in respect of oral hearings per section 86(16) of the 2023. ComReg's position is that the operative law in this regard need not be explicitly stated in the Rules.

- 3.22 Sky submitted that the Rules should be amended: *"to make reference to the option for parties to make application to the Adjudicator for remote hearings or applications to hear matters in private due to sensitivity."*

3.22.1 **ComReg's response:** While oral hearings shall, unless otherwise directed by the Adjudicator, be conducted in person and in public, the Rules do not preclude the parties from making submissions in relation to remote hearings or hearings otherwise than in public, which are matters for the Adjudicator's discretion.

- 3.23 Sky submitted that the Rules should make reference to whether an Adjudicator can issue directions to a third party: *"one not currently a party to the adjudication process, to adduce evidence or produce books, documents or records. It is the nature of the Industry in Ireland that multiple parties may be involved or have evidence in respect of an issue."*

3.23.1 **ComReg's response:** These matters are dealt with at sections 85 and 86 of the 2023 Act. An Adjudicator may, pursuant to section 85(1)(c) of the 2023 Act *"request further information from any other person [other than the person concerned]"*. Where such person does not comply with the request, the Adjudicator may, pursuant to section 86(2)(a) of the 2023 Act, by notice, in writing, summon that person to appear to give evidence or produce before the Adjudicator any books, documents or records in such person's power or control, or to do both.