



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

# **Guidelines and Rules made pursuant to Part 7 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023**

Submission received in response to  
Consultation 24/14

Response to Consultation

**Reference:** ComReg 25/03

**Date:** 14 January 2025

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alternative operators in the communications market

**Consultation: (1) Adjudication Guidelines and Rules; (2) Guidelines for Adjudication Proceedings; (3) Rules for Adjudication Oral Hearings - Ref: 24/14; 24/14a; 24/14b**

**Submission By ALTO**

**Date: March 22<sup>nd</sup> 2024**

ALTO is pleased to respond in brief terms to the Consultations (1) Adjudication Guidelines and Rules – ComReg Ref: 24/14; (2) Guidelines for Adjudication Proceedings – ComReg Ref: 24/14a; (3) Rules for Adjudication Oral Hearings – ComReg Ref: 24/14b.

## **Remarks**

ALTO has considered the document set featuring in this Consultation and does not wish to raise any specific issues of substance on the face of the documents as published.

However, as a matter of principle and law ALTO submits that elements of Chapter 3 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023, and concerning the appointment of certain kinds of adjudicators connected to or employed by ComReg offends natural justice and legal principle of *nemo iudex in sua causa* or that no person should be a judge in their own case. If ALTO is correct in that regard, then certain sections of the legislation may be unconstitutional.

ALTO urges ComReg to make a policy choice (similar to that of the Competition and Consumer Protection Commission – CCPC) to only empanel entirely independent adjudicators or divisions of adjudicators in the exercise of all future adjudications. In other words, to only appoint adjudicators that are entirely unconnected with ComReg by means of employment or other potential conflicts. This position and suggestion is designed to reduce and remove the risk of natural justice, bias and independence administrative law appeals and judicial reviews concerning matters requiring adjudication and involving ComReg and its own decisions.

ALTO had previously raised the issue and the risk of independence and bias legal challenges with the Department of Communications prior to the transposition of the European Electronic Communications Code and the publication and passing of

sections 75(1); 77 and 78 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023.

We consider sections 75(1); 77 and 78 to be legally problematic and improper in the context and exercise of quasi-judicial decision making. We refer ComReg to Articles 34 and 37 of the Constitution and the well-known case of *Zalewski v. Adjudication Officer & Ors* [2021] IESC 24, in that regard.

We note for completeness that the documents under consultation at this time do not in-fact overtly suggest that ComReg proposes to operate in the manner ALTO is concerned about. However, the legislation does permit such operations. ALTO suggests that it would be prudent for ComReg to clarify and determine this matter in order to avoid future legal challenges.

**ALTO**  
**22 March 2024**

**eir's Response to ComReg Consultation 24/14 on ComReg Adjudication  
Guidelines and ComReg Rules for Adjudication Oral Hearings**

**ComReg Document: ComReg 24/14**



**22 March 2024**

## DOCUMENT CONTROL

<b>Document name</b>	eir response to ComReg Consultation 24/14
<b>Document Owner</b>	eir
<b>Status</b>	Non-Confidential

The comments submitted in response to this consultation document are those of Eircom Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

Please note that, for the purposes of the Freedom of Information Act 2014 and the Communications Regulation Act 2002 (as amended) and in the context of the eir Group's general rights and obligations, information supplied by the eir Group to you may contain confidential, commercially sensitive or price sensitive information consisting of financial, commercial, technical or other information, whose disclosure to a third party could result in financial loss to the eir Group, could prejudice the competitive position of the eir Group in the conduct of its business, or could otherwise prejudice the conduct or outcome of contractual or other negotiations to which the eir Group is a party.

Accordingly, you are requested to contact a member of eir Group's Regulatory Strategy Team where there is a request by any party to have access to records which may contain any of the information herein and not to furnish any information before the eir Group has had an opportunity to consider the matter

## Response summary

### Guidelines on Adjudication proceedings

eir considers ComReg's proposed Adjudication Unit is an unnecessary proxy, that is not in line with the 2023 Act or S.I. No. 500/2023 Communications Regulation And Digital Hub Development Agency (Amendment) Act 2023 (Part 7) Regulations 2023 ("the Regulations"). ComReg has also incorrectly proposed to assign responsibilities of the adjudicators to the proxy unit.

ComReg has failed to outline the clear separation between the activities of the proposed Adjudication Unit and ComReg, and measures to ensure the independence of adjudicators which ComReg is required by law to do under section 77 (2) of the 2023 Act.

The adjudication procedures, as currently set out, do not guarantee confidentiality of commercially sensitive information as required under the 2023 Act.

### ComReg Rules for Adjudication Oral Hearings

eir considers that ComReg should review its rules to provide for more flexibility around timings and notice of hearings, including when requiring witnesses to attend hearings. This is to ensure that the parties can fully participate in oral hearings.

## **eir response to consultation 24/14**

Below eir outlines its concerns with ComReg's proposed draft guidelines:

- ComReg Guidelines for Adjudication Proceedings (ComReg Document No.24/14a); and
- ComReg Rules for Adjudication Oral Hearings (ComReg Document No.24/14b).

### **Guidelines on Adjudication proceedings (ComReg Document No.24/14a)**

1. ComReg's proposed Adjudication Unit is an unnecessary proxy that is not in line with the 2023 Act or the Regulations. ComReg has incorrectly proposed to assign responsibilities of the adjudicators to the proxy unit.
2. ComReg has also failed to outline the clear separation of the function of ComReg regarding the proposed ComReg unit and the functions of adjudicators (as required under Regulation 13 of the Regulations). ComReg has also not outlined measures to ensure the independence of adjudicators as required under section 77 (2) of the 2023 Act.
3. The adjudication procedures as currently set out also do not for the confidentiality of commercially sensitive information as required under the 2023 Act.

### *Incorrectly assigned responsibility for adjudicator assistants to ComReg*

4. eir notes that under section 81 (1) of the 2023 Act, ComReg may "from time to time" appoint persons or require a ComReg employee to assist adjudicators or an individual adjudicator in the performance of their functions. Therefore the establishment of a permanent or temporary unit dedicated (or otherwise) to assist adjudicators is not in line with section 81 of the 2023 Act.
5. ComReg has also not outlined why it proposes to create the Adjudication Unit nor provided any evidence for the need to create the unit. It is unlikely that the volume of adjudications will warrant a dedicated permanent unit in ComReg, which will require additional staffing as the function of adjudication must be kept separate from normal ComReg business under Regulation 13 of the Regulations. eir considers ComReg's main focus should be on fulfilling its obligations under section 77 of the 2023 Act to ensure the independence of adjudicators.

6. eir is unclear on the basis for the proposed unit as under section 81(4), the assistant to the adjudicator, “shall 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).” eir notes that in section 2.2 of the guidelines ComReg states that, “[t]he Chief Adjudicator will direct such employees or persons to assist an Adjudicator or Adjudicators as considered appropriate.” ComReg has also stated that a person nominated as an assistant by ComReg “may be assigned to staff the Adjudication Unit”. However, it is not clear that the Chief Adjudicator will run the proposed unit, or run it with staff assistance (whom are also not ComReg staff), and therefore the adjudicator assistant will not be, “solely responsible to the Chief Adjudicator” or assigned adjudicators. Regulation 8 of the Regulations sets out that the role of the Chief Adjudicator is to direct employees of ComReg or other persons appointed to assist adjudicators.
7. In addition, it is unclear how an adjudicator can be “consulted on decisions concerning the appointment and assignment of a person to provide assistance to the adjudicator,” as required under Section 81(7) of the 2023 Act, if ComReg has already staffed a dedicated assistance unit or are proposing to provide its own staff to this unit “from time to time”.
8. If it is the case that ComReg intends the Chief Adjudicator to run the proposed unit, it has created a dynamic where the Chief Adjudicator will always be a ComReg employee. eir notes that section 82(2) of the 2023 Act highlights that appointing a person as an adjudicator does not constitute employment within ComReg. It is also unclear how assistants that are not employees of ComReg can be appointed, and how they will fulfil their role, if this proposed ComReg unit will assist adjudicators. It appears ComReg is attempting to create a dynamic where adjudicator assistants as well as the Chief Adjudicator are always ComReg staff. This is problematic in ensuring the independence of adjudicators as required under section 77 of the 2023 Act.

*Created an unnecessary role for the proposed unit that is not in line with legislation*

9. eir considers that ComReg has created artificial responsibility for the Adjudication Unit in the adjudication process that is not in line with the 2023 Act, nor the Regulations. For instance, in Section 2.1 ComReg sets out responsibilities for the unit such as issuing communications on behalf of adjudicators. Critically, however, under legislation these are obligations of the adjudicators, unless clear authorisation is given from the adjudicator to a member of ComReg staff that is assisting adjudicators (Section 85 (8))

of the 2023 Act]. ComReg has incorrectly proposed to insert the Adjudication Unit as a proxy for an adjudicator, to issue communications, without the prior authorisation from an adjudicator to do so in line with section 85 (8).

10. In addition, ComReg has created a step in the referral process where the authorised officer provides documents to the Adjudication Unit set out in section 3.4. However, these documents must 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.
11. Another example is the proposal that the authorised officer notifies the Adjudication Unit of the withdrawal of the referral under section 4.2 of the guidelines. However, under section 68(4) of the 2023 Act, the authorised officer is required to notify the adjudicator of the withdrawal of the referral.
12. eir understands that adjudicators may need assistance with some administration tasks but is unclear why this would be done through a dedicated ComReg unit, and why ComReg has inserted the unit to undertake certain roles and responsibilities of the adjudicator.
13. ComReg should instead focus on how it will ensure the independence of adjudicators in the proceedings as required under section 77 (2) of the 2023 Act.

*Failed to uphold the clear separation of activities and independence of adjudicators*

14. The guidelines do not clearly set out the roles of different parties as set out in the 2023 Act and the Regulations. For instance, ComReg has stated that “Staff of the Adjudication Unit will not participate substantively in adjudication proceedings or in the making of decisions by Adjudicators” [emphasis added]. However, the 2023 Act and Regulation 12 of the Regulations make it clear that the assistant “shall not participate” in decision making, rather than have a non-substantive role in this process. 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.

15. ComReg has not specified any measures it has taken to ensure the proposed unit would be separate from the internal functions of ComReg itself as required under Regulation 13 of the Regulations. eir notes that in section 2.1 of the guidelines ComReg states that “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.” However, ComReg has not explained how this will be ensured, or how a unit that sits within ComReg will be run without oversight or influence from ComReg staff.

*The process overlooks the requirements to preserve confidentiality of commercially sensitive material*

16. eir does not consider that the adjudication portal proposed to be managed by the Adjudication Unit will provide confidentiality for commercially sensitive material. Under section 85 of the 2023 Act, the adjudicator must provide information to the parties and with “due regard for the protection of commercially sensitive information”. 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).
17. In addition, under section 85 of the 2023 Act the legislation prohibits a person that receives certain information during the adjudication from disclosing the existence or the content of the report to anyone else, without prior authorisation of an adjudicator. eir notes that if a person contravenes this, it is an offence. ComReg has not accounted for how the proposed unit will manage the portal in light of this requirement for prior authorisation to share information. 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.

## ComReg Rules for Adjudication Oral Hearings (ComReg Document No.24/14b)

*The oral hearings procedures should be more flexible*

18. eir considers that an adjudicator should provide more than 28 days' notice of the day, time and location assigned for a hearing. eir considers a minimum of two months' notice is required to ensure parties can adequately plan resources for such hearings. This will ensure effective participation in the process.
19. eir does not accept that the Adjudication Unit would provide this notice, as it is the adjudicator that has the power to conduct an oral hearing. eir also notes that under section 85(2) of the 2023 Act, the adjudicator shall conduct an oral hearing to resolve the dispute of fact, "*on the request of the notified person*". Therefore, the notified parties should be able to request more prior notice of a hearing, which should come from the adjudicator, not ComReg's Adjudication Unit.
20. eir also considers that 14 days is not long enough for minimum notice to give persons that are required to attend a hearing before an adjudicator. 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<sup>1</sup>. 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.

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<sup>1</sup> <https://www.lawsociety.ie/news/news/Stories/issuing-of-subpoenas-to-witnesses#:~:text=provides%20that%20%22unless%20the%20witness.by%20the%20subpoena%20to%20attend.%22>



## Adjudication Rules & Guidelines

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ComReg Consultation 24/14

22<sup>nd</sup> March 2024

Sky welcomes the publication of the ComReg Guidelines for Adjudication Proceedings (Doc. 24/14a) (the “**Guidelines**”) and the ComReg Rules for Adjudication Oral Hearings (Doc. 24/14b) (the “**Rules**”). The Guidelines and Rules are quite comprehensive, and we note that significant effort has been made to ensure that due process and fair procedures are implemented for this new regulatory enforcement regime. We have some comments on key elements of the documents which we have set out below.

#### **Document A - ComReg Guidelines for Adjudication Proceedings (24/14a)**

**Section 2.3:** Sky welcomes the introduction of an Adjudication Portal for submissions. However, 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.

**Section 3.3:** We note that there is no time period within which an Adjudicator or division of Adjudicators must be appointed. We suggest that a time limit for the appointment is included in the final process document. There is also no clarity as to when it should be an individual Adjudicator or when it should be a division of Adjudicators. Some criteria should be included in the final process document.

**Section 3.4(c):** We assume that the “opinion” being formed by the authorised officer under this section 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.

**Section 3.4(i):** From a transparency point of view, it should be clear to users of the Guidelines that the authorised officer will provide only 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.

**Section 4:** This section seems to suggest that it is no longer open to ComReg to settle matters during an investigation without a formal referral for Adjudication. Can ComReg please clarify if this is the case going forward. It is also not clear whether the sanctions that can be imposed under section 4.4 are in addition to the agreed settlement with the Commission or in place of that settlement. 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.

**Section 5.1:** The Adjudicator should have the 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. Furthermore, we suggest that the Guidelines could state that the Section 83 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.

**Section 5.2(c):** 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.

**Section 6.1:** Case management and directions should be a feature for 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, the 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. As stated above, we also suggest that the Guidelines give further clarity on the circumstances that would apply for the appointment of multiple Adjudicators. We request that ComReg indicate in the Guidelines if there is a framework or criteria that would govern the appointment of same.

**Section 6.2:** We suggest the inclusion of two further matters to the case management directions that an Adjudicator may utilise. 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.

**Section 6.4:** We suggest that the Guidelines make specific reference to the consideration by the Adjudicator of adjournments of oral hearings due to exceptional circumstances, on application by the parties.

**Section 7.4:** We request further clarity in the Guidelines in terms of the publication of the Decision made under section 7.3. 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.

**Section 7.6:** We suggest 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.

**Section 8.3:** We request that a time period to publication be clarified in this clause so that notified parties can know when to expect decisions on sanctions to become public.

**Section 9:** While we acknowledge that the Adjudication process is expected to be run without the usual court costs elements, in light of the content of section 9 we would consider it helpful to confirm that any such costs orders would be open to cost adjudication in the usual manner (if disputed).

**Section 10.2:** We suggest that the Guidelines in terms of the High Court confirmation hearing should include a requirement for the notified party to be made aware of any expected application date in advance, or any adjourned date, in order to co-ordinate their attendance if they choose to do so.

## **Document B - ComReg Rules for Adjudication Oral Hearings (24/14b)**

Sky again welcomes the detailed rules for Oral hearings and wishes to make only a few comments and suggestions to the proposed draft.

**Sections 3.5 & 3.6:** 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.

**Section 4.15:** We suggest 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.

**Section 4.19:** Sky believes that it would be helpful to users if the Rules made clear reference as to whether the Adjudicator can make 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.

### **Conclusion**

Sky believes that the Guidelines and Rules are very comprehensive and go a significant way towards clarifying for users the steps involved in these matters.

By addressing our points, ComReg can strengthen and clarify the documents, so that users can be fully prepared and informed throughout. It is important that the documents promote transparency and procedural certainty.

# **Guidelines and Rules for Adjudication and Hearings**

**Response to Document 24/14 from  
Three**

**22<sup>nd</sup> March 2024**



**Three.ie**

## 1. Introduction

Three is pleased to provide input to ComReg's proposals for the practical operation of the new enforcement powers created under Part 7 of the 2023 Act<sup>1</sup>. The objective of these new powers is to provide for a more effective and efficient but fair process for enforcement of "regulatory provisions". To this end, a new independent adjudication process is provided for, including provision for the hearing of evidence. This new adjudication process will be judicial in nature and will provide for the imposition of significant sanctions.

It is important that the process adopted by ComReg is both efficient and fair to all parties involved. While the adjudication process is wholly different to the old Regulatory Appeals Panel, there are some lessons learnt from that mechanism that are still relevant. Given that the sanctions provided for can be significant, any real or perceived flaw in the process or ways of working of the adjudication process are likely to give rise to appeal. This would add to, rather than reduce, delay and cost, which would defeat the objectives of having a separate administrative sanctioning process. For this reason, ComReg should be cautious in designing the process and principles under which the adjudication process will operate. It will of course also be important for the process to align closely with similar adjudication/sanction processes in other agencies such as the Competition and Consumer Protection Commission, the Data Protection Commission, etc.

Overall, Three agrees with the majority of the proposed Guidelines and Rules, however there are some aspects that require further consideration as outlined below.

## 2. Consultation and Guidelines on Sanctions

Section 98 (1) (b) of the 2023 Act provides that ComReg may prepare guidelines for the imposition of sanctions under the Part 7 of that Act. 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.

## 3. Overall Guidelines

### Independence of the Adjudicators

We agree that adjudicators will need support and ComReg's proposals seem to be largely appropriate, however we would like to highlight the importance of ensuring that adjudicators are independent in performing their duties. We have noted an inconsistency between the text of ComReg's proposal and the Regulations<sup>2</sup> which is a cause for some concern.

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<sup>1</sup> Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023, 4 of 2023

<sup>2</sup> Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (Part 7) Regulations, S.I. 500 of 2023

Regulation 13 provides as follows:

*13. The Commission shall, at all times, ensure -*

*(a) effective internal separation between the functions of the Commission and the functions of adjudicators, and*

*(b) that the structure, policies, practices and functions of, and working arrangements within, the Commission are consistent with section 77 of the Act of 2023.*

In addition, Regulation 12 provides that:

*12. A person assisting an adjudicator or a division (whether required under section 81(1)(a) or appointed under section 81(1)(b) of the Act of 2023) **shall not participate** in the making of the decision of the adjudicator or division under section 90(2) of the Act of 2023 [emphasis added].*

In section 2.1 of the Guidelines, ComReg states that:

*Staff of the Adjudication Unit will not participate **substantively** in adjudication proceedings or 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 [emphasis added].*

ComReg's text suggests that it is envisaged that the staff of the adjudication unit might participate to some degree in the making of decisions and this seems to be at odds with the text of the Regulations. If there is a subtlety here, then ComReg should explain it clearly so as to prevent the matter becoming contentious in future. If there is a departure from the Regulations, then it should be explained and justified.

While the Guidelines provide 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*" these guidelines do not prevent these assistants reporting into conflicted management functions for the purposes of wider employment management. Three believes that this would not meet the "*effective internal separation*" as required by the Regulations. Therefore, Three is of the view that Section 2.1 of the draft Guidelines requires reconsideration.

Further to the above, Three is of the view that, in order to show compliance with Regulation 13(a) above, and Section 77 of the 2023 Act, which ensure the independence of the adjudication process it may be prudent that that staff of ComReg are not appointed as adjudicators.

### **Referral of Case for Adjudication**

In section 3.4, the guidelines outline the requirements on the authorised officer at the time of referral, including the documents that must be provided to the notified person. To allow the notified person sufficient and reasonable time to consider those documents, the guidelines

should specify a maximum time for the notified person to receive those documents. We suggest that it should be on the same day that the referral is made to the Adjudication Unit.

### **Settlement Report**

Where a case is settled by agreement, then it is appropriate that the notified person should receive a draft “settlement report” before it is referred. This will allow the notified person an opportunity to specify any confidential information that should be redacted generally, or to specify such specific information, if any, which should not be released in the future under Freedom of Information requests.

### **Powers of Adjudicator**

We suggest an amendment to section 5.2 of the guidelines as follows:

*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:*

In Three’s view this is an important balancing check and is preferable to leaving it to the subjective opinion of the adjudicator as to whether is appropriate to use such powers.

### **Publication of Decision**

Section 7.4 provides for publication of an adjudicator’s decision where a breach has been found. We note that as currently drafted, sole discretion lies with the Commission to decide what information should be withheld or redacted. 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.

### **Submissions on Sanctions**

Sections 7.5 and 7.6 specify the process for submissions on sanctions. While the intention is understood, i.e. that ComReg will make its submission first and then the notified person will make theirs, it seems that the “clock” for the notified person begins immediately on expiry of ComReg’s 15 days. It is unclear how the switchover occurs or how the notified person would know whether ComReg had made a submission at that time. We suggest the inclusion of a step in the guidelines where the adjudicator informs the notified person of this fact, and that their 15 days begins on receipt of that information.

### **Applicability of Sanctions**

Section 7.8 of the guidelines specifies the sanctions that are available to be imposed by the adjudicator, and we note that these mirror section 98 (1) of the 2023 Act, however we note in the following that the guidelines provide that the adjudicator may:

*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 [emphasis added].*

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.

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## **Virgin Media response to:**

ComReg's proposed Rules and Guidelines for Adjudication made pursuant to the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023

**March 2024**  
**Non-Confidential**

## **Foreword**

This is the Virgin Media Ireland Limited (“Virgin Media”) response to ComReg’s proposed Rules and Guidelines for adjudication made pursuant to the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023.

This response is non-confidential and can be published in its entirety.

## **Context**

- The documents published by ComReg (Nos. 24/14a and 24/14b) set out Guidance in relation to Adjudication Proceedings and Rules for Adjudication Oral Hearings respectively.
- This is further to ComReg's new Enforcement powers pursuant to Part 7 of the Communications Regulation and Development Agency Act 2023 ("the 2023 Act").
- Sections 89(2) and 86(17) of the 2023 Act impose obligations on ComReg to publish Guidelines for Adjudication Proceedings and Rules for Oral Hearings.
- This is Virgin Media's feedback on the documents published by ComReg. Virgin Media makes some suggestions that, if adopted, it considers would improve the material published.
- Virgin Media considers that: (i) the independence of the adjudication processes needs to be stronger and clearer than is presently set out – this is required to underpin stakeholder faith in the whole process which is crucial; and (ii) ComReg should expand the scope of the Guidance provided – which presently meets the minimum required but goes no further – this is needed to improve the usefulness of the Guidance to stakeholders.
- Virgin Media provides further comments below.

## **ComReg's proposed Guidelines for Adjudication Proceedings**

### **The issue of Independence**

- For stakeholders to trust the Adjudication process, it needs to be independent. Presently, Virgin Media has serious concerns that independence of the Adjudication process is insufficient.
- A process that lacks independence suggests deference to the position of the regulator. This of course runs counter to the legal civil law standards where the legal burden rests with the Applicant to prove its case on the balance of probabilities and no deference is provided to the Applicant.
- The Guidance could (and should) assist in this regard by more clearly codifying the requirements of Independence in relation to the Adjudication process.
- Virgin Media considers that, for example, the Adjudication Unit should be separate and independent of ComReg.
- In this regard, ComReg will be aware of the approach taken by the Competition and Consumer Protection Commission ("CCPC") as required under Competition Law, wherein

the independence of the adjudication process is carefully and clearly set out. For example, while CCPC staff can serve as adjudication officers, they “*..shall not be required to perform any duty which would be inconsistent with their independence.*”<sup>1</sup>

### **Scope of the Guidance**

- Virgin Media considers that ComReg should broaden the scope of the Guidance provided. Currently the Guidance is limited to certain aspects of the Adjudication Proceedings, and only covers the minimum required pursuant to Section 89(2) of the 2023 Act. Virgin Media also notes that much of the language used by ComReg is taken verbatim from the 2023 Act rather than being actual guidance.
- 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.
- Virgin Media understands that the legislation underpinning ComReg’s expanded powers allows for it to provide a broader set of Guidance than that currently proposed<sup>2</sup>.
- For example, Virgin Media considers 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.

### **Further comments on the document**

- Virgin Media considers that it would be helpful to stakeholders if ComReg supplemented the wording provided with a diagram / schematic summarising the end-to-end process described. This could include a description of the different stages, and the participants involved in the different stages. It would also be useful if ComReg could offer any guidance (which would not be binding) on expected timescales (or timescale ranges) for the different stages.
- In respect of the role of the Adjudicator / Chief Negotiator, it would be useful if ComReg could make additional comments on the importance of independence in relation to these roles (pursuant to Sections 77 to 80 in the 2023 Act).

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<sup>1</sup> Competition (Amendment) Act 2022

<sup>2</sup> See: [Communications Regulation and Digital Hub Development Agency \(Amendment\) Act 2023, Section 98 \(irishstatutebook.ie\)](#)

- Virgin Media further suggests that ComReg also specifically reference Regulations 13 and 14 which provide important text regarding the measures to ensure the independence of adjudicators.
- In relation to the Adjudication Unit, the Guidance would be improved if ComReg were to emphasise 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. Virgin Media notes the use of the word “*substantively*” in section 2.1 in the draft Guidelines which does not exist in the corresponding legislative text for the 2023 Act, and which accordingly it would be better to remove. The present wording undermines confidence in the independence of the Adjudication Unit (by implying, for example, that the Adjudication Unit could potentially influence an outcome by simply choosing to progress one case over another).
- Virgin Media requests that ComReg provides more clarity on what the role of the “Authorised Officer” would entail, including guidance relating to their powers.
- Regarding referrals (pursuant to Section 70 of the 2023 Act), Virgin Media requests that ComReg makes it clearer in the Guidelines that the referral is only complete when all information as detailed in Sections 70 (referral) and 71 (referral report) of the 2023 Act have been submitted in full.

### **ComReg’s proposed Rules for Adjudication Oral Hearings**

- Section 86 (16) in the 2023 Act states that the Minister may make regulations in respect of Oral Hearings. Virgin Media suggests that in the Guidelines it should be made explicit that they are subject to any such regulations. There should also be reference to the rules of evidence applying to the oral hearings as set out in Section 86(14) of the 2023 Act.
- Section 4.1 in the draft Guidelines says 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.*” In Virgin Media’s view, this is unclear, and it would be beneficial to the clarity of the Guidelines if ComReg could indicate what deviations from the legislation are being made and why (or what circumstances such deviations would be made).
- Section 4.17 of the draft Guidelines seems to limit the ability to cross-examination. This is at odds with Section 86 (9) and 86 (10) in the 2023 Act which don’t impose such limits. Virgin Media accordingly suggests that amendments are made to the draft Guidelines to align them with the 2023 Act. Section 86(15) in the 2023 Act provides for legal privilege which does not make it into the Guidelines but would be expected in any event under law. Virgin Media suggests this is included in the Guidelines for completeness.
- Finally, there are references made in the draft Guidelines to expert evidence which do not appear in the legislation for example, it permits the Adjudicator to select a “*joint expert*”. 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.