



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Management and Maintenance of the National Directory Database

Consultation

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Additional Information

All responses to this consultation should be clearly marked:

“Submission to ComReg 19/08”

and sent by post, facsimile, e-mail or online at www.comreg.ie (current consultations) to arrive on, or before, 5pm on 19 March 2019.

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Please note ComReg will publish all respondents' submissions with the Response to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

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1 Executive Summary

- 1 The National Directory Database ("**NDD**") is a comprehensive record of all subscribers of publicly available telephone services in the State who have not refused to have their details recorded in it. The function of the NDD is primarily to facilitate the compilation of and access to information for telephone directories and directory enquiry services. In addition, following the entry into force of the e-Privacy Regulations,¹ the NDD continues to be the basis for the operation of the "opt-out" register for direct marketing purposes.
- 2 ComReg has the power to direct an undertaking to manage and maintain the NDD under Regulations 19 and 30 of European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, ("**the Regulations**").²
- 3 eir currently manages the NDD and the collation of information from all undertakings that assign telephone numbers to subscribers and is directed under ComReg Decision D07/18 ("**D07/18**")³ to do so until 31 March 2019.
- 4 Following public consultation, in December 2018 ComReg decided (ComReg Decision D16/18 ("**D16/18**")⁴ that PortingXS⁵ is the appropriate undertaking to manage and maintain the NDD from 1 July 2019 following the expiry of the Transition Period.⁶
- 5 ComReg had initially considered a three month transition period,⁷ however eir submitted in response to the consultation that a longer transition period than the minimum proposed by ComReg was needed. In light of this, ComReg formed the view that on balance a 6 month transition period to 1 July 2019 was needed to allow transition of the NDD from eir to PortingXS to be completed.

¹ European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011) ("e-Privacy Regulations").

² European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011).

³ ComReg Document 18/56 and D07/18, "*Management and Maintenance of the National Directory Database*", 27 June 2018.

⁴ ComReg Document 18/108 and D16/18, "*Management and Maintenance of the National Directory Database*", 6 December 2018.

⁵ Porting Access B.V., "PortingXS" is a Dutch company, which is an "authorised undertaking" pursuant to Regulation 4 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011. PortingXS currently provides a fixed number portability ("**FNP**") solution in Ireland.

⁶ As specified in D16/18, "**Transition Period**" means the period of time commencing upon the date ComReg confirms its agreement in writing to the Operational Specification in accordance with section 3.3 of this Decision Instrument and ending on 30 June 2019 unless otherwise specified by ComReg.

⁷ ComReg in D07/18 extended the direction on eir to continue as manager of the NDD until 31 March 2019 to allow a minimum period of three months for a transition from eir to a new undertaking.

- 6 In D16/18 ComReg considered that *“subject to the progress of the transition arrangements and carry-over of the NDD to PortingXS, ComReg may need to ensure that eir continues to manage and maintain the NDD to the end of the Transition Period, 1 July 2019, or sooner once the PortingXS system is fully functional and in operation.”*
- 7 eir’s obligations will expire on 31 March 2019 and prior to the obligation on PortingXS commencing.
- 8 Absent an NDD manager from 1 April to 30 June 2019, there is a risk that regulatory requirements may not be met, and that subscribers might lose their legal entitlements and protections under the Regulations. Additionally, direct marketing companies and directory enquiry service providers may not be able to access correct information absent an NDD.
- 9 In preparation for the transfer of the NDD, PortingXS has commenced its implementation plan, and eir continues to engage to ensure the effective migration of the NDD to PortingXS by 30 June 2019, if not sooner. ComReg envisages that at this stage PortingXS will be in a position to begin managing and maintaining the NDD from 1 July 2019 at the latest, as set out in D16/18.
- 10 However, ComReg is also mindful that there is some risk that the Transition Period may need to be extended. ComReg’s preliminary view is that, subject to the progression of the transition arrangements, the direction on eir may need to be extended beyond 30 June 2019, and up to a further maximum 3 month period to 30 September 2019 (**the “Extended Transition Period”**).
- 11 For the purposes of ComReg’s regulatory functions and to ensure the NDD continues to be managed and maintained until all necessary transition arrangements and transfer-over of the NDD to PortingXS are completed and the PortingXS system is fully functional and in operation, and to ensure the integrity and comprehensiveness of the NDD, ComReg’s preliminary view is that it is necessary and appropriate to consult on directing eir to continue as the NDD manager from 1 April 2019 to 30 June 2019 when the Transition Period expires or, to the expiry of an Extended Transition Period, whichever is the earlier.
- 12 ComReg looks forward to receiving responses from all stakeholders in relation to the proposals in this consultation. ComReg will review and fully take into account all of the responses it receives before coming to a final decision in respect of the management and maintenance of the NDD from 1 April 2019.

2 Consultation Issue

- 13 As set out above, eir is currently directed under Regulation 19(4) of the Regulations to maintain and manage the NDD until 31 March 2019 (when the obligation expires). PortingXS are directed to maintain and manage the NDD from 1 July 2019.
- 14 ComReg is concerned that absent a direction on an undertaking to continue to manage and maintain the NDD from 1 April 2019 to 30 June 2019 or, the expiry of the Extended Transition Period, whichever is the earlier, there is a risk that subscribers might lose their legal entitlements and protections under the Regulations and e-Privacy Regulations and therefore regulatory requirements would not be met.
- 15 In accordance with Regulation 19(2) of the Regulations, undertakings that assign numbers to subscribers must supply the information to the NDD with the relevant subscriber details. These undertakings provide up-to date information to the NDD on a regular basis. In addition, the NDD also holds details of subscriber preferences for listing their telephone numbers.⁸ Absent an NDD, direct marketing companies may not be able to access the information they require to determine who they may and may not contact under the e-Privacy Regulations. This may create legal uncertainty for stakeholders.⁹
- 16 The NDD is currently used for a number of purposes, for example:
- The information is be used for the collation of the printed telephone directory and online directories;
 - Directory enquiry service providers use the information to provide their service under a Directory Information Licence Agreement;
 - The direct marketing industry use the information (under the Direct Marketing Licence Agreement) and it continues to be the basis for the “opt-out” register for direct marketing purposes.¹⁰

⁸ Listed: Details (name, address, telephone number) are listed in the telephone directory and with Directory Enquiries; Unlisted : Listed with Directory Enquiries only, i.e. not in the phonebook; Ex-Directory: Details not listed in the phone book or with Directory Enquiries.

⁹ Including: undertakings, subscribers, directory enquiry service providers, direct marketing companies, and the Data Protection Commission.

¹⁰ Regulation 14 of the e-Privacy Regulations requires all undertakings to record a subscriber’s telephone number in the NDD “do not call register” if the customer does not consent to unsolicited calls. Consumers can opt out of direct marketing by asking their telecoms service provider to place their number on the “do not call register.” Fixed line ex-directory numbers must be placed automatically on the “do not call register” by undertakings. Additionally Regulation 13 (6) of the e-Privacy Regulations automatically precludes unsolicited calls to mobile numbers and as such these numbers are already “opted out” by default. The NDD is used as a direct marketing “opt-out” register, and is the mechanism used for collating the “do not call register” for the purpose of the e-Privacy Regulations.

- 17 In D16/18 (section 3.1) ComReg determined that there is a continued need for the NDD. Given the various functions of the NDD, as set out above, it is critical that the NDD continues to be managed and maintained. It would involve:
- Ensuring that subscribers have the right to be listed in directories and DQ services;
 - Keeping an up-to-date and comprehensive database (NDD) containing telephone directory information in relation to all listed telephone numbers;
 - Ensuring that providers of directory information services and/or directories continue to have access to the information necessary to offer those services on the appropriate terms;
 - The NDD continuing to be the basis for the “opt-out” register for direct marketing purposes.
- 18 In the absence of a regulatory obligation to do so, it is not guaranteed that eir would continue to manage and maintain the NDD in the transition from 1 April 2019 to 30 June 2019 when from 1 July 2019 PortingXS are due to take over the management and maintenance of the NDD.
- 19 Following an invitation to undertakings to express their interest in managing and maintaining the NDD once the direction on eir expired,¹¹ ComReg received one expression of interest from PortingXS. However, eir did not put forward an expression of interest in continuing to manage and maintain the NDD.
- 20 Due to its ownership of the assets and systems supporting the NDD, its operational control over the NDD and the assets and systems supporting the NDD, and because of its unique experience in managing and maintaining the NDD so far, eir is the only undertaking who at this point can manage and maintain the NDD until the transfer to PortingXS is complete. There are no alternative ways in which the requirements of the Regulations can be met or that stakeholders can access comprehensive directory information.
- 21 ComReg continues to closely monitor progress with the transition. It is anticipated that all necessary transition arrangements and transfer of the NDD to PortingXS will be completed and the PortingXS system will be fully functional and in operation by 1 July 2019.

¹¹ ComReg Document 18/22, “National Directory Database (“NDD”) Request for Expressions of Interest for Managing and Maintaining the NDD”, 22 March 2018.

- 22 In D16/18, ComReg set out that it may, if it considers it necessary, extend the Transition Period. Should this requirement be necessary and appropriate, ComReg would envisage a short maximum extension to the Transition Period of 3 months to 30 September 2019. However, any obligation imposed on eir following this public consultation would not extend beyond the expiry of the Transition Period or, an Extended Transition Period (if so decided) without a further public consultation.
- 23 In light of the above factors, ComReg's preliminary view is that, under Regulation 19 and Regulation 30 of the Regulations, it is necessary and appropriate to direct eir to continue to manage and maintain the NDD on the same basis as it currently does from 1 April 2019 and until 30 June 2019 when the Transition Period expires or, to the expiry of an Extended Transition Period, whichever is the earlier. This will ensure the continuity and integrity of the NDD and that the requirements of the Regulations are met during the transition from eir to PortingXS.

- Q. 1 Do you agree that ComReg should require eir pursuant to Regulation 19 and 30 of the Regulations, to continue to manage and maintain the NDD from 1 April to 30 June 2019? Please provide detailed reasons and supporting evidence for your view.
- Q. 2 Do you agree that if necessary and appropriate, eir should continue to manage and maintain the NDD during an Extended Transition Period (if so decided)? Please provide detailed reasons and supporting evidence for your view.

3 Draft Regulatory Impact Assessment (“RIA”)

3.1 Role of the RIA

- 24 A RIA is an analysis of the likely effect of a proposed new regulation or regulatory change. Its purpose is to help identify regulatory options, and it should establish whether or not a proposed regulation is likely to have the desired impact. The RIA should also in certain cases suggest whether regulation is or is not appropriate. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 25 ComReg’s approach to RIA is set out in the Guidelines published in August 2007.¹² Furthermore, in conducting this RIA, ComReg takes account of the RIA Guidelines,¹³ adopted under the Government’s Better Regulation programme.
- 26 Before deciding to impose regulatory obligations on undertakings, ComReg must conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the “Better Regulation” programme.
- 27 ComReg’s approach to the RIA follows five steps:
- (i) Step 1 Describe the policy issues and identify the objectives
 - (ii) Step 2 Identify and describe the regulatory options
 - (iii) Step 3 Determine the impacts on Stakeholders
 - (iv) Step 4 Determine the impacts on Competition
 - (v) Step 5 Assess the impacts and choose the best option

3.2 Describe the Policy Issues and identify the objectives

- 28 The Regulations provide that all undertakings providing publicly available telephone services must ensure that their subscribers have the right without charge, to have an entry in a printed directory and/or a directory enquiry service.

¹² Commission Document No. 07/56 & 07/56a “Guidelines on ComReg’s Approach to Regulatory Impact Assessment”, 10 August 2007 (the “RIA Guidelines”).

¹³ See: <http://www.djei.ie/publications/ria/RIAGuidelines2009.pdf>

- 29 The NDD is an important and convenient resource for directory enquiry service providers and direct marketing companies.
- 30 eir is currently directed to maintain and manage the NDD until 31 March 2019. PortingXS are directed to maintain and manage the NDD from 1 July 2019. Absent a direction on an undertaking to manage and maintain the NDD from 1 April to 30 June 2019 or if necessary, until the expiry of an Extended Transition Period (if so decided) subscribers might lose their legal entitlements and regulatory requirements would not be fulfilled.
- 31 ComReg's objective is to ensure that end users are protected and ensure the integrity and comprehensiveness of the NDD to the benefit of end-users.

3.3 Identify and describe the Regulatory Options

- 32 ComReg recognises that any regulatory measures should be kept to the minimum necessary whilst ensuring the needs of industry and consumers are met. ComReg now considers there are two regulatory options available to it to meet the stated objectives. The options available are therefore as follows:

Option 1: Do not specify eir to manage and maintain the NDD from 1 April to 30 June 2019.

Option 2: Specify eir to manage and maintain the NDD from 1 April to 30 June 2019, and not beyond an Extended Transition Period (if so decided).

3.4 Determine the impacts on Stakeholders and Competition

33 For the stakeholder analysis, there are 2 groups to consider: consumers and industry.

	Impact on Industry	Impact on Consumers	Impact on Competition
<p>Option 1:</p> <p>ComReg do not direct eir to manage and maintain the NDD from 1 April to 30 June 2019.</p>	<p>This option would create significant legal uncertainty for stakeholders and may jeopardise other obligations and rights of undertakings and other entities in relation to the NDD and in turn, affect the rights of consumers.</p> <p>The undertaking that maintains the NDD must provide access to subscriber details in accordance with specific terms and conditions. If there is no undertaking specified to maintain the NDD, this will create legal and commercial uncertainty about who must provide access to the NDD and the terms of the access specified in Regulation 19 (4) of the Regulations.</p> <p>Directory Inquiry service providers, may no longer have access to the source of information which their services are based upon, in this case they may potentially have to cease operation.</p> <p>eir may decide to continue to manage and maintain the NDD.</p>	<p>If eir does not continue to maintain the NDD consumers who do not wish to be contacted for Direct Marketing purpose may now be contacted as, there would be no way for them to register their preference. This would cause detriment to consumers.</p> <p>Directory enquiry service providers may have no access to the data therefore causing detriment to consumers.</p> <p>Consumer preferences may not be accurately recorded.</p>	<p>Currently eir is required, to manage and maintain the NDD on a fair, objective, cost-oriented, and non-discriminatory basis. Absent a direction to do it, it could be more costly for directory enquiry service providers to access this information and consequently for consumers.</p>
<p>Option 2</p>	<p>No change to the status quo. There will be no changes to the processes currently used.</p> <p>Industry and DMLA/DILA licence holders can continue to access information.</p> <p>The costs to eir of maintaining the NDD would continue to be covered by the licence fees (DILA/ DMLA).</p>	<p>Avoid any risks in relation to the continuity of operation and the integrity of the data held and processed by the NDD.</p> <p>Consumers Direct Marketing preferences will continue to be recorded, as will their ability to access a Directory enquiry service.</p>	<p>Currently eir is required, to manage and maintain the NDD on a fair, objective, cost-oriented, and non-discriminatory basis. This would ensure directory enquiry service providers have access to this information.</p>

<p>Specify eir to maintain the NDD from 1 April 2019 to 30 June 2019, and not beyond an Extended Transition Period (if so decided)</p>			
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3.5 Assess the impacts and choose the best option

- 34 ComReg has considered the options available to it in terms of managing and maintaining the NDD to meet the stated objectives.
- 35 Subscriber details are obtained from undertakings by the manager of the NDD and recorded in the NDD, without charge to undertakings. In addition, the undertaking that maintains the NDD must allow access to the information in accordance with specific terms.
- 36 Absent a regulatory obligation to do so it is not guaranteed that eir would continue to manage and maintain the NDD after 31 March 2019 when its current obligations in respect of NDD expire. Option 1 would cause detriment to consumers with the result that the requirements of the Regulations would not be met, and therefore, in ComReg's view, this scenario must be avoided.
- 37 ComReg's considers that to facilitate consumer rights in respect of directory entries and opting out of direct marketing (the e-Privacy Regulations) requires an undertaking to maintain the NDD. Doing this would avoid any risks in relation to the continuity of operation and the integrity of the data held and processed by the NDD. Also, if the NDD is maintained, consumers Direct Marketing preferences will continue to be recorded, as will their ability to access a Directory Inquiry service.
- 38 By ensuring the management and maintenance of the NDD by a specified undertaking, industry and direct marketers will not need to obtain information from each telecoms service provider individually. While undertakings are legally obliged to provide this information, the directory enquiry service providers do not obtain it in this manner. It is more convenient and less costly for them and for undertakings to obtain the information from the one centralised source that is the NDD. eir is the only undertaking who at this point can manage and maintain the NDD until the transfer to PortingXS is complete.
- 39 ComReg is of the preliminary view that eir should be required pursuant to Regulations 19 and 30 of the Regulations, to continue to manage and maintain the NDD from 1 April 2019 to 30 June 2019, and not beyond an Extended Transition Period (if so decided), Option 2. ComReg is of the preliminary view that to direct eir to manage and maintain the NDD for a short period is the most appropriate and objectively justified option at this time, as it is the only way to ensure that the related rights and obligations can be guaranteed until such time as PortingXS have taken the NDD over from eir and the PortingXS system is fully functional and in operation.

Q. 3 Do you agree with ComReg's draft assessment of the impact of the proposed options? Please provide detailed reasons and supporting evidence for your view.

4 Draft Decision Instrument

STATUTORY FUNCTIONS AND POWERS GIVING RISE TO DECISION

1. This Decision and Decision Instrument, made by the Commission for Communications Regulation (“ComReg”), relates to the maintenance and management of the National Directory Database and is made:

- i. Having regard to sections 10 and 12 of the Communications Regulation Act 2002 as amended (“the Act”);
- ii. Having regard to the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (“e-Privacy Regulations”);
- iii. Pursuant to the functions and powers conferred upon ComReg under and by virtue of Regulations 19 and 30 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (“the Regulations”);
- iv. Having taken account of the representations of interested parties submitted in response to ComReg document No. 19/08 and
- v. Having regard to the analysis and reasoning set out in ComReg document No. 19/XX.

2. Definitions

In this Decision Instrument, save where the context otherwise admits or requires:

“ComReg Decision D16/18” means ComReg Document 18/108 and D16/18 entitled “Management and Maintenance of the National Directory Database”, 6 December 2018.

“National Directory Database” (“NDD”) means a record of all subscribers of publicly available telephone services in the State, including those with fixed, personal and / or mobile numbers who have not refused to be included in that record, kept in accordance with regulation 19(4) of the Regulations and subject to regulation 14 of the e-Privacy Regulations.

“Transition Period” means the period of time commencing upon the date ComReg confirms its agreement in writing to the Operational Specification in accordance with section 3.3 of Decision Instrument, D16/18 and ending on 30 June 2019 unless otherwise specified by ComReg.

“Extended Transition Period” means a three month extension to the Transition Period expiring on 30 September 2019.

3. Decision

- 3.1. Eircom t/a “eir” meaning Eircom Limited and its subsidiaries and any related companies, and any undertaking which it owns or controls or any undertaking which owns or controls Eircom Limited, its successors and assigns and including agents, contractors or sub-contractors of any of the latter shall manage and maintain the NDD for a period of 3 months until the expiry of the Transition Period and if necessary for a further 3 months until the expiry of an Extended Transition Period whichever is the earlier. For the purposes of this Decision Instrument the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014.
- 3.2. eir shall meet all reasonable requests for access to any information contained in the NDD in an agreed format.
- 3.3. The terms of access to the NDD shall be fair, objective, and cost orientated and non-discriminatory.
- 3.4. The terms of access to the NDD shall otherwise be in accordance with such terms and conditions as may be specified by eir and approved by ComReg in advance of the implementation of any such terms and conditions and such approval shall be obtained in writing.

4. Statutory Powers Not Affected

Nothing in this direction shall operate to limit ComReg in the exercise and performance of its statutory functions, powers and duties under any primary or secondary legislation (in force prior to or after the effective date of this direction) from time to time as the occasion may require.

5. Maintenance of Obligations

If any section, clause or provision or portion thereof contained in this direction is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this direction and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this direction and shall not in any way affect the validity or enforcement of this direction.

6. Effective Date and Duration

- 6.1. This Decision shall be effective from 1 April 2019 (the “Effective Date”).
- 6.2. This Decision shall remain in force from the Effective Date until the expiry of the Transition Period or the Extended Transition Period whichever is the earlier.

THE COMMISSION FOR COMMUNICATIONS REGULATION

Q. 4 Do you agree with the terms of ComReg's draft Decision Instrument? Please provide detailed reasons and supporting evidence for your view.

5 Submitting Comments

- 40 The consultation period will run from Friday 22 February 2019 to Tuesday 19 March 2019. Responses must be submitted in written form. If responses are submitted electronically, they must also be unprotected so as to facilitate online publication.
- 41 It is sometimes necessary for respondents to provide confidential information in their submissions. Confidential information must be clearly identified as such. ComReg will publish all of the responses it receives to this consultation, subject to its guidelines on the treatment of confidential information.

Annex 1: Questions

Q. 1 Do you agree that ComReg should require eir pursuant to Regulation 19 and 30 of the Regulations, to continue to manage and maintain the NDD from 1 April to 30 June 2019? Please provide detailed reasons and supporting evidence for your view..... 8

Q. 2 Do you agree that if necessary and appropriate, eir should continue to manage and maintain the NDD during an Extended Transition Period (if so decided)? Please provide detailed reasons and supporting evidence for your view. 8

Q. 3 Do you agree with ComReg’s draft assessment of the impact of the proposed options? Please provide detailed reasons and supporting evidence for your view..... 13

Q. 4 Do you agree with the terms of ComReg’s draft Decision Instrument? Please provide detailed reasons and supporting evidence for your view..... 16

Annex 2: Legislation

Regulation 19(4) of the Universal Service Regulations¹⁴ provide:

Subject to Regulation 14 of the Privacy and Electronic Communications Regulations and for the purposes of this Regulation, an undertaking that may be required to do so by the Regulator shall keep a record (to be known as the National Directory Database) of all subscribers of publicly available telephone services in the State, including those with fixed, personal and mobile numbers who have not refused to be included in that record, and shall meet all reasonable requests for access to any information contained in that record in an agreed format, on terms that are fair, objective, cost orientated and non-discriminatory, and in accordance with such terms and conditions as may be specified by the undertaking and approved by the Regulator.

Regulation 14 of the e-Privacy Regulations¹⁵ provide:

National Directory Database

14. (1) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall, for the purpose of Regulation 13(3)(b) or (5)(b), record or cause to be recorded in the National Directory Database the relevant information specified in paragraph (3) in respect of a line of any one of its subscribers who—

(a) is, upon the making of these Regulations, an ex-directory subscriber in respect of that line who, in the absence of any express instructions to the contrary, shall be taken not to consent to unsolicited calls for the purpose of direct marketing or to such calls by means of an automated calling machine or a facsimile machine, or (b) had, at any time after the establishment of that Database, made a request to the operator or notified the relevant undertaking that the subscriber does not consent to unsolicited calls for the purpose of direct marketing or to such calls by means of an automated calling machine or a facsimile machine to a line of that subscriber.

(2) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations that has not already done so shall ensure that its subscribers are provided with information regarding their entitlements under Regulation 13(1), (3)(b) and (5)(b) and the possibilities referred to in paragraph (1).

(3) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall, for the purpose of Regulation 13(3)(b) and (5)(b) and when so notified by any one of its subscribers, make available to the operator the following

relevant information in respect of a line of that subscriber to be recorded in the entry in the National Directory Database in relation to that subscriber—

(a) the fact that the subscriber does not consent to unsolicited telephone calls for the purpose of direct marketing or to such calls by means of automated calling machines or facsimile machines, and

(b) if appropriate, the date on which a notification under Regulation 13(3)(b) and (5)(b) was received by the operator.

(4) (a) An undertaking, for the purpose of Regulation 13(3)(b) or (5)(b), shall, as soon as practicable after having been notified under paragraph (3) that a subscriber does not consent to unsolicited telephone calls for the purpose of direct marketing or to such calls by means of automated calling machines or facsimile machines, transmit particulars of such notification to the operator or other person who publishes a directory to whom the undertaking supplies relevant information relating to its subscribers for inclusion in that directory.

(b) When the operator or other person who publishes a directory receives particulars of a notification under paragraph (1), the notification shall be deemed, for the purpose of this Regulation, to have been made to the operator or that other person at the time the operator or that other person receives particulars of the notification.

(5) The operator shall record the relevant information referred to in paragraph (3) in respect of a line of a subscriber in the entry in the National Directory Database in relation to that subscriber when it is made available to the operator.

(6) (a) For the purpose of complying with Regulation 13(3)(b) and (5)(b) a person may, on such terms and conditions as may be approved under Regulation 19(4) of the Universal Service Regulations and on payment to the operator of such fee as may be required by the operator—

(i) be allowed access to the National Directory Database at all reasonable times and take copies of, or of extracts from, entries in that Database, or

(ii) obtain from the operator a copy (certified by the operator or by a member of the operator's staff to be a true copy) of, or of an extract from, any entry in the National Directory Database, or both, but the operator shall refuse such inspection or copying of, or of extracts from, entries in the National Directory Database if the operator has reasonable grounds to believe that the person will not comply with the Data Protection Acts and these Regulations in respect of the information in that Database. (b) A subscriber, or other person with the written consent of the subscriber, may—

(i) be allowed access to the entry in the National Directory Database in relation to that subscriber in respect of a particular line of the subscriber at all reasonable times and, on payment to the operator of such fee as may be required by the operator, take a copy of that entry, or (ii) on payment to the operator of such fee as may be required

by the operator, obtain from the operator a copy (certified by the operator or by a member of the operator's staff to be a true copy) of that entry, or both. (c) In any proceedings— (i) a copy of, or of an extract from, an entry in the National Directory Database certified by the operator or by a member of the operator's staff to be a true copy is evidence of the entry or extract on the date that it is so certified, and (ii) a document purporting to be such a copy, and to be certified as aforesaid, is deemed to be such a copy and to be so certified unless the contrary is proved. (d) In any proceedings— (i) a certificate signed by the operator or by a member of the operator's staff of an entry in the National Directory Database in relation to a specified subscriber in respect of a particular line is evidence of the entry on the date that it is so certified, and (ii) a document purporting to be such a certificate, and to be signed as aforesaid, is deemed to be such a certificate and to be so signed unless the contrary is proved.

(7) (a) Subject to subparagraph (c), the operator may require the payment of fees in respect of the matters referred to in paragraph (6)(a) or (b) and the amount of those fees shall be designed to secure, as nearly as may be and taking one year with another, that the aggregate amount of fees received, or reasonably expected to be received, equals the costs incurred, or reasonably expected to be incurred, by the operator in performing the functions conferred on the operator by this Regulation. (b) Different fees may be required in respect of the matters referred to in paragraph (6)(a) and (b). (c) The amount of the fees required under subparagraph (a) is subject to the approval of the Regulator.

(8) For the purpose of his or her functions under Regulation 17, the Commissioner— (a) shall be allowed access to the National Directory Database at all reasonable times and take copies of, or extracts from, entries in that Database, and (b) may obtain from the operator a copy (certified by the operator or a member of the operator's staff to be a true copy) of, or an extract from, any entry in the National Directory Database, without payment of a fee to the operator

THE LEGISLATIVE ANOMALY

The definition of "operator" in the E-Privacy Regulations is:

a person designated by the Regulator under Regulation 7(1) of the Universal Service Regulations to provide a universal service (within the meaning of those Regulations) in respect of directory services referred to in Regulation 4 of those Regulations.

Relevant provisions of Regulation 4 of the Universal Service Regulations are as follows:

(1) A designated undertaking shall ensure, based on data provided to it in accordance with Regulation 19(4)—

(a) that a comprehensive directory of subscribers is made available to all end-users in a form approved of by the Regulator, whether printed or electronic or both, and is updated at least once in each year, or

(b) that a comprehensive telephone directory enquiry service is made available to all end-users, including users of public pay telephones.

(2) The designated undertaking concerned shall ensure that the directory or the directory enquiry service referred to in paragraph (1) comprises all subscribers of publicly available telephone services in the State (including those with fixed, mobile and personal numbers) who have not refused to have their personal particulars included in those directories. This paragraph is subject to Regulation 12 of the Privacy and Electronic Communications Regulations.

Regulation 19(4) of the Universal Service Regulations provide:

Subject to Regulation 14 of the Privacy and Electronic Communications Regulations and for the purposes of this Regulation, an undertaking that may be required to do so by the Regulator shall keep a record (to be known as the National Directory Database) of all subscribers of publicly available telephone services in the State, including those with fixed, personal and mobile numbers who have not refused to be included in that record, and shall meet all reasonable requests for access to any information contained in that record in an agreed format, on terms that are fair, objective, cost orientated and non-discriminatory, and in accordance with such terms and conditions as may be specified by the undertaking and approved by the Regulator.

Regulation 14 of the E-Privacy Regulations protects the rights of subscribers, for instance this Regulation provides, inter alia, that an undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall record in the NDD that a subscriber who has notified the relevant undertaking that he does not consent to unsolicited calls for the purpose of direct marketing.

The key problem with the current definition of “operator” is that there is a possibility that ComReg may decide not to designate an undertaking for the purposes of Regulation 4(1)(a) or (b) of the Universal Service Regulations. Regulation 7 of the Universal Services Regulations provides that ComReg *may* designate one or more undertakings to comply with an obligation or requirement referred to in Regulation 4(1)(a) or (b) (my italics). In such circumstances, the definition of “operator” would be tied to no undertaking.

ComReg are of the view that the functions of the “operator” are dependent on the maintenance of the NDD and not with the role of any universal service provider that provides a subscriber directory.

ComReg are of the view that the definition of “operator” in the E-Privacy Regulations should be more appropriately tied to the primary obligation in relation to maintenance of the NDD, i.e. Regulation 19(4) and not to Regulation 7 (1) of the Universal Service Regulations

In light of the possibility of an undertaking not being designated under Regulation 7 of the Universal Service Regulations to provide the obligation under Regulation 4(1)(a) or (b), it is in our view legally risky and inappropriate for the current definition of “operator” in the E-Privacy Regulations to be maintained.

ComReg are currently in communication with the DCCAE and expect to have this anomaly resolved as soon as possible.