



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Management and Maintenance of the National Directory Database

Response to Consultation and Decision

Reference: ComReg 19/30

Decision: D03/19

Date: 29/03/2019

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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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 In this decision, ComReg has decided to direct eir to maintain the NDD for a further period commencing 1 April 2019 until PortingXS take over the management of the NDD.

Context

- 4 eir was directed under ComReg Decision D07/18 ("**D07/18**")³ to manage the NDD and the collation of information from all undertakings that assign telephone numbers to subscribers until 31 March 2019 (when the obligation expires).
- 5 PortingXS⁴ are directed under ComReg Decision D16/18 ("**D16/18**")⁵ to manage and maintain the NDD from 1 July 2019 following the expiry of the "**Transition Period**" referred to therein.⁶
- 6 eir's obligations expire on 31 March 2019 and prior to the obligation on PortingXS commencing.

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 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.

⁵ ComReg Document 18/108 and D16/18, "*Management and Maintenance of the National Directory Database*", 6 December 2018.

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 Absent an NDD manager until such time as PortingXS have taken it over, there is a risk that regulatory requirements would not be met and stakeholders might lose their legal entitlements and protections under the Regulations.

Consultation and Decision

- 8 ComReg has undertaken a full public consultation and has carefully considered all of the issues in reaching its conclusions in relation to the continuation of the management by eir of the NDD from 1 April 2019 to 30 June 2019, when the Transition Period expires or, if necessary until the expiry of an Extended Transition Period, and directing eir in that regard.
- 9 On 22 February 2019, ComReg published its Consultation – ComReg Document no. 19/08 “*Management and Maintenance of the National Directory Database*” (“**Consultation 19/08**”)⁷ which gave interested stakeholders an opportunity to share any views on ComReg’s proposal to direct eir to continue as the NDD manager from 1 April to 30 June 2019 (when the Transition Period as specified in ComReg Decision D16/18 is due to expire) or, if necessary, until such time as PortingXS has taken over as the NDD manager following the expiry of an Extended Transition Period. In Consultation 19/08, ComReg set out that there was some risk that the Transition Period 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”**).
- 10 Absent an NDD manager until such time as PortingXS have taken it over, regulatory requirements would not be met. In publishing Consultation 19/08 ComReg was cognisant of the Regulations in addition to its statutory objectives, as set out in Section 12 (1) (a) (iii) of the Act, including the promotion of interests of end-users of services and protecting end-user welfare.
- 11 In Consultation 19/08, ComReg was mindful that there is some risk that the Transition Period may need to be extended. Having regard to the progression of the transition arrangements, ComReg has formed the view that the direction on eir may be extended beyond 30 June 2019, and for a further maximum 3 months to 30 September 2019. Any obligation imposed on eir would not extend beyond 30 September 2019. In the exceptional event that the Transition Period has not commenced prior to 30 June 2019, eir will continue to manage and maintain the NDD until 30 September 2019. However, any extension period may be terminated prior to 30 September 2019 having regard to the progression of the transition arrangements.

⁷ See ComReg website - <https://www.comreg.ie/publication/management-and-maintenance-of-the-national-directory-database-7/>

- 12 There were no submissions received in response to Consultation 19/08.
- 13 Having regard to its statutory objectives and the Regulations, ComReg believes that, on balance, it is appropriate to direct eir to maintain the NDD until such time as PortingXS takes over as NDD manager. This is the most appropriate approach. It helps to ensure that the NDD continues to be maintained and remains available to end-users 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.
- 14 For these reasons and to protect end-users and ensure that the requirements of the Regulations are met, ComReg has decided that eir, as the existing undertaking directed to manage and maintain the NDD (until 31 March 2019), shall continue in that capacity effective from 1 April, 2019, (i.e. the Publication date of the Decision) until 30 June 2019 when the Transition Period is due to expire or, if necessary, until the expiry of an Extended Transition Period.
- 15 Accordingly, this Decision and Decision instrument (Decision D03/19) set out in Annex 2 shall be in force for 3 months (until 30 June 2019) or, until the expiration of an Extended Transition Period as may be specified by ComReg. Any Extended Transition Period shall not, however, extend beyond 30 September 2019.
- 16 ComReg is satisfied that the measure set out in this Decision will help to ensure that, until management of the NDD transfers from eir to PortingXS, entitlements and protections under the Regulations will be met, and that this should not result in any additional costs to eir as the current manager of the NDD in receipt of licence fees, nor will the measure result in substantial end-user detriment.

2 Background to the Decision

17 Under the Regulations, ComReg has the power to direct an undertaking to manage and maintain the NDD.

18 Regulation 19(4) of the Regulations provides as follows:

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.

19 The e-Privacy Regulations require that all undertakings 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. Therefore, 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.

20 In June 2018, ComReg directed eir, as the existing undertaking directed to maintain and manage the NDD, to continue in that capacity for a 9 month period until 31 March 2019.

21 Following public consultation,⁸ in December 2018 ComReg decided (ComReg Decision D16/18) that PortingXS is the appropriate undertaking to manage and maintain the NDD from 1 July 2019 following the expiry of the Transition Period.

⁸ ComReg Document 18/91, "Management and Maintenance of the National Directory Database", 15 October 2018.

- 22 ComReg had initially considered a three month transition period,⁹ 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.
- 23 In D16/18, however, 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.”*
- 24 The direction on eir to manage and maintain the NDD remained in force until 31 March 2019.
- 25 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. 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. Although eir and PortingXS continue to engage, and to liaise with ComReg, there remains some uncertainty regarding the precise point at which the transfer to PortingXS will occur. In these circumstances, ComReg considers it prudent and appropriate to have regard to a possible risk that the transfer will not occur prior to the end of the transition period, 30 June 2019, in formulating its final view.

⁹ 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.

3 Summary of ComReg's Decision

26 The following section contains a brief summary of the rationale for ComReg's Decision and the contents of ComReg's Decision. The Decision Instrument is set out in Annex 2. This is based on ComReg's assessment of progress with the transition arrangements, having regard to current information and having regard to requirements of the Regulations and ComReg's statutory objectives.

Appropriateness of a direction and direction period

27 Having considered all issues, ComReg has decided, in the interest of end-users, to direct eir to continue to manage and maintain the NDD from 1 April to 30 June 2019 or, until the expiration of an Extended Transition Period whichever is the later.

28 This decision is made in light of the following facts:-

- As set out above, eir's obligations expire on 31 March 2019 and prior to the obligation on PortingXS commencing from 1 July 2019.
- If ComReg did not direct an undertaking to continue to manage and maintain the NDD from 1 April 2019 to 30 June 2019 consumers' legal entitlements would not be met including entitlements and protections under both the Regulations and the e-Privacy Regulations.
- Under the Regulations, undertakings must provide up-to date information for the purposes of the NDD on a regular basis, details of subscriber preferences for listing their telephone numbers¹⁰ as well as telemarketing preferences. Therefore, absent the NDD being in place, a number of regulatory requirements could not be fulfilled by undertakings.
- The information contained on the NDD is used for the collation of the printed telephone directory and online directories and Directory enquiry services. In addition, the NDD continues to be the basis for the "opt-out" register for direct marketing purposes. Absent the 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.¹¹
- In the absence of a regulatory obligation to do so, it is not guaranteed that eir would continue to manage and maintain the NDD during the period from 1 April 2019 to 30 June 2019 when from 1 July 2019 PortingXS is due to take over the management and maintenance of the NDD.

¹⁰ 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.

¹¹ Including: undertakings, subscribers, directory enquiry service providers, direct marketing companies, and the Data Protection Commission.

- In these circumstances, and having regard to the progress of the transition arrangements, eir is required to continue to manage and maintain the NDD. 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.
- 29 In light of the above factors, ComReg's view is that, to direct eir to manage and maintain the NDD is the most appropriate approach in light of the short timeframe until PortingXS takes over this role.
- 30 In D16/18, ComReg set out that it may, if it considers it necessary, extend the Transition Period. In Consultation 19/08 ComReg's proposal was that should this requirement be necessary and appropriate, ComReg would envisage that any Extended Transition Period would not be extended beyond 30 September 2019. ComReg considers that it is possible that the transfer from eir to PortingXS will still take place prior to 30 June 2019. However, should it prove necessary and appropriate, in order to ensure the continuity and integrity of the NDD, and to ensure that the requirements of the Regulations are met during the transition from eir to PortingXS, ComReg may extend the Transition Period up to and including 30 September 2019. In such circumstances, eir would be directed to manage and maintain the NDD until the expiration of the Extended Transition Period.
- 31 There were no submissions received in response to Consultation 19/08.
- 32 In light of the above, ComReg has decided to direct eir to continue to manage and maintain the NDD from 1 April to 30 June 2019 or, if necessary, until the expiry of an Extended Transition Period, as provided for by the Regulations to:
- Keep an up-to-date and comprehensive database (NDD);
 - Facilitate consumer rights in respect of directory entries and opting out of direct marketing (the e-Privacy Regulations);
 - Ensure that providers of directory information services and/or directories continue to have access to the information on the appropriate terms necessary to offer services;
 - Ensure the continuity and integrity of the NDD and that the requirements of the Regulations are met during the transition from eir to PortingXS; and
 - Ensure 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.

Annex 1: Final Regulatory Impact Assessment

Introduction

- 33 The analysis presented in this section represents ComReg's final Regulatory Impact Assessment ("RIA"). It sets out ComReg's conclusions of the effect upon stakeholders and competition, of ComReg exercising its powers to direct eir to continue as the manager of the NDD, and of imposing any associated requirements.
- 34 In accordance with the Regulations, having regard to Decision D16/18, and having regard to progress with the transition arrangements, ComReg has assessed whether the management and maintenance of the NDD by eir continues to be necessary until such time as PortingXS has taken over this role following the expiry of the Transition Period.
- 35 ComReg, as part of its Consultation 19/08, set out its preliminary RIA of the various available options open to it to achieve the stated objectives as follows:
- Option 1 – Do not direct eir to manage and maintain the NDD from 1 April to 30 June 2019; and
 - 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).
- 36 In so doing, ComReg noted that the RIA forms part of ComReg's overall analysis of the continued need (or absence of the need) for a manager of the NDD under the Regulations from 1 April 2019 (when the current obligation on eir expires) having regard to the progress with transition arrangements and carry-over of the NDD to PortingXS.
- 37 The purpose of the RIA is to assess the likely impact upon stakeholders and competition of options as regards the management and maintenance of the NDD from 1 April 2019 to 30 June 2019 or, until the expiration of an Extended Transition Period whichever is the later.

- 38 ComReg's aim in conducting the RIA is to ensure that any specific obligations regarding the NDD are appropriate, proportionate and justified in light of the analysis conducted, having regard to its objectives (primarily that subscribers have the right to be listed in directories and DQ services; and keeping an up-to-date and comprehensive database) while also taking into account the principle of proportionality. The purpose of the RIA is to establish whether regulation is actually necessary, to identify any possible negative effects that might result from imposing, amending or withdrawing a regulatory obligation and to consider any alternatives.
- 39 Consistent with the RIA Guidelines¹² and, section 13(1) of the Act, ComReg's RIA considers the effect of proposed regulation along with a consideration of the scope of the various options open to ComReg in respect of the NDD. Therefore, ComReg in conducting this final RIA takes full account of its obligations under the Regulations.
- 40 On the basis of the analysis, ComReg proposed 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 or, until the expiration of an Extended Transition Period (if so decided) (Option2). ComReg's preliminary view was, on balance, that Option 2 represented the most justified and proportionate of the approaches to the NDD.
- 41 No submissions were received in response to Consultation 19/08 and therefore no specific issues were raised on ComReg's proposals including the draft RIA or, the terms of ComReg's draft Decision Instrument. The RIA in conjunction with the rest of the analysis and reasoning in Consultation 19/08 and this document represents the RIA and should be read together.
- 42 Having regard to all available information, and ComReg's statutory objectives, the following sets out ComReg's final RIA in relation to requirements for managing and maintaining the NDD until the end of the Transition period or, the expiration of an Extended Transition Period. This final RIA sets out the 5 steps set out in the RIA Guidelines for conducting RIA's as follows.

Step 1: Describe the Policy Issues and identify the objectives

- 43 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. All undertakings must provide up-to-date information to the NDD on a regular basis.

¹² ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", ComReg Document 07/56a, 10 August 2007 (the "RIA Guidelines").

- 44 Following the entry into force of the e-Privacy Regulations, the NDD continues to be the basis for the “opt-out” register for direct marketing purposes. The “opt-out” register is the means by which subscribers express their preference not to be contacted by direct marketing companies (by so “**opting out**”).
- 45 eir was directed to maintain and manage the NDD until 31 March 2019. Pursuant to D07/18, eir provided directory information held in the NDD to directory enquiry service providers under a Directory Information Licence Agreement (“**DILA**”) for the purposes of access by directory enquiry service providers. eir provides information to the direct marketing industry under the Direct Marketing Licence Agreement (“**DMLA**”). The NDD is an important and convenient information resource for directory enquiry service providers and direct marketing companies.
- 46 PortingXS is directed to maintain and manage the NDD from 1 July 2019.
- 47 Absent a direction on an undertaking to manage and maintain the NDD from 1 April to 30 June 2019, subscribers’ legal entitlements and regulatory requirements would not be fulfilled.
- 48 There is a specific power for ComReg under Regulation 19(4) of the Regulations to require an undertaking to manage and maintain the NDD.
- 49 ComReg’s objective in directing a manager of the NDD is to ensure the comprehensiveness and integrity of the NDD to the benefit of end-users, with the result that end-users are protected. Furthermore, an up-to-date and comprehensive database (NDD) containing telephone directory information in relation to all listed telephone numbers must be kept such that providers of directory information services continue to have access to the information necessary to offer those services and on the appropriate terms.
- 50 In pursuing these objectives, ComReg is also mindful of the principle of proportionality and aims to ensure that any regulatory measures are kept to the minimum necessary whilst ensuring the needs of industry and end users are met.

Step 2: Identify and describe the Regulatory Options

- 51 As set out in Consultation19/08,¹³ ComReg considered regulatory options open to it to achieve the above stated objectives:

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).

¹³ As set out in Chapter 3, p9 of Consultation19/08.

Step 3 and 4: Determine the impacts on Stakeholders and Competition

52 Having considered all issues, and in order to determine the impact on stakeholders and competition ComReg has taken into account the following:

- Subscribers have the right to be listed in directories and directory information services;
- Keeping an up-to-date and comprehensive database (NDD) containing telephone directory information in relation to all listed telephone numbers;
- Providers of directory information services and/or directories continue to have access to the information on the appropriate terms which is necessary to offer those services;
- The NDD continues to be the basis for the “opt-out” register for direct marketing purposes; and
- Progress with the transition arrangements and carry-over of the NDD from eir to PortingXS.

	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>May result in 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 end users.</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 information 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 increased costs or to cease operation.</p> <p>Additionally, eir would no longer incur the costs of managing and maintaining the NDD, but would also lose any potential revenue from it.</p> <p>eir may decide to continue to manage and maintain the NDD.</p>	<p>If eir does not continue to maintain the NDD consumer preferences may not be accurately recorded, with the result that consumers who do not wish to be contacted for Direct Marketing purpose may now be contacted. There would be no way for them to register their preference. This would cause detriment to end users and the requirements of the Regulations would not be met.</p> <p>Directory information and enquiry service providers may cease operation or may increase prices causing detriment to end users.</p>	<p>Absent a direction to manage and maintain the NDD on a fair, objective, cost-oriented, and non-discriminatory basis, it may be more costly for directory enquiry service providers to access comprehensive and up to date information which may dampen competition for directory services, ultimately consumers welfare may reduce.</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 on the NDD in accordance with the terms and conditions previously in place.</p> <p>It is more convenient and less costly for Directory Service Providers and undertakings to obtain the information from the one, centralised source that is the NDD.</p>	<p>Assist with 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 and, therefore, the requirements of the Regulations would be met.</p>	<p>This would help ensure directory enquiry service providers have access to this information in accordance with the terms and conditions previously in place promoting competition and end user welfare. Therefore the requirements of the Regulations would be met.</p>

<p>Specify eir to maintain the NDD from 1 April 2019 to 30 June 2019, or the expiration of an Extended Transition Period (if so decided, but not beyond 30 September 2019).</p>	<p>The costs to eir of maintaining the NDD can continue to be covered by the licence fees (DILA/ DMLA).</p>		
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Step 5: Assess the impacts and choose the best option

- 53 ComReg's objective is to help ensure that the NDD continues to be maintained in a comprehensive way until all necessary transition arrangements are completed.
- 54 Having considered all of the issues and available information, ComReg's view is that Option 1 would cause detriment to end-users with the result that the requirements of the Regulations would not be met, and therefore, in ComReg's view, this scenario must be avoided.
- 55 ComReg considers that to facilitate consumer rights in respect of directory entries and opting out of direct marketing (the e-Privacy Regulations) requires eir, as the existing manager of the NDD, to maintain it until 30 June 2019 when from 1 July 2019 PortingXS is due to take over as manager of the NDD. Doing this would avoid any risks in relation to the continuity of operation and the integrity of the data held on 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 and Directory Inquiry service.
- 56 ComReg's considers that to direct eir, 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 till the expiration of an Extended Transition Period (if so decided, but not beyond 30 September 2019), (Option 2) is objectively justified and proportionate. Overall, this approach 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.
- 57 By ensuring the management and maintenance of the NDD by eir, 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.
- 58 The costs to eir of maintaining the NDD can continue to be covered by the licence fees (DILA/DMLA) meaning that the obligation is no more burdensome than necessary. Any cost burden incurred by eir would, on balance, be out-weighted by the benefits to end users. Accordingly, ComReg has decided that Option 2 is the optimal approach to the matter. It continues to be proportionate and achieves the stated objectives.

Annex 2: Final 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 sought representations of interested parties in response to ComReg document No. 19/08 and
- v. Having regard to the analysis and reasoning set out in ComReg document No. 19/08.

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”, dated 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 any extension to the Transition Period expiring no later than 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 continue to manage and maintain the NDD during the period from 1 April 2019 to 30 June 2019 and during such Extended Transition Period(s) as may be specified by ComReg. In the exceptional event that the Transition Period has not commenced prior to 30 June 2019, Eircom Limited shall continue to manage and maintain the NDD until 30 September 2019 or until the expiration of the Transition Period (in accordance with ComReg Decision D16/18, which shall not be later than 30 September 2019), any Extended Transition Period or until otherwise directed by ComReg. 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 otherwise specified by ComReg but shall not be effective beyond 30 September 2019.

THE COMMISSION FOR COMMUNICATIONS REGULATION

Annex 3: Legal Basis

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 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.