Commission for
Communications Regulation

Contract Change Notifications
Non-Confidential submissions received from respondents

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alto

alternative operators in the communications market

Response to Consultation - Contract Change Notifications Ref:12/86

Submission By ALTO

Date: September 12th 2012

ALTO is pleased to respond to Consultation – Contract Change Notifications, Ref: 12/85.

Preliminary Comments

ALTO makes the following key comments on ComReg's Consultation 12/67:

ALTO wrote to ComReg in advance of this Consultation, on the 22nd of August 2012, in the following terms:

"We have some concerns over the interchangeable use of the legally defined words 'subscriber' and 'consumer' within the course of this Consultation.

Business contracts are often developed in a manner that may not be standard, and are as such bespoke in nature. They defer to, and uphold regulation, but often are working in grey areas, which either are undefined by regulation or are partially subject to regulation.

I think it necessary to ask ComReg to formally clarify what its position on this Consultation paper actually is?

It is not really sufficient to use legally defined words interchangeably as stated at footnote 2 of the document.

Why is this? This is due to the fact that certain operators (including some ALTO members) simply ***do not*** *address consumer markets at all.*

If the Consultation is designed to deal with both markets - Consumer and Business then the Executive Summary needs to be amended to the extent that it reflects that reality.

I understand that you may have heard from some undertakings in relation to this, but we feel that an Information Notice might assist matters for us."

The following response was received from ComReg on the 31st of August 2012:

"In relation to your query regarding ComReg Consultation 12/85 we would like to remind you that this consultation relates to the format of contract notifications and not the requirement to notify subscribers, as detailed in paragraphs 12 and 13 of Consultation 12/85. As detailed in paragraph 8 of Consultation 12/85, under

Regulation 14 (4) of the Regulations, ECS providers must notify their subscribers, one month in advance, of modifications they propose to make to their subscribers' contracts. They must at the same time, notify their subscribers of their right to withdraw without penalty from their contract if they do not accept the proposed modification(s).

Paragraph 9 of Consultation 12/85 states that ' Regulation 14 (5) of the Regulations allows the Commission to specify the format of these notifications" and paragraph 13 states that "This consultation is about the minimum specifications for the format of the statutory notifications to be given by ECS providers under Regulation 14(4) of the Regulations."

As such, ALTO's query is not directly relevant to matter under consultation in Consultation 12/85 but is instead related to the applicability of Regulation 14(4), which is not being consulted on in Consultation 12/85.

However, If ALTO or any of its members have any concerns or comments in regard to the matters being consulted on they are entitled to raise this in their responses to Consultation 12/85 and ComReg will review and fully take into account all responses it receives.

In relation to Regulation 14(4);

Regulation 14(4) states the following:

"An undertaking referred to in paragraph (1) shall, not less than one month prior to the date of implementation of any modification to the contractual conditions proposed by the undertaking, notify its subscribers to that service of —

(a) the proposed modification in the conditions of the contract for that service, and
(b) their right to withdraw without penalty from such contract if they do not accept the modification."

Regulation 14(1) of the Universal Services Regulations provides that, "An undertaking that provides to consumers, and other end-users so requesting, connection to a public communications network or publicly available electronic communications services shall do so in accordance with a contract that complies with paragraph (2)".

Therefore, whom the notifications are required to be sent to is already established by the legislation and its definitions of subscribers, end-users and consumers."

ALTO remarks that insofar as this is ComReg's position, one is left with the impression that this Consultation is not designed to interfere with the business-to-

business types of contracts which most ALTO members would concern themselves with.

In general, ALTO members consider that this consultation aims to bring enhance clarity relating to how the notification of contract changes should be communicated with customers.

The Consultation is welcomed as it allows ALTO to present important views from its members on aspects of ComReg's reforms proposals contained therein.

ALTO members take compliance with the provisions of Regulation 14 of the Universal Services Regulations 2011,[1] extremely seriously particularly in light of the punitive nature of the sanctions, should members not act in a manner corresponding to the behaviour expected in the Regulation.

ALTO members generally agree with principles set out in the consultation on the format of notifications of contract changes to customers.

There are some important issues that we highlight in this response and urge ComReg to take full account of these concerns.

ALTO members are concerned that in some instances, certain solutions and measures that ComReg proposes, may exceed the powers available in the legislation, and therefore may be acting *ultra vires* the object and purpose of the relevant legislation.

Undertakings will from time to time make changes to their products and services which are to the benefit of consumers and do not amount to a contract change. Such changes could for example include

[1] European Communities (Electronic Communication Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011)
(revoking S.I. No. 308 of 2003 and S.I. No. 374 of 2007)

(i) Addition of new products or services to a consumer's account; or

(ii) Enhancements to existing products and services without any change to a consumer's price or contract terms.

These types of changes which are to the benefit of the consumer and do not constitute a change to the consumer's contract terms should not and must not be caught by the notification requirements that ComReg are looking to put in place.

ALTO recommends that ComReg clearly defines what it means by contract change notification and proposes the following as a definition "contract modification" means a change to a consumer's general terms and conditions but does not include an enhancement(s) to a consumer's service which is/are for the benefit of the customer and does not result in any additional cost or costs for the consumer.

ALTO would also draw ComReg's attention to changes to third parties wholesale call charges. These are changes that are not within the control of an undertaking and can occur at any point in time, meaning that unless an undertaking has been able to communicate these changes to its consumers it must absorb the costs of these changes until it can carry out a communication to its consumer base. Given the frequency of these types of changes, (often with very little advance notice) undertakings could be required to communicate on a regular /ongoing basis with its customers about individual price changes that it has no control over. This is not always possible to do given the costs involved in planning, running and implementing a communications campaign, the end result being that undertakings are forced to sell below cost until they are in a position to carry out a communications campaign.

In our view the Regulations were not drafted so as to catch changes that are outside the control of an undertaking rather the clear intention was to ensure that

undertakings are required to notify customers of changes that they the undertaking make to a customer's terms and conditions.

ALTO therefore suggests that changes such as these that are not within an undertakings control should also be excluded from the definition of "contract modification", failing which undertakings will be forced to update their contracts to ensure that these third party wholesale pricing changes will not amount to a contract modification for the purposes of Regulation 14.

ALTO members also feel that it is important to note that the laws of Contract in this jurisdiction should not be fettered where the appropriate regulatory and legal powers are not in being.

Response to Consultation Questions:

Proposed Minimum Format Specification

Q. 1. Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

A. 1. ALTO members have some concerns relating to this proposal. In the case of fixed and bill-pay consumers the word contract is often perceived to relate to the minimum term. Fixed and Mobile prepay consumers often have a limited understanding of the contractual aspect of prepay service.

ALTO members suggest that the heading "NOTICE: CONTRACT CHANGE" may be more likely to confuse customers than to promote awareness of a specific change. This is particularly so where the change relates to specific elements such as pricing that is ancillary to the general terms and conditions. In the case of a price change, the message will be far more concise if the communication were to focus immediately on the specific pricing element that is changing.

ALTO members suggest that a rigid approach to this form of notification may be problematic. Further, the suggestion that one SMS text notification be sent, is welcomed, though the character limited stipulated may pose problems given the length of ComReg's proposed 'boilerplate' text.

Q. 2. Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

A. 2. ALTO members believe that the provision of minimum information may be challenging in some cases.
ComReg's proposal is that *"an intelligible summary of the proposed changes must be included in the notification"* be sent to the customer.

ALTO members feel that it may not always be possible to meet this requirement and therefore operators should be free to direct customers to websites or materials, which can provide an intelligible summary and full information.

ALTO members agree that the timeframe to withdraw from the contract should always be stated. The proposal that the period be a minimum of one month, running in parallel with the notification period, is a practical approach. The provision of an extended period for notification and cancellation should be left to the discretion of ECS providers in line with the Regulations and contract law principles.

Q. 3. Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

A. 3. ALTO members disagree with the suggestion that the old and new terms and

conditions should be presented to customers. Given that any change must be notified a month in advance, customers will have the opportunity to review the change against their current terms and conditions. To require ECS providers to present both the current and the proposed terms and conditions will impose a significant cost burden. By way of example, where tariffs are being rationalised and customers are being moved from various price-points to a common price-point, such a requirement would necessitate a tailored approach to the communication.

ALTO refers ComReg to Recital 30 of the User Rights Directive, which states, in particular that *"measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition."*
ALTO suggests that the intention of the Directive is to ensure that customers are transparently made aware of new terms and conditions so that that they can review their current service, with the proposed changes against others that are available in the market.

This is of course, notwithstanding the fact that customers will have the opportunity to view the outgoing terms and conditions for a month, additional obligations aimed at aiding a comparison of the old and new conditions could not be objectively justified as they would not lend towards the objective of the Directive of optimising consumer choice in order to fully benefit from competition.

Furthermore such a requirement would likely result in disproportionate costs that would not result in any benefit to the operator or consumer.

In addition to being onerous for operators, customers may become confused and misinterpret the provisions that are being amended when presented with the old and new terms and conditions. Such confusion could serve to detract from the objective of ensuring customer choice by undermining customer understanding of the revised offering from their current provider.

Notification Medium

Q. 4. Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

A. 4. ALTO members consider that while these proposals appear reasonable, the limited space available in the medium does create certain issues. ALTO members should be afforded flexibility to manage their communications effectively, and of course where the consumers has specifically consented to receipt of communications (or not, as the case may be) in a given medium.

With reference to our answer to Question 1, above, ALTO members consider that the proposed notification heading could detract from the objectives of Regulation 14, as it would effectively limit the available space in an SMS to 138 characters while also having the potential to confuse customers by potentially drawing the focus away from the specifics of each change.

Q. 5. Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.

A. 5. ALTO suggests that the current proposal seeks to micromanage customer communications and does not guarantee that customers will read the notification.

ComReg's comment that *"some ECS providers include contract notifications at the bottom of another communication with a very small font size."* may of course be true, but it does not take away from the fact of notice.

ALTO members and other operators should be required to ensure that the notification is reasonably prominent in the communication to customers.

Q. 6. Do you agree or disagree with the proposal in relation to a verbal

contact change notifications? Please provide detailed reasons and supporting evidence.

A. 6. ALTO notes that certain subscribers do have difficulties in receiving and communicating with members and undertakings in various mediums. This is particularly acute when dealing with customers who are visually impaired, deaf or who have specific mobility issues.

ALTO welcomes the suggested use of telephone calls, whether automated or not. The Disability Forum may be the best place to appropriately deal with the appropriate standards, which could apply in the circumstances.

Direct Marketing

Q. 7. Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

A. 7. ALTO members believe that this proposal extends beyond ComReg's powers. ALTO members' investments in brand and communications should not be underestimates. Customer communications are expensive to plan, execute and implement.

ALTO members believe that they should not be prevented from using the opportunity to communicate with its customers in a proper and appropriate manner (usually with prior approval and consent) to update consumers about services and other matters, provided that they comply full with the relevant data protection regulations.

Draft Regulatory Impact Assessment ("RIA")

Q. 8. Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

A. 8. ALTO members believe that proposals raise significant concerns for members, for the various reasons stated in this response. ComReg must take account of the impact of mandating the headings, mediums and the presentation of and new terms and conditions all of which need to be considered further in the RIA. It might be the case that ComReg opts to drop certain issues, subject to this consultation. The Impact Assessment, such as it is, must take due account of the costs and inefficiencies, as well as burdens created when considering the commercial and operational realities of certain aspects of ComReg's proposals.

Q. 9. Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

A. 9. ALTO states that such a proposal is simply inappropriate and if mandated will reflect negatively on ComReg's ability to assess market realities and undertakings marketing, billing, legal and consumer management operations.

There are significant commercial realities to be taken into account directly related to this area.

ComReg must consider, *inter alia*, that operators could be in the midst of modifications at this point, and certain consumer communications campaigns may also be underway. A duration such as the one proposed may create calculable business losses for undertakings and requires immediate revision.

ALTO comments that litigation might arise if durations, such as, but not limited to, the one proposed, for such a drastic change was to be mandated. It is apparent though that a specified duration will have to be chosen, three to six months might be more realistic, though at bare minimum, two months could work.

ALTO members suggest that ComReg also considers its discretion relating to this topic, as each operator in the market is going to have a differing approach to this subject.

Draft Direction

Q. 10. Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

A. 10. ALTO members query whether specifications relating to wording are best dealt with by way of a Direction from ComReg. ALTO members consider that amending the Authorisation requirements might be a more appropriate mechanism to achieve robust compliance with the intention of this consultation and general body for work. By taking this approach, ComReg would also be able to know that new entrants are fully aware from day zero, on market entry of what the various Regulation 14 requirements are and how they apply. We refer ComReg to our Preliminary Comments in this regard.

Ronan Lupton

Chairperson

ALTO

12th September 2012

Extended Submission Date: 21st September 2012

2 BT

BT Communications Ireland Limited ("BT") Response to ComReg's Consultation

Contract Change Notifications

Issue 1 – 21st September 2012

Introduction and Summary

1. Our understanding of this consultation is that it is aimed at establishing the minimum specification for notifying customers of contract changes including price changes.

2. The consultation appears aimed at protecting the consumer where a standard contract would apply to a large base of consumer customers. BT no longer sells consumer services in Ireland so we not commenting on consumer issues in this response as others active in the consumer market are better placed to address the consumer market.

3. However, BT does sell retail services to the larger SME, corporate, multi-national and government markets and we do have a concern that the interchangeable use of the terms consumer, subscriber and end-user within the consultation widens the scope of the consultation on notification format to potentially include changes to business contracts, including multi-million Euro business contracts.

4. For medium and larger scale customers, the contract between the provider and the customer is normally bespoke and negotiated by both parties with support from business experts and legal representation; and it is not possible for either party to unilaterally change the contract. If a change to this type of contract were required, one party would contact the other to discuss the change. ✂ I.e. in summary a change would be requested, often by the customer, and then negotiated rather than just notified and enforced. The change could be requested by either party.

5. Based on the above our interpretation is that change requests (which are then subject to the formal agreement of both parties) are very different from change notifications (unilateral change) and are outside the scope of the proposals in the consultation.

6. In conclusions many business contracts are negotiated and there is no unilateral right to change the contract, hence the term NOTICE: CONTRACT CHANGE is not appropriate to negotiated business contracts; it is meaningless as the contract can't be changed this way and in our view disrespects the rights of the other party by implying a right that does not exist. Our view is a change request is more appropriate for business customers and we believe this to be out of scope for this consultation.

Detailed Response to the Questions.

Q. 1 Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

A.1

7. As discussed we consider that negotiated business contracts cannot be unilaterally modified as implicit in the notification process proposed by ComReg. I.e. negotiated business contracts don't allow unilateral changes and any changes have to be negotiated and formally agreed in writing. We would therefore suggest that for these types of contract either party can request a change by the other party but they cannot impose it. We therefore consider these types of contract where a change is requested are outside the scope of the notification formats being proposed.

8. The notification issues ComReg are trying to resolve don't arise for negotiated business contracts as business correspondence and detailed discussions is the norm for changing these contracts.

9. It is also worth noting that for these types of contract the change request can be equally served by the customer as well as the provider hence it would be disproportionate to tie the hands of one of the parties in this matter.

Q. 9 Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

A.9.

10. We acknowledge ComReg's focus is clearly towards the consumer customer as the issues described are consumer issues and the proposed regulatory remedy is optimised for the consumer sector; however given the potential links to the business community we disagree with the notification proposals with respect to business contracts as these are neither appropriate nor workable for these types of contracts. We don't have a unilateral right to change agreements and the proposed notification approach would in our view disrespect the equal rights of the other party, hence it is more likely a change request would arise either in writing or verbally through account management activities or correspondence and the parties would follow a formal process to agree any such change. In many cases it would be the business customer and not the provider seeking the change.

Q. 10 Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

A.10

11. As above the consultation is targeted towards the consumer community and whilst the draft direction addresses changes to consumer contracts it is not tailored towards multi-million euro business contracts where significant commitments are required by both parties to make the agreement work. We would like to offer the following comments to the draft direction.

    a. Most business contracts run for a fixed term rather than indefinitely in the case of consumer agreements, hence in section 2(iii) a fixed term normally applies rather than a minimum term. The term of the contract would be clearly identified in the contract.

    b. We consider changes to business contracts would be triggered by an individual change request from either party, not the unilateral change notice approach used for consumer contracts. Our view is that given a change request will lead to a discussion and formal signed agreement by the parties it should be outside the scope of this consultation as it is addressed through contract law. We therefore believe section 3 of the draft direction should not apply to negotiated business agreements where a change request is made as the contract may or may not change – it is merely the start of a negotiated settlement.

End

Documentation Control

Status: Issue 1 - Non Confidential Version

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3 Eircom

eircom Group

Response to ComReg Consultation Paper: Contract Change Notifications

ComReg Document 12/85

21 September 2012

The comments submitted to this consultation are those of Meteor Mobile Communications Ltd. (MMC) and eircom Ltd collectively referred to as eircom.

Executive Summary

eircom welcomes this opportunity to contribute towards this consultation on contract change notifications.

ComReg refers to some service providers failing to prominently communicate contract change notifications however we believe that this is not the norm and that ComReg has overplayed the need for such specifications. ComReg has failed to provide any material evidence to support interventions in the form of these specifications. This carries through to the specifications themselves, which in many respects are excessively detailed. eircom therefore proposes that a more general approach is taken to the specification of contract change notifications which would address the limited number of issues that have arisen to date, while ensuring that the specifications remain relevant even as technologies and services change.

We commend many of the pragmatic aspects of the proposals. We welcome ComReg's proposals to permit any medium to be used and in particular the provision for a minimum notification supplemented by additional information. This provides for the continued use of media such as SMS. However we have identified serious inconsistencies in these proposals which we highlight in this response and we urge ComReg to take full account of these concerns.

In particular we consider the proposed discrimination in respect of Electronic Communication Service (ECS) media by limiting the content of minimum notification or initial alerts, specifically over this medium to be entirely untenable. We believe that ComReg would be exceeding its powers if it were to generally prohibit the sending of marketing material in the same communication piece as a contract change notification to those customers that have not opted out of marketing communications. More generally, ComReg overlooks the possibility that a contract change could have both positive and negative aspects. ComReg has rightly proposed that all aspects of a contract change should be communicated therefore the communication of such a change may not differ significantly, if at all from direct marketing communications.

In addition we believe that the attempt to apply specific rules in respect of notifications, to communications over Electronic Communication Service (ECS) is also misguided, given that direct marketing contact rules differ between consumer and business customers. In short data protection regulations already provide adequate protection and do not need to be supplemented in these specifications.

ComReg proposes that the minimum notification should contain extensive information including advice of the right to withdraw from the contract. We consider the minimum notification to be an initial alert which forms part of the notification that is required under the regulations. Therefore we view the proposed minimum information under the draft direction to be excessive. It is not realistic to expect such an extensive communication to be encapsulated in a single 160 character SMS for example and this sets the draft direction at odds with ComReg's commentary elsewhere in the consultation and draft direction. Here ComReg suggests that SMS could continue as a notification medium, which it must, given that SMS is the only medium by which many prepaid subscribers can be reached. The purpose of the regulations is to ensure that competition is promoted and customers benefit from choice in the markets by empowering them with the information necessary to compare offerings, therefore it is vital that consumers are

aware of the full implications of a contract change before exercising their right to withdraw from their current contract. A requirement to include the right to withdraw in the initial alert, particularly in the case of an SMS communication which due to space limitations would be to the exclusion of potentially material detail about the change, would likely exaggerate any negative aspects of the change by presenting the option to withdraw ahead of the full details of the change. This would not serve the objectives of protecting consumers or promoting competition as it is likely to mislead subscribers and unduly disadvantage the service provider issuing the notification.

We also consider that the proposal to effectively micromanage the content of communications by specifying headings, formats and fonts would unduly add to the regulatory burden while also undermining the objectives of the specifications, in particular by specifying a heading where an alternative heading could describe the key element of a contract change. Rather, the specifications should seek through general terms to ensure that notifications are prominent, concise and accurate.

Similarly the proposal that new contract terms should be presented alongside the prevailing terms overlooks the fact that subscribers will have a minimum of one month's notice of a change of terms. Therefore the proposal has the potential to unduly add significant cost.

Greater clarity is required as to the scope of the specifications across the various recipients of notifications as determined by the terminology used. Regulation 14 (4) of the User Rights Regulations[1] which contains the notification requirement, identifies it as being applicable to "Subscribers". Clarity on the use of the term "Subscriber" is required as the terms "subscriber" and "consumer" are used interchangeably in this consultation document whereas the Framework Regulations[2] suggest a much broader definition.

We also question the regulatory mechanism that ComReg proposes to use to specify notification requirements. Given the general applicability of the specification, instead of issuing a Direction, we would consider it more appropriate to include any specifications as an amendment to the General Authorisation, thereby better ensuring compliance by future ECS providers as well as current providers.

1 S.I. No. 337 of 2011
2 S.I. No. 333 of 2011

Response to Consultation Questions

Section 1: Proposed Minimum Format Specification

Q. 1 Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

We do not agree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters). In the case of fixed and mobile bill-pay consumers the word contract is often perceived to relate to the minimum term while prepay consumers often have a limited understanding of the contractual aspect of prepay service. Therefore we believe that such a heading may be more likely to confuse customers than to promote awareness of a specific change, particularly where that change related to elements such as pricing that are ancillary to the general terms and conditions. For instance in the case of a price change, the message will be far more concise if the communication were to focus immediately on the specific pricing element that is changing.

Furthermore in the case of a notice delivered via SMS, we agree with ComReg's view that the message should not extend beyond one SMS, in which case the proposed heading would take up 22 of the 160 character limit that applies to SMS. ComReg acknowledges in paragraph 41 that SMS messages are generally intended to be quite short While it has been possible to date to provide a succinct message within 160 characters, it is likely that this would become impossible in many cases if the available space for the specific message were reduced to 138 characters. This would seriously undermine ComReg's objective as set out in paragraph 38 of the consultation, of providing "sufficient information so that the customer can fully understand the impact of the proposed change on them". Bearing in mind that SMS may be the only means by which some customers can be reached, ComReg should avoid any measures that would undermine this medium. Notwithstanding the above, the proposed use of capitals for the heading may be viewed as 'bad news' which would unduly convey a negative signal thereby biasing attitudes towards the change before the full implications of the change have been read.

Q. 2 Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

We agree with the principle of a minimum notification requirement but we believe that the proposed amount detail is excessive. The provision of minimum information is already challenging but manageable in the case of initial SMS alerts that are sent today advising of contract changes. ComReg proposes that "an intelligible summary of the proposed changes must be included in the notification". We consider the initial alert (described by ComReg as a

minimum notification) to provide such a summary and to form part of the notification that is required under the regulations. Therefore we view the proposed minimum information under the draft direction to be excessive.

It is not realistic to expect such an extensive communication to be encapsulated in a single 160 character SMS for example. This sets the draft direction at odds with ComReg's commentary elsewhere in the consultation and draft direction, which suggests that SMS could continue as a notification medium. We would remind ComReg that SMS is in many cases the only medium by which some subscribers can be reached.

It is both practical and sufficient to provide subscribers with the following minimum information:

1. A concise summary of the change
2. The effective date of the change
3. Information on accessing full detail about the proposed change.

The purpose of the regulations is to ensure that competition is promoted and that customers are protected and benefit from choice in the markets by empowering them with the information necessary to compare offerings. Therefore it is vital that consumers are aware of the full implications of a contract change before exercising their right to withdraw from their current contract. A requirement to include the right to withdraw in the case of an SMS communication which due to space limitations would be to the exclusion of potentially material detail about the change, would likely exaggerate the impact of the change by presenting the option to withdraw ahead of the full details of the change. This would not serve the objectives of protecting consumers or promoting competition as it is likely to mislead subscribers and unduly disadvantage the service provider issuing the notification.

In respect of other forms of communication whether used initially or as a means of supplementing an initial alert, eircom agrees that the timeframe to withdraw from the contract should be stated. The proposal that the period be a minimum of one month, running in parallel with the notification period, is a practical approach. The provision of an extended period for notification and cancellation should be left to the discretion of ECS providers in line with the Regulations.

Q. 3 Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

eircom strongly disagrees with the suggestion that both old and new terms and conditions should be presented to customers. Given that any change must be notified a month in advance, customers will have the opportunity to review the change against their current terms and conditions. To require ECS providers to present both the current and the proposed terms and conditions could impose a significant cost burden. For instance where tariffs are being rationalised and customers are being moved from various price-points to a common price-point,

such a requirement would necessitate a tailored approach to the communication. Also when operators need to communicate with customer by post, additional material (old and new terms and conditions) will dramatically increase postage costs.

There is no evidence that the practice up to now has caused difficulties and eircom has not received complaints in this regard.

Recital 30 of the User Rights Directive states that "measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition." Therefore the intention of the Directive is to ensure that customers are transparently made aware of new terms and conditions so that that they can review their current service in light of proposed changes against others that are available in the market.

Notwithstanding the fact that customers will have the opportunity to view the outgoing terms and conditions for a month, additional obligations aimed at aiding a comparison of the old and new conditions could not be objectively justified as they would not lend towards the objective of the Directive of optimising consumer choice in order to fully benefit from competition. When comparing competing offerings customers need to be supplied with current information about the offerings. Outgoing terms and conditions will have no bearing on this assessment. Furthermore such a requirement would likely result in costs that far outweigh any perceived benefit.

In addition to being onerous for operators, the presentation of old and new terms would likely cause confusion and lead to misinterpretation of the provisions that are being amended. At a minimum, this could lead to information overload and thereby obscure the core message.

Section 2: Notification Medium

Q. 4 Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

As outlined in response to question 1, we consider the proposed notification heading to detract from the objectives of Regulation 14 as it would effectively limit the available space in an SMS to 138 characters while also having the potential to confuse customers by drawing the focus away from the specifics of each change. We also refer ComReg to the response to question 2 which highlights that the proposed minimum information requirements would be both disproportionate and unworkable.

Q. 5 Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer

The proposal to specify that the text "NOTICE: CONTRACT CHANGE" must be in capital letters and in a larger font (minimum font 11) compared to the remainder of the message (minimum font 9) is excessive as it seeks to micromanage customer communications. ComReg should be seeking to establish a standard that expresses in general terms the requirement that notifications are prominent and concise. Whether a notice is sufficiently prominent will depend on the medium and the context of the communication. It should be sufficient to require that it is positioned so that it would be immediately noticed and is in a text format consistent with the text in the remainder of the communication. This should be determined on a case by case basis through ComReg's enforcement of the general requirements.

With regard to the statement in the consultation document that "some ECS providers include contract notifications at the bottom of another communication with a very small font size." Eircom does not employ this practice and believes that this could be addressed effectively through a general requirement that notifications should be prominent in the communication to customers.

Q. 6 Do you agree or disagree with the proposal in relation to a verbal contract change notifications? Please provide detailed reasons and supporting evidence.

eircom appreciates the challenges faced in ensuring effective communication with visually impaired customers and supports the use of telephone calls. However given the difficulties that arise in identifying customers with specific needs, eircom suggests that this matter should be addressed by the Disability Forum which ComReg chairs.

The Regulations do not prescribe the notification medium, therefore the potential to use verbal notifications goes beyond communications to visually impaired customers. Verbal notifications could be used for other users. Certain business customers could also be notified verbally depending upon the nature of the relationship.

Section 3: Direct marketing

Q. 7 Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

Each communication can give rise to significant expense both in planning and implementation and a requirement for a distinct contract change communication, separate from other communications that are sent to customers that have opted to receive direct marketing would unduly impose significant costs on service providers. We believe that it would therefore fail any proportionality test.

Operators are already bound by data protection regulations, which should be enforced with due reference to the obligation to notify contract changes. The notification requirement in the Directive is technology neutral in respect of the medium used and it would be bizarre for

ComReg to introduce further specifications that discriminate in relation to electronic media. Moreover, the focus on electronic media in this consultation, which appears to be an attempt to align with the data protection Regulations, overlooks the fact that different direct marketing rules apply depending on the target of a communication, with communications to business entities being subject to more liberal contact rules.

Furthermore, individual contract changes can entail both negative and positive aspects. We consider it appropriate that in such instances, service providers should communicate both the negative and the positive aspects in a balanced way in which case these communications could indeed be very similar to direct marketing that would be sent in any event, absent the notification requirement. It is entirely inconsistent for ComReg to propose in paragraph 52 that such communications be limited to "the required standard information in relation to the contract change as set out in Regulations 14" thereby bypassing these specifications. In order to meet the objective set out in paragraph 38, that seeks to ensure that service providers include "sufficient information so that a consumer can fully understand the impact of the proposed change on them, and decide whether or not they wish to withdraw from their contract", ComReg must make the specifications consistent in scope and consistently applicable across all communications media.

Section 4: Draft Regulatory Impact Assessment ("RIA")

Q. 8 Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

The proposals raise significant concerns for eircom for the reasons set out elsewhere in this response. In particular we urge ComReg to take account of the impact of discriminating against ECS communications, the implication of the prosed extensive minimum information, mandating the heading "NOTICE: CONTRACT CHANGE" and mandating the presentation of and new terms and conditions. These have clearly not been considered in the Draft RIA and cannot be objectively justified.

Q. 9 Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

eircom does not believe that the proposals can reasonably be implemented with immediate effect, when ComReg issues its Direction. There should be a minimum grace period of two months from the date of and direction. Operators need time to plan and execute communications with customers, including Regulation 14 related messages. Operators could find themselves in the midst of a communication programme that would have to be changed in the event of an immediate implementation of a direction. A two month grace period is therefore essential.

Section 5: Draft Direction

Q. 10 Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

As outlined in detail in response to question 2, due to the fact that the initial communication of a contract change may in many cases be limited to an SMS, it would be impossible to provide such extensive information in the confines of a 160 character SMS, even in the absence of the proposed mandated heading. We therefore recommend that the specification set out the following minimum information:

1. A concise summary of the change
2. The effective date of the change
3. Information on accessing full detail about the proposed change.

Further to our previous observations in relation to the provision of current and new terms and conditions, we believe that the requirement to provide "Details of the proposed new terms and conditions, together with the terms and conditions that are proposed to be modified" to be removed.

Regarding print notifications, we do not disagree with the proposed requirement for a font size of at least 9 point however further to the response to question 5, the specification in respect to the wording of the headings and differing font sizes should be removed.

Further to the objections raised in response to question 7, we call for the removal of the proposed prohibition of direct marketing given that any abuse can adequately be addressed through the enforcement of existing data protection regulations.

For the reasons set out in response to question 9 we urge ComReg to amend the effective date by allowing a lead time of at least two months from publication.

As regards the terminology used, Regulation 14 (4) of the User Rights Regulations[3] which contains the notification requirement identifies it as being applicable to "Subscribers". We request that ComReg provide clarity on the use of the term "Subscriber". The second footnote on page 6 of the consultation document states that 'The terms "subscriber" and "consumer" are used interchangeably in this consultation document'. This suggests that subscribers are consumers and not business customers. The scope of the draft direction refers to subscribers and "other end-users". The Framework Regulations[4] however suggest a much broader meaning for 'subscriber'. The interpretation section provides '"subscriber" means any natural

3 S.I. No. 337 of 2011
4 S.I. No. 333 of 2011

person or legal entity who or which is party to a contract with a provider of publicly available electronic communications services for the supply of such services'.

The management of the relationship with consumers and business customers require different strategies. Any direction resulting from this consultation should allow operators to freedom to manage the relationships with consumers and business customers. ComReg should not be overly prescriptive in how communications relating to Regulation 14 are managed as outlined in more detail in response to the consultation questions and this should be accommodated in the scope of the specifications.

In addition to the necessary changes to the wording of the specifications, eircom would question the use of a Direction as the means of specifying the format of notifications. Given the general applicability of the specification, we would consider it more appropriate to include the specifications as an amendment to the General Authorisation thereby better ensuring compliance by future ECS providers as well as current providers.

4 Magnet

There are some important issues that we highlight in this response and urge ComReg to take full account of these concerns.

Magnet must state that Magnet understanding is that the interchangeable words "subscriber" and "consumer" refer more particularly to residential users and does not affect the business to business customer who benefits from a more bespoke contract that is tailored to meet their business requirements.

Magnet is concerned that in some instances, certain solutions and measures that ComReg proposes, may exceed the powers available in the legislation, and therefore may be acting *ultra vires* the object and purpose of the relevant legislation.

It is also important to note that the laws of Contract in this jurisdiction should not be fettered where the appropriate regulatory and legal powers are not in being.

Q. 1. Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

Magnet has some concerns relating to this proposal. In the case of fixed and bill-pay consumers the word contract is often perceived to relate to the minimum term whereas terms and conditions actually manage the day to day relationship with the customer in the areas of billing, cancellations, notice etc.

Thus, Magnet suggest that the heading "NOTICE: CONTRACT CHANGE" may be more likely to confuse customers than to promote awareness of a specific change. This is particularly so where the change relates to specific elements such as pricing that is ancillary to the general terms and conditions. In the case of a price change, the message will be far more concise if the communication were to focus immediately on the specific pricing element that is changing. Also, such bold type face may also make the customer suspicious that their provider is up to something untoward which may not be the case.

Magnet believes that such a rigid approach to this form of notification may be problematic. Further, the suggestion that one SMS text notification be sent, is welcomed, though the character limited stipulated may pose problems given the length of ComReg's proposed 'boilerplate' text.

Q. 2. Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

Magnet believes that the provision of minimum information may be challenging in some cases.

ComReg's proposal is that *"an intelligible summary of the proposed changes must be included in the notification"* be sent to the customer.

Magnet feels that it may not always be possible to meet this requirement and therefore operators should be free to direct customers to websites or materials, which can provide an intelligible summary and full information.

Magnet agrees that the timeframe to withdraw from the contract should always be stated. The proposal that the period be a minimum of one month, running in parallel with the notification period, is a practical approach. The provision of an extended period for notification and cancellation should be left to the discretion of ECS providers in line with the Regulations and contract law principles. Magnet believes that ComReg does not need to intervene in the notice period as it is set out within the Regulation and thus is a compliance requirement.

Q. 3. Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

Magnet disagrees with the suggestion that the old and new terms and conditions should be presented to customers. Given that any change must be notified a month in advance, customers will have the opportunity to review the change against their current terms and conditions. To require ECS providers to present both the current and the proposed terms and conditions will impose a significant cost burden. By way of example, where tariffs are being rationalised and customers are being moved from various price-points to a common price-point, such a requirement would necessitate a tailored approach to the communication. It may also cause confusion with the customer if they receive either large volumes of paper or multiple email attachments on notification. Also, the customer may not read them and discard the whole correspondence without even reading the covering letter highlighting the actually change in terms. This would be counter to the point ComReg is endeavouring to achieve i.e. making the consumer aware of their statutory rights.

Magnet refers ComReg to Recital 30 of the User Rights Directive, which states, in particular that *"measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition."*
Magnet suggests that the intention of the Directive is to ensure that customers are transparently made aware of new terms and conditions so that that they can review their current service, with the proposed changes against others that are available in the market.

This is of course, notwithstanding the fact that customers will have the opportunity to view the outgoing terms and conditions for a month, additional obligations aimed at aiding a comparison of the old and new conditions could not be objectively justified as they would not lend towards the objective of the Directive of optimising consumer choice in order to fully benefit from competition.

Furthermore such a requirement would likely result in disproportionate costs that would not result in any benefit to the operator or consumer.

In addition to being onerous for operators, customers may become confused and misinterpret the provisions that are being amended when presented with the old and new terms and conditions. Such confusion could serve to detract from the objective of ensuring customer choice by undermining customer understanding of the revised offering from their current provider.

Q. 4. Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

Magnet considers that while these proposals appear reasonable, the limited space available in the medium does create certain issues. Magnet believes it should be afforded flexibility to manage our communications effectively and of course where the consumers have specifically consented to receipt of communications (or not, as the case may be) in a given medium.

With reference to our answer to Question 1, above, Magnet considers that the proposed notification heading could detract from the objectives of Regulation 14, as it would effectively limit the available space in an SMS to 138 characters while also having the potential to confuse customers by potentially drawing the focus away from the specifics of each change.

Q. 5. Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.

Magnet suggests that the current proposal seeks to micromanage customer communications and does not guarantee that customers will read the notification.

ComReg's comment that *"some ECS providers include contract notifications at the bottom of another communication with a very small font size."* may of course be true, but it does not take away from the fact of notice.

Magnet believes that the only requirement should be to ensure that the notification is reasonably prominent in the communication to customers. Magnet believes that there is also an obligation on the customer to keep themselves informed of the terms and conditions of their contract and Magnet suggests no amount of letters and warnings will keep some customers informed. The axiom caveat emptor is still relevant.

Q. 6. Do you agree or disagree with the proposal in relation to a verbal contact change notifications? Please provide detailed reasons and supporting evidence.

Magnet notes that certain subscribers do have difficulties in receiving and communicating with members and undertakings in various mediums. This is particularly acute when dealing with customers who are visually impaired, deaf or who have specific mobility issues.

Magnet welcomes the suggested use of telephone calls, whether automated or not. The Disability Forum may be the best place to appropriately deal with the appropriate standards, which could apply in the circumstances.

Q. 7. Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

Magnet believes that this proposal extends beyond ComReg's powers. Magnet invests in its brand and communications and ComReg should not seek to underestimate this. Customer communications are expensive to plan, execute and implement.

Magnet believes that they should not be prevented from using the opportunity to communicate with its customers in a proper and appropriate manner (usually with prior approval and consent) to update consumers about services and other matters, provided that they comply full with the relevant data protection regulations.

Q. 8. Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

Magnet believes that proposals raise significant concerns, for the various reasons stated in this response. ComReg must take account of the impact of mandating the headings, mediums and the presentation of and new terms and conditions all of which need to be considered further in the RIA. It might be the case that ComReg opts to drop certain issues, subject to this consultation. The Impact Assessment, such as it is, must take due account of the costs and inefficiencies, as well as burdens created when considering the commercial and operational realities of certain aspects of ComReg's proposals.

Q. 9. Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

Magnet believes that such a proposal is simply inappropriate and if mandated will reflect negatively on ComReg's ability to assess market realities and undertakings marketing, billing, legal and consumer management operations.

There are significant commercial realities to be taken into account directly related to this area.

ComReg must consider, *inter alia*, that operators could be in the midst of modifications at this point, and certain consumer communications campaigns may also be underway. A duration such as the one proposed

may create calculable business losses for undertakings and requires immediate revision.

Magnet suggests that litigation might arise if durations, such as, but not limited to, the one proposed, for such a drastic change was to be mandated. It is apparent though that a specified duration will have to be chosen, three to six months might be more realistic, though at bare minimum, two months could work.

Magnet suggest that ComReg also considers its discretion relating to this topic, as each operator in the market is going to have a differing approach to this subject.

Q. 10. Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

Magnet query whether specifications relating to wording are best dealt with by way of a Direction from ComReg. Magnet considers that amending the Authorisation requirements might be a more appropriate mechanism to achieve robust compliance with the intention of this consultation and general body for work. By taking this approach, ComReg would also be able to know that new entrants are fully aware from day zero, on market entry of what the various Regulation 14 requirements are and how they apply.

5 Sky

Response to Consultation 12/85 on Contract Change Notifications

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Executive summary

1. British Sky Broadcasting Limited (Sky) is a residential broadband and telephony provider, with over four million UK broadband customers.

2. Sky will launch broadband and telephony services in Ireland later this year and, as such, we are interested in this consultation and welcome the opportunity to contribute to it.

3. We apply considerable focus to put customers at the heart of what we do. In the UK, Ofcom's most recent customer satisfaction survey found that Sky's broadband and telephony customers were either equally or more satisfied than those of any other provider surveyed.[1]

4. Sky's values are consistent with the Commission's aim of ensuring that consumers are notified of contract changes by clear means that enable them to make informed decisions. However, we believe the Commission's strong focus on restricting the way that providers can inform consumers of contract changes runs the risk of failing to address the wider concerns of consumers who, research shows, can be overloaded by standardised information.

5. A prescriptive approach may desensitise consumers to contract change notifications and make it difficult for consumers to differentiate between minor and significant changes, which may undermine the effectiveness of notifications and have a counterproductive effect on consumers.

6. Moreover, such an approach removes the role of industry, and the expertise it has developed in communicating effectively with different consumers. We consider that providers themselves are best placed to determine the most effective way to inform their customers (which may vary between services and providers) and that industry has a critical role to play in ensuring that contract change notifications are proportionate and meaningful to consumers.

7. The current statutory framework ensures that communications providers are required to inform their consumers in a way that does not mislead, including by omitting or concealing material information, and we consider that to issue a further directive would risk causing regulatory disparities with other industries and cause legal uncertainty for both consumers and businesses alike

8. We therefore support a modified version of the Commission's proposal. Communications providers must continue to be able to determine the best way to communicate contract change notifications to consumers. However, in so far as the Commission considers that communications providers are not performing their obligations, we support straightforward, clear and accessible sector focused guidance to inform consumers and communications providers of their *existing* rights and obligations under the current framework.

9. If the Commission considers appropriate, we would value the opportunity for Sky and industry to work with the Commission to develop appropriate sector specific guidance on the existing law applying to contract change notifications

[1] Ofcom Customer Service Satisfaction Report, 2011 available at http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/customer-service.pdf

10. In so far as communications providers do not comply with their obligations or the Commission's sector focused guidance, we note that the Commission can take enforcement action under the existing consumer protection regulations and that communications providers that do not comply with their obligations are liable to fines under each of those.

11. In considering this consultation it is therefore important that the Commission's action:

    a) is proportionate to its objective of ensuring that consumers are protected in their dealings with suppliers and receive clear information;

    b) is consistent with the Government's principles of *Better Regulation*; and

    c) has regard to the Unfair Commercial Practices Directive, which fully harmonises consumer protection across Europe.

Part 2: Consumer, industry and market perspectives

Consumer perspectives

12. We recognise the Commission's duty to take *reasonable* measures to promote the interests of consumers.

13. However, we are concerned that consumers' interests may not be well served with a prescriptive direction that could cause disparity with other industries and cause legal uncertainty for both consumers and businesses.

14. The draft direction goes beyond what is required to ensure that consumers receive clear information about contract changes and enable them to make informed decisions and it has a number of adverse consequences, which we detail in full in the third part of our response. By way of example:

    14.1. Consumers would likely be desensitised to contract change notifications overall, as it would be difficult to distinguish inconsequential and administrative notifications for those which are important.

    14.2. Communications providers would be prevented from sending lawful marketing messages by e-mail to consumers that had expressed an interest in receiving such messages, and may be directly relevant to a contract change and therefore promote consumers' interests (e.g. a contract change to enable existing customers to reduce the price of their service by joining a related service).

15. Prohibiting activities that are otherwise permitted by general law has significant adverse impacts for consumers and industry, and it sets a dangerous precedent that can undermine the intentions of the legislature. Moreover, as per the example given at paragraph 14.2 above, the prescriptive approach described in the draft direction may not always be good for consumers.

16. As the draft direction deals with consumer protection issues that are already the subject of a statutory framework (described at paragraph 35.1 below), and is more onerous than the rules set by the legislature, we would expect such a measure to be proposed only as a last resort that is counterbalanced by overwhelming evidence of consumer harm by way of justification.

17. We are concerned that the Consultation does not offer *any* available evidence of consumer harm. In the absence of such data, the draft direction appears to address perceived industry issues without full consideration of the consumer perspectives, such as:

    17.1. the importance to consumers of having consistent consumer protection in their dealings with suppliers across all industries and beyond the communications sector;

    17.2. the impact of standardisation on consumers' ability to digest information;

    17.3. the critical role communications providers can play in ensuring that contract change notifications are meaningful to consumers; and

17.4. the impact of removing consumers' statutory right to make informed choices on whether they receive marketing communications in e-mail contract change notifications.

18. Without further context, the Consultation and draft directive appear focused on remedying a perceived shortfall in industry compliance rather than resolving an identified consumer problem.

19. We support the aims of the Consultation and concerns the Commissions has raised. However, we consider that consumers are better protected by the more flexible and effective measures already available under general law and that the Commission's aims can best be achieved by promoting awareness of and enforcing existing regulation in advance of introducing new regulation.

20. We have explained our proposals further at paragraph 35.6 below.

Industry Perspectives

21. The Commission is concerned that compliant providers adopting best practice may be disadvantaged by "providers who continue to issue regulatory notifications that are not transparent and do not adequately provide the require information to subscribers".

22. In so far as this concern has influenced the draft direction, we submit that compliant providers rely consumers to identify non-compliance by competitors and on regulators to take action in response to consumer complaints to ensure a level playing field.

23. The Consultation does not refer to any material complaints data from consumers. However, we should be grateful to have sight of that, if available. Moreover, there is an existing legal framework under which the Commission can take enforcement action to ensure compliance.

24. We consider that the Commission must seek to enforce the existing regulation before considering any new regulation, which not, of itself, advance issues of non-compliance.

25. Cross industry minimum standards would be a disproportionate reaction to the concerns the Commission has highlighted and we see no clear evidence that requiring minimum standards would increase compliance by comparison to alternative and more proportionate means of intervention, such as issuing clear guidance as to providers existing obligations under the CPA and taking enforcement action where appropriate.

26. Finally, it is a concern that the draft direction prejudices existing compliant providers, who would no longer be able to rely on their own expertise to provide consumers with contract change notifications that are proportionate, effective and meaningful in context of the changes proposed and who would be prevented from including lawful sales messages in contract change notifications by e-mail, thereby increasing their costs.

Market perspectives

27. We acknowledge the Commission's concern that consumers with insufficient information may make transactional decisions that they would not otherwise make about their right to switch in the event of a contract change notification. We consider that our third proposed option at paragraph 35.6 below would proportionately address this concern in combination with enforcement action, where required.

28. Providing they are enforced, the Universal Services Regulations require all providers to inform consumers of contract changes. Therefore, we do not accept that the current framework allows some providers to gain a commercial advantage. Moreover, the direct direction would not prevent non-compliance by a provider that currently does not currently comply with its obligations.

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Part 3: Promoting consumers' interests through proportionate regulation

29. Sky has considered its response by reference to the following regulation:

    29.1. Regulations 14.4 and 14.5 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (the "**Universal Services Regulations**"), as interpreted by reference to the Universal Services Directive 2002/22/EC, as amended by Directive 2009/136/EC (the "**Universal Services Directive**");

    29.2. the Consumer Protection Act 2007 (the "**CPA**"), as interpreted by reference to the Unfair Commercial Practices Directive 2005/29/EC (the "**Unfair Commercial Practices Directive**")

    29.3. the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the "**Privacy and Electronic Communications Regulations**"); and

    29.4. Section 12 of the Communications Regulation Act 2002 (as amended) (the "**Communications Regulation Act**").

The Commission's role and remit

30. The Commission must ensure that the reasonable measures it takes to promote the interests of consumers are proportionate to stated statutory objectives and have regard to Governmental and ministerial policy statements notified to it.[2]

31. Our response considers the Commission's proposals in light of the context set out above, by reference to our own understanding of consumer interests in this area and by reference to the objectives of the Universal Services Directive in ensuring that national regulatory authorities can specify the format of contract change notifications.

Ensuring the draft direction is proportionate to its aims

32. The Communications Regulation Act requires that Commission must ensures its measures are proportionate to its relevant statutory objectives of ensuring that consumers are protected in their dealings with suppliers and that consumers have clear information.[3]

[2] See sections 12(3) and 12(4) of the Communications Regulation Act respectively.
[3] See sections 12(2)(c)(ii) and (iv) of the Communications Regulation Act and para 3 of the Consultation.

33. The principle of proportionality is described by the European Court of Justice as set out below:

> *"By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".*[4]

34. Therefore, to show that the draft direction is proportionate to the Commission's stated statutory objectives, we consider that the Commission must be able to show that the draft direction set out at section 5 of the Consultation:

    34.1. is appropriate and necessary to ensure that consumers are protected in their dealings with suppliers and that they have clear information;

    34.2. the least onerous way to ensure that consumers are protected in their dealings with suppliers and that they have clear information, if other appropriate means of doing that are available; and

    34.3. will not produce adverse effects that are disproportionate to the aim pursued.

35. For the reasons we have already stated and set out below, we consider the draft direction wholly disproportionate by reference to this framework:

The draft direction is not appropriate or necessary to ensure consumers are protected in their dealings with suppliers and that they have clear information

    35.1. Communications providers already have statutory duties to notify consumers of contract change notifications in a way that is clear and does not mislead:

        35.1.1. Regulation 14(4) of the Universal Services Regulations requires providers to notify subscribers of contract modifications not less than one month before a change is implemented and of their right to withdraw from their contract without penalty if they do not accept a modification;

        35.1.2. Sections 41, 42, 42 & 46 of the CPA require providers to ensure that their commercial practices do not cause the average consumer to make transactional decisions that they would not otherwise make, whether by misleading, omitting or concealing material information; and

        35.1.3. Regulation 13 of the Privacy and Electronic Communications Regulations prohibits unsolicited direct marketing communications by e-mail.

    35.2. Collectively this framework allows the Commission's to achieve its statutory duties to ensure that consumers are protected in their dealings with suppliers and have clear information and without the draft direction, which is therefore unnecessary.

[4] See judgment of the ECJ in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, paragraph [13].

35.3. The draft direction is unduly prescriptive and thereby also inappropriate by comparison to the more flexible and sophisticated consumer protection already offered under existing regulation (in particular the CPA).[5]

The Commission can achieve its objectives by more proportionate means

35.4. We note that the Consultation considers only two polarised options of (1) not taking any action and (2) intervening in the market by mandating the minimum standards set out in the draft direction.

35.5. Given that contract change notifications are already heavily regulated by statute, we believe that it is unnecessary for the Commission to introduce further *ex ante* regulation and we do not therefore consider Option 2 tenable.

35.6. The Government's RIA guidelines anticipate that in most cases at least three options will be considered.[6] We consider that the Commission has at least two further options, which are not discussed in the Consultation:

35.6.1. The Commission can issue straightforward, clear and accessible sector focused guidance to inform consumers and communications providers of their *existing* rights and obligations under the statutory framework.

If the concerns raised by the Commission are rooted in a perceived lack of understanding or awareness of the framework applying to contract change notifications (in particular the CPA), this should improve compliance and promote consumers' interests in a way that is proportionate.

35.6.2. The Commission can take enforcement action against non-compliant providers under each of the regulations above, in particular as communications providers that do not comply with their obligations are liable to fines under each of those.

35.7. Each of these would be consistent with the requirement of proportionality that "when there is a choice between several appropriate measures [to ensure that consumers are protected in their dealings with suppliers and have clear information] recourse must be had to the least onerous".

The draft direction would produce adverse effects that are disproportionate to the aim pursued

35.8. We support clear and transparent consumer processes and transparent information for consumers.

35.9. However, we are concerned that the prescriptive approach the Commission has proposed will have a number of adverse consequences:

[5] See our summary at paragraphs 48 to 53 below.
[6] At p18, footnote 12.

Confusion caused by inconsistency between sectors

35.9.1. Sky is concerned that the draft direction would lead to inconsistent processes between sectors, which would not promote the wider interests of users within the Community.

35.9.2. For example, contract change notifications by an electricity provider may be overlooked because they are not headed "**NOTICE: CONTRACT CHANGE**" and consumers may not therefore take transactional decisions that they would not otherwise make.

35.9.3. We consider that consistent principles best protect consumers' interests we do not consider that it is appropriate for sector regulation to divert from general consumer protection measures unless further measures are unconditionally required.

35.9.4. We have explained this further at paragraphs 39 to 53 below

Desensitising consumers to important messages, to their detriment

35.9.5. Sky is concerned that setting a prescriptive format for notifications will have a counterproductive effect on consumers, in that by standardising all notifications it will be very difficult for consumers to differentiate minor changes to their contract from significant changes.

35.9.6. We note that the Commission is required to conduct its RIA in accordance with European and International best practice. Following various studies to examine how to most effectively communicate with consumers, the UK Better Regulation Executive, National Consumer Council and the Office of Fair Trading have acknowledged that too much information can harm consumers:

> *"Simplifying and standardising product information can make decision-making easier. But, when considering the impact of intervention in consumer markets, it is important to understand that consumers' tendency to assess only a few key variables means that too much information may sometimes do more harm than good".*[7]

35.9.7. We are concerned that restricting providers and consumers' ability to present and take in information by applying a "one size fits all" approach may cause many consumers to switch off, in particular after receiving heavily prescribed notifications that are immaterial or an improvement to their service.

35.9.8. It would be perverse if standardising notifications resulted in consumers ignoring more notifications. For example it is not unusual for banks' customers to experience

[7] Quotation from the Office of Fair Trading study on Consumer Contracts (February 2011), at paragraph 3.39 http://www.oft.gov.uk/shared_oft/market-studies/consumercontracts/oft1312.pdf . See also the final report by the Better Regulation Executive and National Consumer Council on maximising the positive impact of regulated information for consumers and markets (November 2007) available at http://www.bis.gov.uk/files/file44588.pdf

notification fatigue each time a change to their credit card terms and conditions is notified, meaning that many customers do not open the e-mail notification at all.

Overlooking the contribution of industry to ensuring effective consumer protection

35.9.9. Sky recognises the importance of ensuring that our customer communications are clear and properly inform consumers of the information they require.

35.9.10. By way of illustration, Ofcom's 2011 study on the quality of customer service offered to owners of broadband, mobile, fixed line and pay TV providers, which measured satisfaction with the quality of customer service that they receive from their providers, found that:

35.9.10.1. Sky Talk customers had the highest overall satisfaction with their provider and the customer service they receive of any provider; and

35.9.10.2. Sky Broadband customers had the joint highest overall satisfaction with their provider and highest satisfaction with customer service of any provider.[8]

35.9.11. Communications providers invest considerable time and resources to understand the most effective way of communicating with their consumers. The profile and needs of consumers may differ between providers and services, thereby requiring different approaches for effective communication that would be prevented by the draft direction.

35.9.12. If consumers do not understand a contract change we communicate and first become aware of this when the change is implemented, it can drive considerable calls to our contact centre, which can adversely effect our ability to help other customers. Therefore it is in our interests as a communications provider to ensure that consumers understand the information we communicate.

35.9.13. We have highlighted above that prescriptive nature of the draft direction raises considerable challenges to communications providers ability to tailor appropriate messages to their consumers, and may be to their detriment and counterproductive if consumers switch off as a result.

35.9.14. The draft direction would also have disproportionately adverse effects on communications providers' ability to communicate positive information. For example, it would be significantly onerous to require that communication providers' use the e-mail heading "**NOTICE: CONTRACT CHANGE**" where amending a broadband service to *increase* consumers' usage limits. In such a case, a provider may wish to head their e-mail "Good news: we are improving your service", which would not mislead.

[8] Ofcom Customer Service Satisfaction Report, 2011 available at http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/customer-service.pdf

36. Having regard to all of the points made at paragraph 35 above, we do not consider that the draft direction is a tenable and proportionate way for the Commission to achieve its statutory objectives.

Ensuring consistency with Governmental and ministerial policy statements

37. As stated at section 4.1 of the Consultation, the Commission must regulate only after conducting a regulatory impact assessment in accordance with best practice and considering the principles established by the Government's *Better Regulation* programme.

38. Referring to the six principles of Better Regulation and the Government's guidance on those[9] we are concerned that the draft direction set out a section 5 of the Consultation is significantly out of line with government policy:

Principle 1: Necessity - Government policy requires high standards of evidence before regulating and that new regulation will only be introduced where necessary.

38.1. We have explained at paragraphs 35.1 to 35.3 above that we do not consider that new regulation is necessary. We are also deeply concerned that the Consultation does not offer any available evidence of consumer harm, as shown by complaints or other robust data before proposing the draft direction.

38.2. The Government's Chart of Regulatory Principles advocates strengthening the quality of regulations "through impact analysis, better training and awareness-raising" and we have proposed two ways for the Commission to raise consumer and communications providers' awareness of existing regulation at paragraph 35.6 above, which we consider are more in keeping with the principle of necessity.

Principle 2: Effectiveness - Policy guidelines call for more frequent use of regulation that sets out the goals to be achieved but which leaves maximum flexibility as to the means of achieving them.

38.3. The existing regulation under the CPA is consistent with the principle of effectiveness and set a framework that can apply to all kinds of communications with consumers.

38.4. The draft direction would be ineffective within the meaning described above and we therefore cannot support it in light of the existing protection already provided for consumers.

Principle 3: Proportionality - Regulators are asked to regulate as lightly as possible and use more alternatives where those are available.

38.5. We repeat our point above on the proportionality of this proposal and the alternative more proportionate means by which the Commission can achieve its aims, if further action is required.

[9] See the Government's Chart of Regulatory Principles and Actions and White Paper *Regulating Better*, p. 2, as published on the Department of Taoiseach publications archive for 2011.

Principle 4: Transparency - Regulatory measures should be as straightforward, clear and accessible as possible.

38.6. We consider that, if consumers have different rights in different aspects of their dealings with providers, it is likely to be more difficult for them to understand their rights in the way that Community rules on consumer protection intend.

Principle 5: Accountability - Government policy aims to strengthen accountability in the regulatory process.

38.7. We repeat our concern that no evidence whatsoever is provided as to:

38.7.1. any existing consumer harm, as shown by complaints or other robust data;

38.7.2. the future effects that the Commission states are *likely*, if it does not intervene;

38.7.3. why existing regulation is insufficient to ensure that reasonably well informed, reasonably observant and circumspect consumers are able to make informed transactional decisions about contract change notifications; or

38.7.4. why the Commission cannot perform its duties under s12 of the Communications Regulation Act by less onerous means of intervention (e.g. through clear consumer and industry guidance).

38.8. Without such evidence the draft direction is unaccountable and, in the absence of that, we do not consider that further regulation can be considered without breaching this policy.

Principle 6: Consistency - Regulation of linked or connected areas must be consistent to protect consumers effectively.

38.9. We consider that this is a key concern for the Commission's RIA and have highlighted above that the draft direction would cause inconsistency with consumers experience in other market sectors because it is not aligned to consumers' existing protection under general law. If introduced, the draft direction would lead to a clear inconsistency between the contract change notifications consumers receive from communications providers and those received from other service providers, which is likely to be confusing. It is also likely to lead to different practices within the same communications provider depending on whether important notifications are contract change notifications, which adds further confusion.

38.10. Communications providers are required to comply with their statutory obligations notwithstanding the draft direction and the inconsistency between it and consumer protection provided by it and existing laws are likely to cause conflict and confusion for industry as to the requirements they should be complying with. In so far as the direction is not aligned with existing law it may actually drive non-compliance, as individual providers focus on one requirement or the other.

38.11. The proposed direction would be wholly at odds with the principle of consistency for the reasons we have already stated and, overall, we are unable to reconcile the Commission's regulatory impact assessment and draft direction with the principles of *Better Regulation* and the best practice it is required to act in accordance with by Ministerial Policy Direction.[10]

Compatibility with European policy and law

39. Our response above considers the Commission's proposals in the context of its duties of proportionality and to ensure that its measures are consistent with the objectives set out in keeping with relevant Governmental and ministerial policy statements.

40. We also consider that the Commission's obligation to conduct a regulatory impact assessment in accordance with European and international best practice requires it to consider the objectives of the Universal Services Directive, which is the root of the powers it refers to under Regulation 14(5) of the Universal Services Regulations.

41. Article 1(4) of the Universal Services Directive states that "[t]he provisions of this Directive concerning end-users' rights shall apply *without prejudice to* Community rules on consumer protection".

42. Community rules on consumer protection are fully harmonised under the Unfair Commercial Practices Directive, which is implemented in Ireland by the Consumer Protection Act 2007 (the "**CPA**").

43. The principle of full harmonisation means that Member States can no longer implement or apply either less or more restrictive or prescriptive consumer protection measures in the area that has been harmonised. The Preamble to the Unfair Commercial Practices Directive explains that, in order to remove internal market barriers caused by regulatory disparities and to increase legal certainty for both consumers and businesses, it was necessary to replace existing national systems with a uniform regulatory framework at Community level (see in particular Recitals 5, 12 and 13).

44. The principle has also been confirmed by the Court of the Justice of the European Union, which has ruled that this prohibits Member States adopting stricter rules than those provided for in the CPA, even in order to achieve a higher level of consumer protection.[11]

45. We note that the Draft Directive goes further than and is inconsistent with the fully harmonised rules on consumer protection laid down by the Unfair Commercial Practices Directive and the CPA above, which provide a permissive framework that the draft direction is at odds with and allows consumer providers to choose how to communication with their customers on the proviso that they ensure that the average consumer is not likely to be

[10] Ministerial Policy Decision made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003, Policy Direction 6

[11] See the "Total Belgium" case (Joined Cases C-261/07 and C-299/07). The Court of Justice, while examining the compatibility of a Belgian law prohibition on combined offers with the Directive's provisions, held that "the Directive fully harmonises those rules at the Community level. Accordingly, [...] Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection". Thus, the Directive was found to preclude a national prohibition of combined offers.

misled by a contract change notification into making a transactional decision that they would not otherwise have made.

46. We are therefore concerned that the Commission has misinterpreted the scope to regulate more broadly under Regulation 14(5) of the Universal Services Regulations than is intended by the Universal Services Directive and that the draft direction would cause regulatory disparities with other industries and increase legal uncertainty for both consumers and businesses, in conflict with Community and national consumer protection law.

Consumer protection under the Consumer Protection Act 2007

47. We have summarised the relevant terms of the CPA below.

48. Section 42 of the CPA sets out a general prohibition on misleading commercial practices and Sections 43-46 of the CPA deal with specific types of misleading commercial practice.

49. Section 43 of the CPA (false, misleading or deceptive information) prohibits commercial practices that (a) include the provision of false information in relation to the matters specified in that section[12] **and** (b) as a result of that information are likely to cause the average consumer to make a transactional decision that they would not otherwise make.

50. Section 46 of the CPA (withholding, omitting or concealing material information) prohibits commercial practices in which (a) a trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision **and** (b) the act of doing is likely to cause the average consumer to make a transactional decision that they would not otherwise make.

51. It is important to note that a commercial practice can only mislead for the purposes of these sections if both of the limbs (a) and (b) set out above are satisfied. The *likelihood* of a consumer being misled must also be considered by reference to the "average consumer". The CPA defines the "average consumer" by cross reference to Unfair Commercial Practices Directive and Recital 18 of Unfair Commercial Practices Directive defines the "average consumer" objectively and to be "reasonably well-informed and reasonably observant and circumspect".

52. We consider that the Universal Services Directive requires the Commission's power under Regulation 14.5 of the Universal Service Regulations to be read "without prejudice to Community rules on consumer protection".[13] Therefore, in considering the proposals set out in this Consultation, the Commission must have regard to the maximum harmonisation requirements of the CPA and assess in each case whether *without* a proposed change:

    a) a reasonably well informed, reasonably observant and circumspect consumer is likely to be misled as to either (i) the existence of a right to withdraw from their contract without penalty, or (ii) when, how or in what circumstances that right may be exercised; **and**

[12] Section 43(3)(j) confirms that information concerning a customer's legal rights and when, how or in what circumstances those rights may be exercised is relevant information for the purposes of this section.
[13] See paragraph 2 above.

b) a consumer is likely to make a transactional decision that they would not otherwise make as a result.[14]

53. We therefore consider that the draft directive *cannot* require telecoms providers to go further than is necessary to ensure that the average consumer is not misled into making a transactional decision that they would not otherwise have make and to *prescribe* a single way of notifying consumers of contract changes, because the area it proposes to regulate is fully harmonised across Europe by the Unfair Commercial Practices Directive.

54. For these reasons, we consider that the draft direction inconsistent with the intention of the Universal Service Directive.

[14] See Sections 43(2) and 46(2) CPA, as described above.

Part 4: Responses to the Commission's consultation questions

1. Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

1.1. We disagree because:

Existing regulation is sufficient

1.2. Communications providers are already under a statutory duty to notify consumers of contract change notifications in a way that does not mislead, whether by omission or otherwise:

1.2.1. Regulation 14(4) of the Universal Services Regulations requires providers to notify subscribers of contract modifications not less than one month before a change is implemented and of their right to withdraw from their contract without penalty if they do not accept a modification;

1.2.2. Sections 41, 42, 42 & 46 of the CPA require providers to ensure that their commercial practices do not cause the average consumer to make transactional decisions that they would not otherwise make, whether by misleading, omitting or concealing material information; and

1.2.3. Regulation 13 of the Privacy and Electronic Communications Regulations prohibits unsolicited direct marketing communications by e-mail.

1.3. The consumer protection provided by the CPA is not only more flexible and therefore effective than the prescriptive regulation proposed for the purposes of *Better Regulation* but is subject to full harmonisation obligations under European law that prevent Member States adopting stricter rules than those provided for in the CPA, even in order to achieve a higher level of consumer protection.[15]

1.4. Given the comprehensive statutory framework of existing regulation, we do not consider that the Commission can show that new regulation is proportionate and justifiable in the light of the objectives laid down in section 12 of the Communications Regulation Act and the Government's requirements of *Better Regulation*.

1.5. If the Commission considers that communications providers and consumers do not understand their rights and obligations as described above, we consider that the Commission should issue sector specific guidance to highlight the framework of regulation around contract change notifications and the Commission's view as to best practice.

[15] The full harmonisation effects of the Directive have been spelled out in the "Total Belgium" case. The Court of Justice, while examining the compatibility of a Belgian law prohibition on combined offers with the Directive's provisions, held that "the Directive fully harmonises those rules at the Community level. Accordingly, [...] Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection". Thus, the Directive was found to preclude a national prohibition of combined offers.

1.6. If the Commission receives notification that communications providers are not complying with the Commission's guidance, then the Commission should take appropriate enforcement action, if required (or refer the matter to the Office of the Data Protection Commissioner or National Consumer Agency, as is appropriate).

The requirements of proportionality and six principles of Better Regulation mitigate against further regulation

1.7. The prescriptive requirements of the proposal are unnecessary for the Commission to perform its duties under section 12 of the Communications Regulation Act. In particular, the Commission's Regulatory Impact Statement contains no evidence as to:

1.7.1. any existing consumer harm, as shown by complaints or other robust data;

1.7.2. the future effects that the Commission states are *likely*, if it does not intervene;

1.7.3. why existing regulation is insufficient to ensure that reasonably well informed, reasonably observant and circumspect consumers are able to make informed transactional decisions about contract change notifications; or

1.7.4. why the Commission cannot perform its duties under s12 of the Communications Regulation Act by less onerous means of intervention (e.g. through clear consumer and industry guidance).

The Commission has a duty to require high standards of evidence before regulating under the first *Better Regulation* principle of necessity. We do not consider that the Commission has satisfied this requirement, based on information set out in this Consultation.

1.8. In keeping with the second *Better Regulation* principle of effectiveness, we consider that providers should be given maximum flexibility as to how they ensure that consumers can make informed transactional decisions about contract change notifications.

1.9. Further regulation is unnecessary and would be disproportionate under the third principle of *Better Regulation* because misleading commercial practices are already regulated by the CPA.

1.10. Any proposal to apply a different and more prescriptive standard of consumer protection for communications providers than is applied in other sectors and by other regulators under the CPA would cause significant regulatory inconsistency and confusion for both consumers and industry; this would contradict the Commission's obligation to ensure consistency under the sixth principle of *Better Regulation* and produce adverse effects that are disproportionate to the Commission's aim of ensuring greater clarity for consumers.

The Commission's aims can be achieved by alternative and more proportionate means of intervention

1.11. The concerns raised by the Commission can more proportionately be addressed with clear sector specific guidance to raise industry and consumer awareness of how providers can best comply with the CPA in making contract change notifications (for example in relation to Question 1, by making it clear on the outside of an envelope that "Important information [is] enclosed" and prominently identifying the contract change notification, including by the means the Commission has proposed, or similar).

2. Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

2.1. We disagree with the proposed minimum information requirement because it is disproportionate and unnecessary in light of the existing regulation.

2.2. We repeat the points made in response to Question 1 above.

2.3. The Universal Services Regulations already specify the content of contract change notifications and the CPA contains a framework to ensure that those do not mislead.

2.4. Regulation 14(5) of the Universal Services Regulations permits the Commission to specify the *format* of notifications but it is clear from the drafting of that regulation that it does not go further to allow the Commission to specify the *content* of notifications.

2.5. We consider that it is in any event unnecessary for the Commission to specify the *content* of notifications because the minimum information requirements proposed at paragraph 32 of the Consultation can either be taken directly from the Regulation 14(4), or inferred from it in assessing the requirements of the CPA.

2.6. Having regard to the principles of *Better Regulation* and the points made in response to Question 1 above, it would be wholly disproportionate and inappropriate to introduce further regulation explaining the information required to be provided to consumers in respect of contract change notifications.

2.7. However, we consider that it would be useful for the Commission to issue guidance to industry and consumers on the application legal framework to contract change notifications and on its view as to best practice.

3. Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

3.1. We disagree with the proposed requirement to provide full information in the prescriptive manner set out in the Consultation.

3.2. We repeat the points made in response to Question 1 above.

3.3. We further note that consumers will not always require:

3.3.1. further information of changes to be accessible elsewhere, as it may be possible to explain many changes in full in the contract change notification; and

3.3.2. details of old terms and conditions (for example, where a new term on fair usage is being introduced and on which the contract was previously silent).

3.4. For the reasons set out above, we do not consider that prescriptive regulation would be a proportionate or effective response to the concerns the Commission has identified.

4. Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

4.1. We disagree with the proposed standards for contract notifications by SMS.

4.2. We repeat the points made in response to Question 1 above.

4.3. We agree that:

4.3.1. communications providers should provide notification of the contract change in the main text (i.e. first 160 characters) of the SMS(s);

4.3.2. if a hyperlink is provided in the main text for additional information, this link should bring the consumer to a page on the communication provider's website that properly explains the proposed contract change (although note our comments at paragraph 4.5 below).

4.4. However, these requirements are consistent with and can be inferred from providers existing obligations under the CPA, which makes it unnecessary and disproportionate to introduce further regulation to ensure that contract change notifications by SMS do not mislead.

4.5. By way of example, we do not consider that it would be appropriate to *prescribe* that a hyperlinked landing page contains the full information described by the Commission at paragraph 36 of the Consultation as that may prevent new and innovative ways of presenting information (e.g. appropriate use of pop-ups, or a whole microsite devoted to the proposed change(s)) and it may not be misleading for providers to maintain some information outside that page (e.g. a PDF tariff guide hosted elsewhere on the provider's website and prominently hyperlinked to from the page on which details of the contract change are explained).

4.6. The standards proposed for contract change notifications made by SMS are unnecessary and would be disproportionate if introduced, including because s46 of the CPA already regulates the withholding, omitting or concealing material information.

4.7. However, we consider that it would be useful for the Commission to issue guidance to industry and consumers on the application legal framework to contract change notifications and on its view as to best practice.

5. **Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.**

5.1. We disagree with the proposed standards for print contract notifications.

5.2. We repeat the points made in response to Question 1 above.

5.3. We do not consider that the average consumer, who is reasonably well informed, reasonably observant and circumspect, is in all cases likely to make a different transactional decision than they would otherwise make *because* the minimum information described at paragraph 32 of the Consultation is not presented at the start of an e-mail or on the front page of a letter.

5.4. Where providers give full information of the kind described at paragraph 36 of the Consultation on the reverse of the first page or on a separate insert within the envelope and that is clearly signposted, it may be unduly duplicative to give the minimum information on the front page of a letter or the start of an e-mail.

5.5. Similarly, an explanation of the positive changes a provider has made to justify a contract change consumer may benefit customer satisfaction and experience and therefore be appropriate to include before minimum information is given in contract notifications given by e-mail.

5.6. Providing that the contract change notification is sufficiently clearly signposted and that the information is not concealed, we do not consider that, of itself, a contract change notification given other than as proposed for print contract notifications in this Consultation is a misleading commercial practice under the CPA.

5.7. The standards proposed for print contract change notifications are unnecessary and would be disproportionate if introduced, including because s46 of the CPA already regulates the withholding, omitting or concealing material information.

5.8. However, we consider that it would be useful for the Commission to issue guidance to industry and consumers on the application legal framework to contract change notifications and on its view as to best practice.

6. **Do you agree or disagree with the proposal in relation to a verbal contact change notifications? Please provide detailed reasons and supporting evidence.**

6.1. We disagree with the proposal in relation to a verbal contact change notifications.

5.9. We repeat the points made in response to Question 1 above.

6.2. We agree that consumers notified of a contract change by telephone should be made aware that full, detailed information is available and the means by which this can be accessed, if the full information has not been communicated. Where full information has been provided, this requirement may not be applicable.

6.3. The requirements at 6.2 above are consistent with and can be inferred from existing obligations under the CPA, and as such it is unnecessary and would be disproportionate to introduce further regulation of verbal contract change notifications.

6.4. However, we welcome non-binding guidance from the Commission the application of the existing regulation under the CPA to verbal contract change notifications.

7. Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

7.1. We disagree with the proposal that a contract change notification delivered by electronic means must exclude marketing material.

7.2. The Privacy and Electronic Communications Regulations clearly describe the requirements for direct marketing by electronic means.

7.3. Communications providers that send unsolicited direct marketing communications are liable to an offence under the Privacy and Electronic Communications Regulations. Enforcement action against such providers would proportionately address the concerns raised by the Commission at paragraph 51 of the Consultation.

7.4. Having regard to the six principles of *Better Regulation*, the points made at paragraph 1.1 of our response above and the existing regulation in this area, it would be wholly disproportionate and inappropriate to introduce further regulation of unsolicited direct marketing.

7.5. We are also concerned that this proposal may drive providers away from e-mail notification which is helpful to ensure that consumers have timely information and is cost effective for consumers and industry.

7.6. However, we welcome non-binding guidance from the Commission the application of the Privacy and Electronic Communications Regulations to contract change notifications.

8. Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

8.1. We disagree with the Commissions assessment of the impact of the proposed direction.

8.2. We repeat the points made in response to Question 1 above. In particular, paragraphs 1.2 to 1.6 of our response.

9. Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

9.1. We do not agree that the proposals can be implemented with immediate effect as drafted, in particular because we consider that:

9.1.1. the findings of the Commission's Regulatory Impact Assessment do not reflect best practice as set out in the six principles of *Better Regulation* and otherwise under the Government's Better Regulation programme to support evidence based policy making;

9.1.2. the Draft Direction goes further than is required by the Commission's statutory duty to ensure that its actions are proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act; and

9.1.3. the Draft Direction is incompatible with European law in so far as it prescribes either less or more restrictive consumer protection measures than are already set out in the CPA.

9.2. We nonetheless recognise the benefit of sector specific guidance as to the Commission's interpretation of the applicable regulation described at paragraph 1.2 above of our response.

10. Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

10.1. We repeat the points made in response to Question 9 above.

10.2. We have not proposed a mark-up of the draft direction, as we do not consider that the direction is required.

10.3. However, if the Commission considers appropriate, we would value the opportunity to work with either the Commission or other members of industry to develop appropriate sector specific guidance as to the law applying to contract change notifications.

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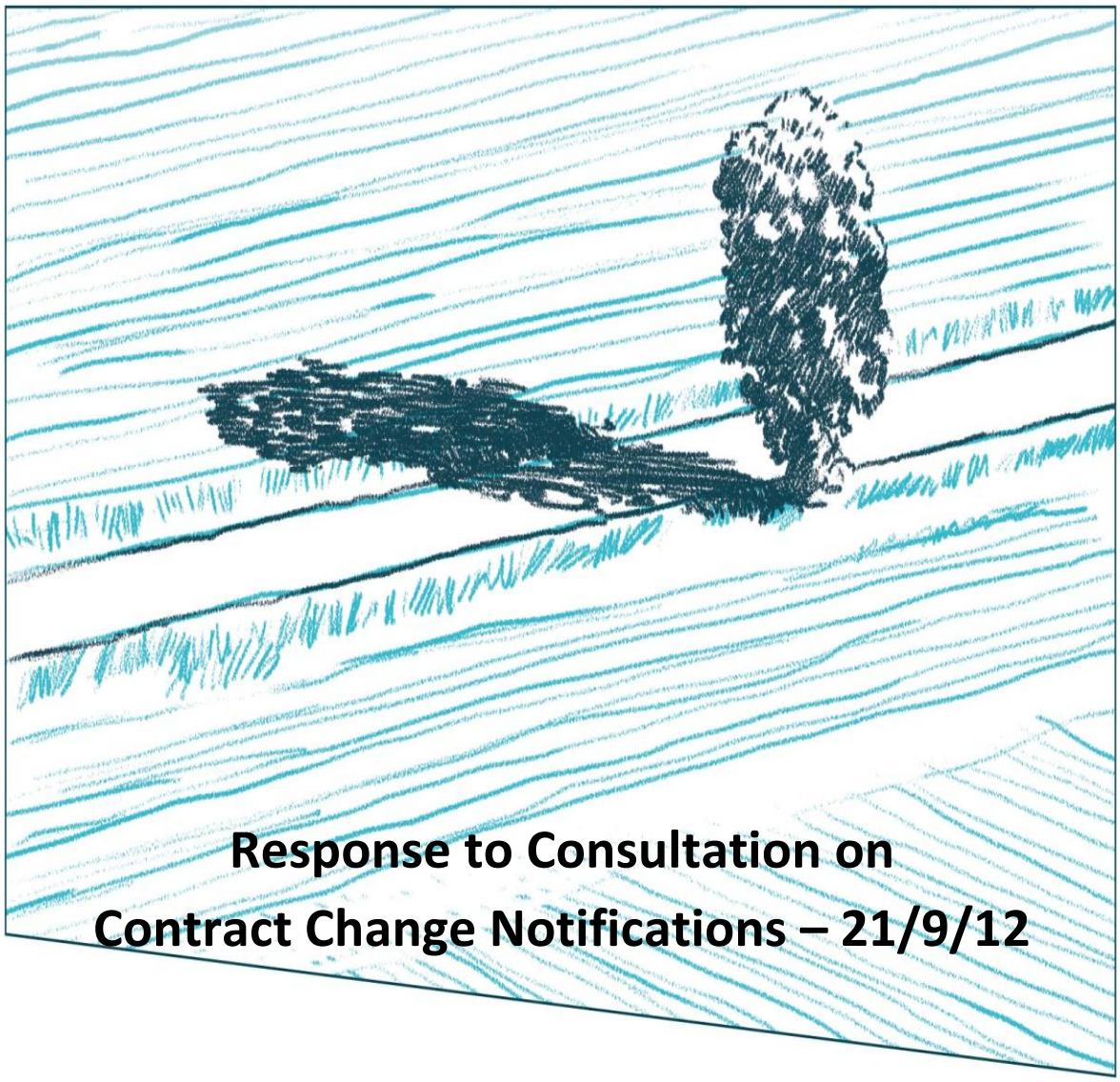

Response to Consultation on Contract Change Notifications – 21/9/12

Comments on Document 12/85

Telefonica

This is the response of Telefonica Ireland to the ComReg consultation on contract change notifications (Ref: ComReg 12/85). While Telefonica does not agree with all proposals put forward from ComReg, we welcome the opportunity to respond and support the general objective to ensure a consistent industry approach is applied to the implementation of a notification of proposed modifications to contractual conditions.

General Comments

The detailed comments are provided in response to each question below. In particular, we would highlight the following:

1. Certain proposals are overly prescriptive and may detract from the general purpose to inform customers of modifications to contractual conditions and advise them of their rights in a clear and intelligible manner. In particular, the requirement to include all the details currently proposed as minimum information in the SMS element of a customer notification will limit the detail summarising the change. A reduction will permit more clarity detailing the actual change with the customer then linked directly to the full information. Technical restrictions and limitations on what can be provided in such communication – which would be essential for communication to a base of mobile telephony customers – must be taken into account.

2. The range of modifications that ComReg consider a modification to contractual conditions is extremely broad. Examples include modifications to 'special promotions' and 'wording changes'. Telefonica would observe that all legislative obligations have only ever related to *'modifications in the conditions of the contract for that service*[1]*'* and we note that the legal comprehension of same relates to a 'condition' being a material term of a contract entitling termination. It must be therefore submitted that the purpose of the Regulation should be to ensure notification (in required formats) of material changes which are not in the subscribers favour.

3. The limitation on provision of information on alternative services (i.e. *marketing content)* is an unnecessary commercial restriction and will limit an operators' ability to fully inform customers of their options and may result in a negative consumer experience without awareness of alternatives or replacement options being proffered. Telefonica must be allowed to provide such basic information to its customer base and thus recommends that this proposal is altered to ensure only relevant information is provided and provision of such information is in compliance with customers marketing consents.

4. ComReg must acknowledge and reflect that certainty of subscriber receipt of notices, or of their actual understanding of their content, cannot be guaranteed and due acknowledgement of this concept should be reflected. Furthermore, the extent of what will be required to demonstrate compliance should be more clearly understood, so as to minimise disproportionate technological development to validate same.

[1] See generally Regulation 17(4)(a) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 and the replacement of same under Regulation 14(4) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011.

5. The impact assessment should take into account the costs of dealing with queries around notifications and the resulting commercial costs where a notification leads to exit – especially where changes are in the customers favour or have no impact on the customer (if due acknowledgement of the principle referred to in 2 above is not forthcoming).

Reservation of Rights

Telefonica fully reserves its rights to continue to raise further concerns and objections raised beyond its responses herein, including at any later stage of consultation, or in the event of Telefonica objecting to any ultimate Decision adopted by ComReg.

Any failure to comment on specific aspects of this document 12/85 should not be taken as implicit acceptance of specific assertions in the document or endorsement of the approach of ComReg on such matter. Telefonica also fully reserves its rights to raise further concerns, including ones similar to those that may be raised by such other operators in their responses which equally impact upon the position of Telefonica and the industry more generally.

Response to Consultation Questions

Q.1. Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

Telefonica agrees in principle that it is appropriate to differentiate a notification to the customer by means of a concise heading. A unique heading would make it clear to notified customers that the content is relevant to their service and (for customers opted out of marketing communications), that it is a regulatory requirement that they receive the notification.

A concern arises around the wording that is proposed in particular the statement 'Contract change. Most customers take the statement 'in contract' to mean they are still within the minimum term of a contract. The notice as proposed may cause alarm for some prepay customers who believe that they have 'no contract' (i.e. no minimum term commitment). In the case of bill pay customers a notice of 'contract change' will mislead customers who are still within their minimum term if they get the impression that their term is being increased or, (for customers with no minimum term left), that a new commitment is being imposed.

Telefonica recommends a change to the current proposed wording which we believe has the potential to mislead and cause inconvenience for customers who contact their operator unnecessarily. This will have also place significant pressures on customer care resources. Taking this into account ComReg may consider it appropriate to require that the word 'Notice' should be used uniquely for regulatory notifications. An added benefit of this approach will be a reduction in characters which (for SMS communications) will permit the inclusion of detailed information of the specific change within the body of the message.

Q.2. Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

With regard to the minimum detail, which is proposed in Paragraph 32, Telefonica is of the view that the emphasis should be on the objective - to ensure that notifications are clear, transparent and that full details are provided. It is generally acknowledged that SMS, where available as a contact option, is a very effective direct communications channel. However, the requirement to include a detailed heading, and a long statement in relation to exit without penalty, will limit the amount of information that can be included in the actual summary of the modification of the contractual condition. Telefonica considers that the emphasis of an SMS communication element of a notification should be on providing a clear and intelligible summary of the change. If that is provided the customer can then form their own view as to whether they require more information.

Further details should also be provided in the SMS message on how to access full information and this detail could be published online as a further element to the notification (and would include the details on rights of exit, alternative service options, processes for contacting the operator etc). We would suggest that where a link is being used that a unique link for any changes is appropriate e.g. www.operator.ie/notice.

We would agree the effective date of the change should be included in the SMS summary provided to the customer. We must observe that SMS is an essential channel of notification to unregistered pre-pay customers and provides a level of certainty as to simultaneous communication to a large base. However, given the technological limitations on the amount of content capable to be sent, where it is impractical to provide all minimum information above in the individual SMS – a unique link with full detail, notification of contract change and effective date of change should be sufficient.

Paragraph 30 of the document states that 'the minimum information relates to a proposed contract modification' and then outlines typical changes including special promotions and wording changes. We note the draft direction in Section 3(1) refer to the modifications to 'contractual conditions'. Telefonica are of the view that the scope of what ComReg consider is a contractual condition, within the consultation document, has serious impacts for industry and requires clarification by ComReg. For example, it is not clear from the wording of this paragraph whether ComReg consider the very introduction of a 'special promotion' a modification to a contractual condition of a customer's core contract for service, or if an alteration to a promotional offer (e.g. to extend the promotion benefits), is considered a modification to core contractual conditions. A further example is in relation to wording changes. A change to wording on a contract could be made to ensure clarity for customers and it may have no impact whatsoever on the contractual conditions. Furthermore the requirement for change may be outside the control of the operator (e.g. a third party referenced in the contract, such as a statutory body or bank, changes its name). It is impractical to consider that such changes, which have no impact on the services provided or the manner in which they are provided, should be considered a modification to the contractual conditions. We note that ComReg has provided detail to industry previously around the scope of Regulation 14 however, Telefonica requests that ComReg provide further clarification, in light of the detail outlined in this paper.

Telefonica understands ComReg's objective to ensure that the notifications do not lack transparency however as outlined above we would encourage ComReg to avoid being overly prescriptive in relation to the wording being used to summarise changes as outlined in Paragraph 34 of the consultation document. Generic terms may be appropriate especially where there are a range of changes being implemented at any one time.

Telefonica must also express concerns as to commentary that seems to indicate an obligation on operators to ensure receipt of individual notification and subjective understanding of consumers of the text and consequences of same. Neither is technically or practically viable. Whilst Telefonica would of course ensure the progression of notifications to all customers, we cannot be held responsible for any non-receipt, nor of any actual lack of understanding or awareness held by consumers. This should be specifically incorporated into any final proposal and we would welcome your confirmation on this point prior to any final decision being made.

Q.3. Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

Telefonica consider that clear information should be provided. It is appropriate, as outlined in Paragraph 37, that the amendment is unambiguous, accurate and presented clearly and furthermore that the customer can fully understand the impact and make a decision on any action (Paragraph 38). However, it is not appropriate to provide superfluous detail as this has the potential to undermine the objective of the notification, and places an unnecessary burden on operators. The requirement to provide old terms and conditions, which have already been provided to a customer, is one example. If there is a modification to one contractual condition it is not appropriate that full details of old terms and conditions details are required. This will result in the provision of excessive information which will reduce transparency, increase the cost burden on industry (as a result of the increased volume of information and resulting confusion generated) and undermine the overall objective.

We would understand that the reference in Paragraph 40 to demonstrate compliance with the Regulations on a case-by-case basis refers to general compliance with whether notifications were generally issued where the requirement arises and not to providing technical evidence of the sending or receipt by each individual customer. If same were to require the latter, this would be entirely impractical and require further disproportionate technical investment and development. Our view is that retention of the basic message sent, together with a list of the numbers to whom such message had been sent (or e-mail addresses, postal addresses as applicable) should be sufficient. This would then be held for a period of six (6) months, as we believe this period to be proportionate and reasonable having regard to our general data protection and retention obligations. We would appreciate your confirmation on this point prior to any final decision being made.

Q.4. Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

Telefonica agrees with the proposals, subject to consideration of the points outlined in response to consultation question 1 above, regarding minimum information.

Q.5. Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.

Telefonica considers the proposals reasonable.

Q.6. Do you agree or disagree with the proposal in relation to a verbal contact change notifications? Please provide detailed reasons and supporting evidence.

Telefonica considers the proposals reasonable. ComReg has limited verbal notifications to telephone notifications however the scope of verbal notifications should also include face to face discussions with customers which will be noted on the customer account as proposed.

Q. 7 Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

Telefonica does not agree with this proposal. If an operator has a consent to market their customers and they ensure compliance with data protection obligations, ComReg should not restrict provision of this information. In adopting an approach ComReg wish to ensure that customers are fully informed (and that a marketing message does not detract from the main message) when considering the impact of a change. In this regard a customer who is advised of a contractual modification, such as a tariff change, should also be advised of alternative tariff options which may be of interest. This is an integral part of carrying on a viable commercial enterprise and managing a relevant and pertinent consumer experience.

Q. 8 Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

Telefonica agrees that a consistent approach benefits consumers and industry however the assessment of regulatory impact also needs to take into account specific points outlined above.

Firstly, the scope of what is considered a modification of a contractual condition requires clarification as this has significant regulatory impact. For example, if an operator was required to permit exit from a contract due to a wording change, (which as noted may be outside an operators control), this would undermine the ability of an operator to compete in the market and will restrict consumer choice. With regard to the requirement to notify customers of modifications to contract conditions that are to their benefit or have no impact whatsoever the full cost burden on industry should be considered. There is a significant cost burden on industry to implement notifications and deal with inevitable customer enquiries that arise. In addition a competitive market and the need to meet customer demand for (subsidised) smart technologies dictate that costs to acquire and retain customers are greatly increased. If exit rights apply on such a broad interpretation then it is essential that consequential administrative and commercial costs arising are considered as part of this assessment.

The requirement to provide modified terms and conditions with old terms and conditions alongside is not in the interest of consumers as it will lead to confusion as customers receive too much detail. Furthermore the impact on industry is not considered and the requirement

to provide ‘terms and conditions’ is unclear and if full details are required this introduces unnecessary administration and cost. It is agreed the information needs to be sufficiently clear for customers to understand the change being made and the impact it has on them however, unnecessary detail should not be required and ComReg always has the power to intervene in cases where it considers inadequate detail is notified.

In addition the proposal to restrict marketing information is onerous and is not in the interest of customers who may make uninformed choices as a consequence.

Telefonica considers these points should be included in the RIA.

Q.9. Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

Telefonica does not agree. It is at the discretion of ComReg to specify the date of implementation. Operators have a regulatory obligation to comply and are required by ComReg to ensure individual notification.

Taking the above into account it should be acknowledged that operators will only be aware of the final requirements on publication of this decision. The provision for any appropriate implementation period will ensure that requirements are educated across organisations and correctly incorporated into customer communications plans.

Q. 10 Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

Telefonica believes the direction text should be amended to take into account the points raised in answer to the questions above.

7 H3GI

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Michelle O'Donnell
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

BY POST AND EMAIL

Date: 11 September 2012

Re: CONSULTATION 12/85 ON CONTRACT CHANGE NOTIFICATIONS

Dear Ms. O'Donnell,

I refer to Consultation 12/85 on Contract Change Notifications. Hutchinson 3G Ireland ("H3GI") hereby responds as follows.

1. Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.

H3GI agrees that the notification could state as above but would note the difficulty that this would pose when sending such a notification by SMS. The maximum capacity for an SMS is 160 characters including spaces. To state "NOTICE:CONTRACT CHANGE" would require 22 characters before even explaining what the proposed change is. H3GI proposes that the notification be sent via 2 SMS therefore encompassing a total of 320 characters and include the heading.

2. Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.

H3GI agrees that minimum information is required. However, once again it is difficult to see how the minimum information proposed in addition to the title could be sent via SMS within 160 characters. H3GI proposes that the notification be sent via 2 SMS as noted at Q1.

3. Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.

H3GI agrees with the requirements purposed to provide full information relating to the contract change noted at para. 36 namely; details of the amended terms and conditions together with the old terms and conditions, details of how consumers can notify their ECS provider of their wish

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to withdraw from the contract should they wish to do so, and the timeframe within which the subscriber can notify their ECS provider of their wish to withdraw from the contract should they wish to do so.

4. Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.

H3GI notes that ComReg appreciates that it may not be possible to set out the full details of any contract changes in an SMS because they are intended to be quite short and that it proposes that the minimum standard information must be presented in the main text of the SMS. H3GI notes that an SMS is only 160 characters long including all spacing. It is difficult to envisage how the minimum information (a summary of all proposed changes; contact/location information where further and full information can be assessed; a clear and unambiguous statement that the subscriber has a right to withdraw from their contract without penalty; and the effective date of the proposed contract change) in addition to the title can fit within the capacity for an SMS. H3GI reiterates that it may not be possible to include all of the information within the character spacing of a single SMS. In order to ensure that all of this information is included, it is suggested that perhaps the information could be sent by 2 linked SMS providing more character spacing to include the information as noted at Q.1.

5. Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.

It is H3GI's practice to notify customers via SMS.

6. Do you agree or disagree with the proposal in relation to a verbal contact change notifications? Please provide detailed reasons and supporting evidence.

H3GI agrees with the proposal standards in relation to a verbal contract change notification.

7. Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.

H3GI agrees that the regulatory message delivered by electronic means must exclude marketing material. In this regard, it is noted that Regulation 13(7) of the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 states that a person shall not use or cause to be used any publicly available electronic communications service to send to a subscriber or user an SMS message for a non-marketing purpose which includes information intended for the purpose of direct marketing unless the person has been notified by that subscriber or user that he or she consents to the receipt of such a communication. Therefore only customers that consent to such communications could be sent a notification in this manner requiring an undertaking to send 2

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separate notifications; one to those who consent to the inclusion of direct marketing material and one to those who do not. Furthermore it is difficult to envisage how the minimum information and any direct marketing material could be included within one single SMS comprising only 160 characters.

H3GI does not and has not included marketing material with any customer notifications pursuant to reg .14 of the European Communities (Electronic Networks and Services) (Universal Service and Users' Rights) Regulations 2011 ("the Regulations").

8. Do you agree or disagree with the Commissions assessment of the impact of the proposed direction? Please set out reasons for your answer.

Please see comments above and below.

9. Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.

H3GI suggests that a 6 month grace period be provided for the implementation of the proposed direction, especially given the constraints of notifications via SMS.

10. Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.

H3GI questions whether at para. 1 of the minimum information in the draft Direction, it is necessary to include all the information in the said order. When sending such information via SMS where spacing is limited, it may be easier to send such information in a differing order. In relation to SMS notifications, as stated before, H3GI is of the opinion that it is not possible to include all the minimum information in addition to the title within the constraints of 160 characters or 1 SMS and therefore suggests that consideration is given to providing such information within 2 SMS as previously noted. This would require an amendment to draft Direction to exclude the reference to 160 characters.

Yours sincerely,

SOPHIA PURCELL
Regulatory Affairs Manager

8 TIF

Telecommunications and Internet Federation (TIF)

Response to ComReg Consultation 12/85 "Contract Change Notifications"

21st September 2012

Introduction

The Telecommunications and Internet Federation (TIF) is the representative body for the electronic communications industry in Ireland and is affiliated to the Irish Business and Employers Confederation (IBEC). TIF represents companies involved in broadcasting, cable, fixed, fixed wireless, internet, mobile, outsourcing, satellite and wireless internet service provision.

TIF welcomes the opportunity to respond to this consultation. Individual TIF members may choose to correspond directly with ComReg regarding this consultation and express their company's specific views more comprehensively. TIF members are very aware of the need to notify customers of contractual changes as they arise. All TIF members are also conscious of the need to be compliant with the relevant regulations in this regard. This consultation should help deliver greater clarity on how notifications of contract changes should be communicated with customers.

TIF members have been in compliance with the provisions of Regulation 14 of the Universal Services Regulations 2011. In general, TIF agrees with the general principles set out in the consultation on the format of notifications of contract changes to customers.TIF highlights several important issues in this response and urges ComReg to take full account of these concerns.

A significant concern is that ComReg is proposing measures that go beyond its powers. Aspects of the proposed format stray into the realm of data protection law and would unduly compromise the freedom of operators to communicate with their customers.

ComReg proposes to apply specific limitations in respect of notifications delivered over Electronic Communication Service (ECS). While the consultation documents refers to abuses in the case of customers that have opted not to receive direct marketing, TIF notes that the difference between customers who have opted out and those that have not is ignored in the draft directive. Instead it envisages a complete ban on the incorporation of any marketing material in ECS notifications.

TIF believes that this exceeds ComReg's powers by straying into the realm of data protection notwithstanding the fact that data protection regulations already provide ample protection. Also, given that a contract change could entail both positive changes in addition to negative changes, some notifications may not differ materially from direct marketing communications.

The draft direction also proposes that the minimum information should be contained in a single 160 character SMS. TIF supports this proposal which reflects the practice of operators today, which aims to avoid the confusion that would likely arise from splitting a communication across more than one SMS. However, the draft direction also proposes that the minimum notification should provide consumers with extensive information including advice of their rights to withdraw from the contract. TIF considers this to be unrealistic. It would have the effect of prohibiting the use of SMS as a notification medium and, as SMS is the only medium by which many prepaid customers can be reached, it would bar operators from meeting their obligations under Regulation 14. Furthermore, due to the space limitations imposed by SMS, a requirement to advise of the right to withdraw in the minimum notification would limit the scope to include material detail about the change while creating an unduly negative perception of the change that would not serve the objectives of protecting consumers, as the message would be unbalanced. Neither would it serve the objective of promoting competition as the service provider issuing the notification would likely be unduly disadvantaged.

TIF requests that ComReg provides clarity on the use of the term “Subscriber”. The second footnote on page 6 of the consultation document states that ‘the terms “subscriber” and “consumer” are used interchangeably in this consultation document’. This suggests that subscribers are consumers and not business customers. The Framework Regulations (SI 333/2011) however suggest a much broader meaning for “subscriber”. The interpretation section provides ‘“subscriber” means any natural person or legal entity who or which is party to a contract with a provider of publicly available electronic communications services for the supply of such services’.

The management of the relationships with consumers and business customers require different strategies. Any direction resulting from this consultation should allow operators the freedom to manage the relationships with consumers and business customers. Also, data protection law draws a distinction in respect of natural persons for the purposes of direct marketing which calls into question the specific limitation proposed for communications via ECS. For these reasons in addition to those outlined above, ComReg should not be so prescriptive in how communications relating to Regulation 14 are managed.

TIF’s responses to the individual questions in this consultation are set out overleaf.

Responses to consultation questions

Proposed Minimum Format Specification

Q. 1 *Do you agree or disagree that the notification must state "NOTICE: CONTRACT CHANGE" (in capital letters) at the beginning? Please provide detailed reasons and supporting evidence for your answer.*

TIF believes that it would be counterproductive to mandate a specific heading, not least because it would prevent a more precise description of the core elements of a change while taking up space, where space can be very limited in some media. The word contract is often perceived to relate to a minimum contract term while mobile prepay consumers often have a limited understanding of the contractual aspect of prepay service. Therefore, TIF believes that the heading "*NOTICE: CONTRACT CHANGE*" may be more likely to confuse customers than to promote awareness of a specific change. This is particularly so where the change relates to specific elements such as pricing that is often communicated separately from the general terms and conditions.

TIF agrees with ComReg's view that the message should not extend beyond one SMS. This means that the proposed heading would take up 22 of the 160 character limit and thereby rule out the use of SMS. This would mean that mobile operators would be left with no means of communicating contract changes to a large portion of their prepaid base.

Q. 2 *Do you agree or disagree with the proposed minimum information for inclusion in contract change notifications? Please provide detailed reasons and supporting evidence for your answer.*

TIF views the proposed minimum information under the draft direction as excessive and, in light of the fact that the minimum notification may be subject to space limitations, it would be disproportionate to mandate the inclusion of advice regarding the right to withdraw in the initial notification. This would further limit the scope to include material detail about the change while creating an unduly negative perception of the change that would not serve the objectives of protecting consumers, as the message would be unbalanced. Neither would it serve the objective of promoting competition as the service provider issuing the notification would likely be unduly compromised.

TIF agrees that the notification should state the timeframe to withdraw from the contract. TIF also agrees that this should run in parallel with the notification period while not limiting the discretion of operators to provide more notice.

Q. 3 *Do you agree or disagree with the requirement to provide full information relating to the proposed contract change? Please provide detailed reasons and supporting evidence for your answer.*

TIF disagrees with the suggestion that the old and new terms and conditions should be presented to customers on the basis that this cannot be objectively justified. Customers will have the one month notice period to review the change against their current terms and conditions. Such a suggestion would impose significant and unnecessary costs. For example, where new terms are being applied consistently to an entire customer base that may previously have been subject to varying terms, this would necessitate bespoke communications. Furthermore, the imposition in respect of cost would be particularly severe in the case of postal communications where the requirement could result in the voluminous correspondence.

The objective of the Directive is to ensure that customers receive a clear understanding of significant changes proposed to their contracts. This, as is clear from the wording in the Directive, is so that customers "optimise their choices and thus benefit fully from competition". Deluging customers with voluminous documentation will not serve this purpose. TIF contends that the provision of comparisons between old and new conditions falls into this category and is completely superfluous because customers will already have the opportunity to review the proposed charges for one month.

In addition to being onerous for operators, customers may become confused and misinterpret the provisions that are being amended when presented with the old and new terms and conditions. Such confusion could serve to detract from the objective of ensuring customer choice by undermining customer understanding of the revised offering from their current provider.

Notification Medium

Q. 4 *Do you agree or disagree with the proposed standards in relation to a contract notification by SMS? Please provide detailed reasons and supporting evidence for your answer.*

As outlined in our response to question 1, TIF believes the proposed notification heading will detract from the objectives of Regulation 14 as it would effectively limit the available space in an SMS to 138 characters while also having the potential to confuse customers by drawing their attention away from the specifics of each change. TIF would also urge ComReg to refrain from mandating that the minimum notification or initial alert to customers should advise customers of the right to withdraw from their contract for the reasons outlined in detail in response to question 2.

Q. 5 *Do you agree or disagree with the proposed standards in relation to print contract notifications? Please provide detailed reasons and supporting evidence for your answer.*

Specifying that the text "NOTICE: CONTRACT CHANGE" must be a larger font (minimum font 11) compared to the remainder of the message (minimum font 9) further exacerbates the use of capitals (see also response to question 1). The proposal seeks to micromanage customer communications and does not guarantee that customers will read the notification.

TIF notes the comment that "some ECS providers include contract notifications at the bottom of another communication with a very small font size." Operators should be required to ensure that the notification is reasonably prominent in the communication to customers.

Q. 6 *Do you agree or disagree with the proposal in relation to verbal contract change notifications? Please provide detailed reasons and supporting evidence.*

TIF members are aware of the difficulties that arise in tailoring communications to visually impaired customers and welcome the use of telephone calls. However, visually impaired customers may not be registered with operators. TIF suggests that this matter is best dealt with in the Disability Forum which ComReg chairs.

Direct marketing

Q. 7 *Do you agree or disagree that the regulatory message, delivered by electronic means, must exclude marketing material? Please provide detailed reasons and supporting evidence for your answer.*

This proposal extends beyond ComReg's powers and would encroach on existing data protection law which already comprehensively addresses the concerns raised. Operators invest heavily in communications to customers because each communication can be an expensive exercise to plan and implement. Provided operators comply with existing data protection regulations, they should not be compromised in their communications with customers in relation to service and other matters.

TIF notes that the difference between customers who have opted out and those that have not is ignored in the draft directive. Instead it envisages a complete ban on the incorporation of any marketing material in ECS notifications.

Also, given that a contract change could entail both positive and negative changes some notifications may not differ materially from direct marketing communications. Both aspects should be communicated in a balanced way. Aside from the complications that would arise in managing a separate rule for ECS communications, it is inappropriate for ComReg to propose that ECS communications should be limited to the basic requirements of Regulations 14, as suggested in paragraph 52 of the consultation, while not being subject to or benefitting from the clarity provided in the specifications. In ensuring that service providers include "sufficient information so that a consumer can fully understand the impact of the proposed change on them, and decide whether or not they wish to withdraw from their contract", ComReg must accept that the specifications have to be consistent in scope and consistently applied across all communications media and all aspects of contract changes.

Draft Regulatory Impact Assessment ("RIA")

Q. 8 *Do you agree or disagree with the Commission's assessment of the impact of the proposed direction? Please set out reasons for your answer.*

Many concerns have been raised in TIF's response to the previous questions, a number of which have not even been mentioned much less addressed in the regulatory impact assessment (RIA). ComReg must take these additional concerns into account before making a final decision on these matters.

Q. 9 *Do you agree or disagree that the proposals set out above can be implemented with immediate effect? Please set out reasons for your answer.*

TIF believes that a lead time of at least two months is required following the publication of the specifications and in advance of the specifications coming into force in recognition of the fact that contract changes need to be planned well in advance of implementation.

Draft Direction

Q. 10 *Do you have any comments on the substance or the drafting of the draft direction? If necessary, please provide a marked up version of the draft direction, indicating what changes you believe are appropriate and why.*

TIF believes that paragraph 4 of the Minimum Information section of the draft direction should be amended by replacing the words "in isolation from other information ordinarily provided to the subscriber" with the words "in a separate paragraph or section of a communication provided to the subscriber".

Further to the response to question 2, TIF would urge ComReg to recognise the space limitations that can apply to the initial alert and, therefore, not to mandate the communication of the right to withdraw in the initial alert.

TIF also calls for the proposed requirement to present old and new terms to be withdrawn as set out in response to question 3.

Further to the response to question 7, TIF calls for the removal of the proposed prohibition of direct marketing.

Finally, TIF calls for an amendment to the effective date by allowing a lead time of at least two months from publication for the reasons set out in response to question 9.

Conclusion

TIF reiterates that its members comply with the provisions of regulation 14 of the Universal Services regulation 2011. In general, TIF agrees with the general principles set out in the consultation on the format of notifications of contract changes to customers. In it submission TIF highlights several important issues and urges ComReg to take full account of these concerns when making decisions on these important matters. It should be noted that Three does not support the position outlined in this submission. TIF is available to meet with ComReg on this matter or to provide further information in support of our submission.

Further information

For further information please contact:

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