



Commission for  
**Communications Regulation**

# **Premium Rate Services Consultation on Code of Practice**

## **Consultation**

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# 1 Introduction

- 1 Premium Rate Services (“*PRS*”) are, typically, goods and services that a consumer can buy by charging the cost to their fixed line or mobile telephone account, whether pre-paid or bill-paid. At present most PRS are provided via premium rate telephone numbers (starting with the prefix 15XX) and short-codes (in the form 5XXXX) but technological developments now result in some PRS being charged to consumer mobile phone accounts without recourse to premium rate shortcodes<sup>1</sup>. PRS usually offer information and entertainment services, some examples of which are digital content such as games and videos delivered to mobile handsets, quiz television services, chat-line services, ringtones, sports alerts, weather alerts, television voting and competitions. However, recent advancements allow consumers to pay for mobile apps and game credits as well as “off-handset”<sup>2</sup> goods and services such as parking fees by charging the cost to their mobile phone account.
- 2 On 12 July 2010, the regulation of PRS was placed on a statutory footing with the enactment of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010 (the “*PRS Act*”). The PRS Act also amended the Communications Regulation Act, 2002 (the “*Principal Act*”), which sets out the Commission for Communications Regulation’s (“*ComReg*”) objectives, functions and many of its powers and now requires Comreg to carry out investigations into matters relating to the provision, content and promotion of PRS in order to “protect the interests of end-users of PRS”.
- 3 Section 15 of the Act requires ComReg, following a consultation with PRS providers, other interested parties and, as it considers relevant, other regulatory bodies in the State, to publish a new Code of Practice to be followed by providers of PRS with respect to the provision, content and promotion of PRS. Accordingly, on 1 December 2010, ComReg consulted on the draft provisions for a new Code. At the conclusion of a lengthy consultative process, ComReg issued a new Code of Practice<sup>3</sup> (“the Code”) on 5 April 2012, which came into effect on 25 July 2012.

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<sup>1</sup> “Short Code” or “shortcode” means a five-digit number within the range of 50xxx to 59xxx as provided for in the National Numbering Conventions.

<sup>2</sup> “Off-handset” goods and services is a colloquial term used to refer to PRS where no goods or services are delivered to the end users handset and can include, for example, parking fees, vending machine charges or road toll charges.

<sup>3</sup> ComReg document 12/29 <http://www.comreg.ie/fileupload/publications/ComReg1229.pdf>

- 4 ComReg believes that the Code provides greater protection for end-users in their dealings with PRS through the provision of clear information, in particular transparency of tariffs and material conditions and enhanced certainty in the purchase process. Nonetheless, to ensure the Code is kept relevant, and in accordance with a previous commitment, made in an Information Notice<sup>4</sup> published on 8 March 2013, ComReg is consulting now on some issues including, *inter alia*, the issue of whether a threshold value should be introduced below which the Double Opt-in requirements set out in sections 5.13 to 5.18 of the Code of Practice (“the Double Opt-in Requirements”) would not apply or might apply in a modified manner. This and other matters are now set out in this paper for consideration by all interested stakeholders.
- 5 In addition and with respect to other provisions in the Code, ComReg is evaluating information derived from its own compliance actions against non-compliant PRS providers, issues raised by end users and engaging with PRS regulatory authorities in other jurisdictions. Resulting from a review of relevant information gathered, ComReg may consider publishing a further consultation proposing appropriate amendments to the Code in due course.
- 6 Accordingly ComReg invites submissions to the issues raised and questions posed in this consultation. Responses to this consultation must be received at ComReg not later than 5.00 pm on Friday, 4 October 2013. Further details are provided in Section 6 below.

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<sup>4</sup> <http://www.comreg.ie/fileupload/publications/ComReg1324.pdf>

## 2 Executive Summary

### 2.1 Background

- 7 On 12 July 2010, the regulation of PRS was placed on a statutory footing with the enactment of the PRS Act. The PRS Act also amended the Principal Act, which sets out ComReg's objectives, functions and provides that ComReg should protect the interests of end users of PRS.
- 8 Under the provisions of the PRS Act, ComReg was required to introduce a new Code with respect to the provision, content and promotion of specified PRS, to be followed by licensed PRS providers. In accordance with its statutory obligation<sup>5</sup>, ComReg is fully committed to ensuring the interests of end-users of PRS are protected and to this extent it actively enforces the Code of Practice for PRS and, accordingly, following a comprehensive consultation process it published the new Code<sup>6</sup> on 5 April 2012 which came into effect, on 25 July 2012. One of the changes introduced under the new Code requires end users to confirm, by sending an SMS from their handset, their intention to subscribe to a subscription PRS (i.e. a PRS for which there is a recurring charge; typically a charge every week).
- 9 Section 15 of the PRS Act requires ComReg to consult with PRS providers, other interested parties and, as it considers relevant other regulatory bodies in the State and afford these parties the opportunity to make written representations in relation to any proposals that ComReg may publish to amend the Code.
- 10 The PRS industry is particularly subject to change and is influenced by technological developments in the areas of digital marketing, mobile handsets and consumer purchasing practices. In this regard, ComReg keeps the provisions of the Code under review and will propose, where it considers appropriate, changing the existing provisions or introducing new provisions to ensure that the Code remains appropriate as the PRS market evolves.

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<sup>5</sup> "To protect the interests of end users" in accordance with Section 12(1)(d) of the Principal Act

<sup>6</sup> ComReg document 12/29 <http://www.comreg.ie/fileupload/publications/ComReg1229.pdf>

## 2.2 Review of the existing Code of Practice

- 11 In light of the experience gained over the past year ComReg believes that some provisions of the Code require minor modifications and clarifications. In addition to these proposed amendments ComReg is also seeking submissions on whether a threshold value should be introduced below which the Double Opt-in requirements set out in sections 5.13 to 5.18 of the Code of Practice (“the Double Opt-in Requirements”) would not apply or might apply in a modified manner.
- 12 These issues on which ComReg is seeking responses are briefly summarised below and set out in greater detail in Section 4 of this paper.

### 2.2.1 Section 4.8 of the Code - Price Transparency

- 13 Section 4.8 of the Code requires that end users are fully informed of the full and true cost of a PRS prior to incurring any charges. While this would appear to be an incontrovertible and straightforward requirement, the nature of PRS price structures, which may comprise several independent features such as sign-up costs, additional network charges beyond the control of the PRS provider and free or discounted periods can result in the full cost of the PRS being ambiguous and consequently unclear to some end users.
- 14 While some PRS providers may supply all such information to end users, it is evident to ComReg that the aggregated total cost might not be provided or is not sufficiently clear to ensure that the end user is fully informed prior to incurring costs. ComReg, therefore, proposes to amend the existing provisions of Section 4.8 of the Code, with the intention of ensuring that the consumers are aware of the total cost of a PRS before they are incurred, in order that they can make an informed transactional decision.

### 2.2.2 Regulatory Reminder Messages

- 15 Section 5.20 of the current Code provides that end users, who are subscribed to a PRS with a recurring charge (i.e. a subscription PRS) must receive periodic reminders setting out details about the cost of the PRS and how to cancel the subscription. Such regulatory updates are required to be delivered by SMS and are intended to be received by end users after each €20 spend interval.

- 16 It is clear to ComReg that where the cost of a PRS does not fall precisely on €20 then, contrary to the requirements of the Code, the end user might not receive a regulatory reminder SMS until they have incurred charges in excess of the €20 interval. For example, if the weekly cost of a PRS is €8, then the end user may not receive the regulatory reminder message until after the charges for the third week of the PRS have been incurred resulting in the reminder message being received after the end user has incurred charges of €24. As such, end users who decide to unsubscribe after receiving such a regulatory reminder message will have incurred additional charges (i.e. an extra €4) above what is intended by setting the reminder interval at €20.
- 17 Accordingly, ComReg proposes to amend the existing provisions of the Code to provide that the regulatory update messages must be received by end users at intervals no greater than €20.

### **2.2.3 Price Threshold for Subscription Services**

- 18 The double opt-in requirements contained in Section 5.13 to 5.18 of the Code apply to all subscription PRS at any value and not to single or “once-off” purchases. These provisions require that after an end user has first responded to a PRS promotion, they must receive an SMS from the PRS provider setting out details of the recurring cost of the PRS and instructions on how to subscribe to the PRS. End users who wish to subscribe must confirm their intention (i.e. enter a contract, typically of indefinite duration) by sending an SMS from their handset to the PRS provider – hence the “double opt in” title. Section 4 of this document sets out ComReg’s preliminary position in respect of introducing a price threshold for subscription services, below which the current double opt-in requirements would not apply or may apply in a modified manner.
- 19 In arriving at its preliminary position, ComReg has considered the various media through which PRS are promoted and the various ways that an end user can subscribe to a PRS. ComReg has also taken cognisance of current industry practices and issues raised with ComReg by end users of PRS over the last year since the double opt-in provisions were included in the Code.
- 20 ComReg’s preliminary position is that, having cognisance for ComReg’s statutory objective<sup>7</sup> to protect the interests of end users of PRS, and given the protections provided by double opt-in for all subscription PRS, it would not be appropriate to introduce a threshold below which the double opt-in requirements do not apply, at this time. The justification for ComReg’s preliminary position is set out in Section 4.3 below.

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<sup>7</sup> In accordance with Section 12 of the Principal Act



## 3 Legal Basis

### 3.1 ComReg's Objectives and Functions

- 21 ComReg's functions in respect of PRS are set out in Sections 10 and 12, respectively, of the Principal Act.

#### *Functions of Commission*

10.—(1) *The functions of the Commission shall be —*

[..]

*(cb) to ensure compliance by premium rate service providers with their obligations in relation to the provision, content and promotion of premium rate services,*

*(d) to carry out investigations into matters relating to—*

[..]

*(ii) the provision, content and promotion of premium rate services,*

*(2) The Commission may carry out an investigation referred to in subsection (1) either on its own initiative or as a result of a complaint made by an end user or an undertaking.*

*(3) The Commission shall have all such powers as are necessary for or incidental to the performance of its functions [under this or any other Act.*

#### *Objectives of Commission*

12.—(1) *The objectives of the Commission in exercising its functions shall be as follows—*

[..]

*(d) to protect the interests of end users of premium rate services.*

[..]

*(3) In carrying out its functions, the Commission shall seek to ensure that measures taken by it are proportionate having regard to the objectives set out in this section.*

## 3.2 The PRS Act

22 Section 15 of the PRS Act provides:

*15.—(2) Before publishing a code of practice or any part of a code of practice, the Commission—*

*(a) shall publish in such manner as it considers appropriate a draft of the code of practice or the part of the draft code of practice and shall give premium rate service providers, other interested persons and, as it considers relevant, other regulatory bodies in the State one month from the date of publication of the draft code or the part of the draft code within which to make written representations to the Commission in relation to the draft code or the part of the draft code, or for such further period, not exceeding 2 months, as the Commission in its absolute discretion thinks fit,*

*(b) shall, having considered the representations, if any, publish the code or the part of the code with or without modification as the Commission in its absolute discretion thinks fit, and*

*(c) where the Commission publishes a code of practice or any part of a code of practice, it shall publish a notice of such publication in the Iris Oifigiúil and that notice shall—*

*(i) identify the code,*

*(ii) specify the matters concerned in respect of which the code is published, and*

*(iii) specify the date on which the code comes into operation.*

*(3) The Commission may, following consultation with premium rate service providers, other interested persons and, as it considers relevant, other regulatory bodies in the State amend or revoke any code of practice or part of any code of practice prepared and published by it under this section.*

*(4) Where the Commission amends or revokes a code of practice or any part of a code of practice published under this section, it shall publish notice of the amendment or revocation in the Iris Oifigiúil.*

*(5) The Commission shall make available for public inspection, without charge, on the Commission's website on the internet and at its principal office, during normal working hours—*

- (a) a copy of each code of practice, and*
  - (b) where a code of practice has been amended, a copy of the code as so amended.*
- (6) It is a condition of a premium rate service licence that any code of practice is complied with.*

## 4 Consultation Issues

- 23 Section 15 of the PRS Act provides that ComReg may, amend or revoke any code of practice or part of any code of practice but must first consult with PRS providers, other interested parties and, as it considers relevant, other regulatory bodies in the State.
- 24 The Code was introduced on 5 June 2012 and came into force in full on 25 July 2012. ComReg's stated approach is to monitor developments and practices in the PRS industry in order to ensure the Code remains relevant and appropriate in the PRS market.
- 25 Since the introduction of the Code ComReg has identified two areas, Sections 4.8 and 5.20 of the Code, where it considers that the provisions might be slightly amended in order for ComReg to better meet its statutory objective to protect the interests of end users of PRS. In addition, ComReg is consulting on whether a threshold value should be introduced below which the Double Opt-in requirement set out in Sections 5.13 to 5.18 of the Code would not apply or might apply in a modified manner.

### 4.1 Section 4.8 – Price Transparency

- 26 Section 4.8 of the Code states (emphasis added):

***4.8 PRS Providers must ensure that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge. To this end, PRS providers are required to ensure that:***

*(a) charges and prices are inclusive of VAT, where appropriate,*

*(b) where applicable, the following information is conveyed in a transparent, prominent and clear manner:*

*(i) any costs, additional to the cost of the service, relating to delivery or other charges,*

*(ii) any sign-up cost,*

*(iii) that network data charges may apply,*

*(iv) the price per message and the number of messages required to complete the transaction,*

*(v) the duration of any "free" or discounted period and the relevant charges that will apply thereafter, and*

*(vi) if it is a Subscription Service, the charge per period and that charge period,*

*(c) as appropriate, that prices are presented in the form:*

*(i) numerical price per minute for time based/charged services,*

*(ii) the total cost to the end-user and, if applicable, include the minimum duration of the call necessary to participate, or*

*(iii) whichever of (i) or (ii) is most relevant to the end-user making an informed decision to proceed with a transaction,*

*(d) the required pricing information for voice services states the rate for calling from the Eircom network and that calls from other networks may be higher, and*

*(e) values in Euro include the Euro symbol (€) or, where that is not possible, use the word "EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"*

27 It is clear that the current provisions attempt to anticipate all possible charges, which may comprise the total cost of a PRS, are brought to the end users attention in order that the end user may make an informed transactional decision. However, in ComReg's experience<sup>8</sup>, some end users are clearly misled or unaware of the actual cost of a PRS when this cost is expressed in terms that are particular to PRS and different from other everyday purchases.

28 The particular nature of PRS, which typically, though not always, sees the end users being charged for receiving messages (referred to as "reversed-billed"<sup>9</sup> or "MT" SMS) from the PRS provider rather than for sending SMS, which is the standard means by which end users incur charges can lead to charges being presented to end users in terms to which they are not accustomed. For example, some PRS providers have presented the cost of their PRS as

5 x €2.50 instead of simply €12.50.

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<sup>8</sup> ComReg has found that some PRS providers did not comply with the requirements of the Code, details of which are published on [http://www.phonesmart.ie/Code\\_of\\_Practice/133](http://www.phonesmart.ie/Code_of_Practice/133)

<sup>9</sup> "Reversed-billed" or "MT-billed" (standing for "mobile-terminated") SMS is a mechanism whereby a consumer is charged for receiving a message at the retail level. The opposite of this is Mobile Originated (MO) Billing where the consumer is charged for sending an SMS.

Presenting pricing in such terms, while factually correct, has led to confusion as some end users clearly have not understood the manner in which the price is calculated. Some end users, who contacted ComReg, believed that they would receive 5 items for a total cost of €2.50 rather than receiving one item for a cost of €12.50, which was charged by the PRS provider sending five MT-billed messages at a cost of €2.50 each.

- 29 The practice of sending a multiple MT-billed SMS to end users arises because PRS providers are, typically, limited by the number of fixed “price-points”, for example €1, €1.5, €2 and €2.50 that are available to them. Each shortcode<sup>10</sup> from which a PRS provider sends MT-billed messages to end users of its PRS has a fixed price and in order to reduce costs and administration, PRS providers reasonably seek to keep the number of shortcodes it operates to a minimum. As a result PRS providers will send, for instance, an end user two SMS at a cost of €2.50 each rather than setting up a separate shortcode for which the cost of each MT-billed SMS would be €5. However, the practice of charging for a PRS through the use of multiple MT-billed SMS has also confused some end users, who mistakenly believe that they have been charged a number of times for the same PRS.
- 30 In order to reduce the number of queries that PRS providers, network operators and ComReg may receive from end users who believe that they have been charged a number of times for the same PRS Section 4.8(b)(iv) of the Code requires PRS providers to inform end users of,
- “(iv) the price per message and the number of messages required to complete the transaction”*
- 31 However, when a PRS is charged by sending multiple MT-billed messages, some PRS providers state the number of messages required to complete the transaction rather than ensuring that the pricing information is clear, comprehensive and unambiguous. ComReg considers that end users should be provided with relevant and clear pricing information that will allow them to make an informed transactional decision and not cause them to make a decision that they would not have taken otherwise.
- 32 In this regard, ComReg proposes amending the provisions of Section 4.8 in order to more clearly set out the requirements with respect to the pricing information that must be provided to end users but which does not change the manner in which PRS itself is provided . The proposed revised Section 4.8 is set out below and for ease of comparison a tracked version of the proposed changes is attached at Annex 1:

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<sup>10</sup> A five-digit number within the range of 50xxx to 59xxx, which PRS providers set up on each of the mobile networks to whose subscribers it intends to make it PRS available.

*“4.8 (a) PRS Providers must ensure that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge.*

*(b) Costs must be presented in Euro, inclusive of VAT unless no VAT applies, and include the Euro symbol (€) or, where that is not possible, use the word "EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"*

*(c) Without prejudice to the generality of the requirement imposed by Section 4.8(a) above, PRS providers must, where appropriate, provide the following information:*

*(i) any costs, additional to the cost of the service, relating to delivery or other charges,*

*(ii) any sign-up cost,*

*(iii) that additional network data charges may apply,*

*(iv) the price per message and the number of messages required to complete the transaction,*

*(v) the duration of any "free" or discounted period and the relevant charges that will apply thereafter, and*

*(vi) if it is a Subscription Service, the charge per period and that charge period,*

*(vii) the numerical price per minute for time based/charged services, or the total cost to the end-user and, if applicable, the minimum duration of the call necessary to participate, whichever is most relevant, and*

*(viii) in respect of voice services states the price relates to costs for calling from the Eircom network and that calls from other networks may be higher.”*

- 33 It is ComReg's preliminary position that the proposed amendments to Section 4.8 of the Code do not alter the current objective of the original wording in Section 4.8, which is to ensure that end users clearly understand the price of a PRS or the manner in which the price is calculated prior to making a decision to transact. The proposed amendments would appear to reflect many PRS provider's practice but, if implemented, will serve to ensure that this practice is mandatory and implemented by all. Achieving this objective will ensure that end users make informed transactional decisions, which, in turn, will enhance their trust and confidence in PRS. Finally, ComReg considers that this means that PRS providers do not have to change how their PRS are provided (i.e. MO or MT-billed messages), which ensures that this clarification is proportionate, and will have minimal impact on PRS providers.

Q. 1 Do you agree with ComReg's proposal to amend the provisions of Section 4.8 of the Code? Please give reasons to support your view.

## 4.2 Section 5.20 – Regulatory Reminder Messages

- 34 Section 5.20 to 5.22, inclusive of the Code state (emphasis added):

### ***“Regulatory Updates for Subscription Services***

***5.20 For Subscription Services, every time an end-user has spent a total of €20 on the Subscription Service a Regulatory Update Message, containing the information set out in Sections 5.21 and 5.22 must be sent via a free standard SMS to the end-user.***

*5.21 Regulatory Update Messages must:*

- (a) commence with the phrase "Free Message" or "Free Msg" in the SMS header or as the first words in the body of the text,*
- (b) not contain any links or promotional material,*
- (c) state the name of the service,*
- (d) confirm that the service is subscription-based,*
- (e) state the basis for calculating charges including any:
  - (i) charges for each message received,*
  - (ii) charges for each message sent, and*
  - (iii) charge per charge period and that charge period.**



*(f) details of how to unsubscribe from the service by sending/replying "STOP" to the short code which is used to charge end-users of the service, and*

*(g) the PRS Provider's helpline number.*

5.22 Regulatory Update Messages must follow the format of the example provided below:

**SUBSCRIPTION REGULATORY UPDATE MESSAGE**  
***You are subscribed to [name of service and optional description] for [cost of service in €] per [billing frequency - message received/time] until you send STOP to [originating service short code]. Helpline [not more than national rate phone number].***

- 35 The clear intention of the provisions of Section 5.20 is that end users are provided with periodic regulatory updates, after each €20 they spend, in order to remind them that they are subscribed to a PRS and, if they wish to do so, how to cancel their subscription and associated charges.
- 36 However, where the cumulative cost of a PRS does not fall precisely on €20 then the end user may not receive a regulatory reminder SMS until they have incurred charges in excess of the intended €20 interval. For example, if the weekly cost of a PRS is €8, then the end user will, typically, not receive the regulatory reminder message until after the charges for the third week of the PRS have been applied, resulting in the reminder message being received after the end user has incurred charges of €24 (i.e. 3 weeks x €8/week).
- 37 Some PRS providers, which supply PRS at a cost of €8 per week, had structured their operations such that the Regulatory Reminder Message was "triggered" to be sent to an end user once the end user incurred charges of €20. Experience has clearly demonstrated that with such arrangements, while the Regulatory Reminder message may be sent after the end user has spent €20, because of how charged messages and free Reminder Messages are routed through the mobile networks, the result was that the free Reminder Message was frequently received by the end user after the charged MT messages, typically after €24, and therefore not within the €20 interval.
- 38 ComReg has found, in accordance with Section 9 of the PRS Act that some PRS providers, which charge €8 per week for their PRS and were sending the Regulatory Reminder Message after the third week's charges, this resulted in the end user receiving the Reminder Message after they have incurred charges of €24.

- 39 It was, therefore, evident to ComReg that end users were not receiving reminder messages within the stipulated €20 interval, which resulted in them incurring unnecessary charges, when they decided to terminate their subscription. For example, where end users unsubscribed immediately after receiving a Regulatory Update Message, they nonetheless incurred “extra” charges because the regulatory reminder message was sent at the incorrect interval, such as €22 or €24.
- 40 ComReg made a finding of non-compliance<sup>11</sup> against the relevant PRS provider because it considered that the PRS provider had not complied with the provisions of Section 5.20<sup>12</sup> of the Code and had arranged the pricing structure and operation of its PRS in such a manner that the Regulatory Reminder Messages would frequently not be received by end users within the €20 interval specified in the Code.
- 41 ComReg is not seeking to restrict the periodic price of PRS or how PRS providers structure the cost of their subscription PRS once the interests of the end users are met by providing them with a Regulatory Update Message at each €20 interval, as set out in Section 5.20 of the Code. In this regard, some PRS providers applied for and were granted permission by ComReg under the provisions of Section 3.3<sup>13</sup> of the Code, to provide Regulatory Update Messages at lower intervals than the stipulated €20. In this manner, some PRS providers, whose PRS cost €8 per week, now send Regulatory Reminder Messages after the second week charges have been incurred i.e. after each €16 interval.
- 42 In circumstances where an end user did not receive the Regulatory reminder Message at the correct interval because of technical limitations, for example where the end user was outside network coverage, ComReg would not countenance compliance action if, in the main, end users could reasonably be guaranteed to receive Regulatory Reminder Messages within the €20 interval. ComReg’s intention is that PRS providers take appropriate measures to ensure, as far as practicable that both the provisions and the spirit of Section 5.20 are met.

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<sup>11</sup> ComReg publishes all findings of non-compliance against PRS providers on its website phonesmart.ie [http://www.phonesmart.ie/Code\\_of\\_Practice/133#findings](http://www.phonesmart.ie/Code_of_Practice/133#findings)

<sup>12</sup> A similar provision to Section 5.20 was set out in Section 11.13.5 the previous Code (ComReg 10/54), published by RegTel in October 2008.

<sup>13</sup> Section 3.3 of the Code provides *inter alia* that “Where, in respect of a particular PRS, a PRS Provider satisfies ComReg that any requirement of the Code can be adequately met by alternative means to that specified in the Code, ComReg may, in its sole discretion, permit such alternative means to be used by the PRS Provider concerned in respect of that particular PRS.”

- 43 ComReg considers that in order to facilitate PRS providers to provide Regulatory Update Messages at lower intervals than the €20 set out in Section 5.20, without having to apply for specific permission under the provisions of Section 3.3 in respect of each and every subscription PRS that they provide, it is appropriate to propose a change to Section 5.20.
- 44 Accordingly, ComReg proposes to amend the existing provisions of the Code to clarify that the regulatory update messages must be received by end users at intervals no greater than €20.
- 45 The proposed revised Section 5.20 is set out below (emphasis added) and for ease of comparison a tracked version of the proposed changes is attached at Annex 2:

*“5.20 (a) For Subscription Services, PRS providers must ensure that end users receive periodic Regulatory Update Messages, containing the information set out in Sections 5.21 and 5.22,*

*(b) Such Regulatory Update Messages must:*

*(i) be sent via a free standard SMS, and*

*(ii) be received by an end user each and every time an end-user spends a total of €20, or some lesser amount, on the Subscription Service: and*

*(c) be sent at a time that allows an end-user a reasonable period of time within which to unsubscribe before any further charges are incurred.”*

- 46 It is ComReg’s preliminary position that the proposed amendments to Section 5.20 of the Code do not alter the current objective, which is to ensure that end users receive periodic reminders at no more than €20 intervals of the cost that they will continue to incur while subscribed to a PRS. Providing regular and standardised updates will ensure that end users be aware of their outgoings and allow them to make informed transactional decisions.

<p>Q. 2 Do you agree with ComReg’s proposal to amend the provisions of Section 5.20 of the Code? Please give reasons to support your view.</p>
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## 4.3 Price threshold for Subscription PRS

### 4.3.1 Background and Context

- 47 ComReg first proposed introducing a “double opt-in” process in its initial consultation<sup>14</sup> on a new Code in December 2010. In Section 2.9 of that document ComReg clearly set out that subscription PRS were, at that time, the main reason for end users contacting ComReg in relation to a PRS. ComReg’s consumer care statistics illustrated that 84% of the weekly average of 250 end users who contacted ComReg in relation to PRS raised issues about subscription PRS with as many as 40% of all end users of PRS, who contacted ComReg at that time, denying that they had, in fact, subscribed to a PRS.
- 48 ComReg further set out various means by which end users can subscribe to a PRS and acknowledged that in some instances, for example where end users subscribe to PRS by first entering their mobile phone number online and subsequently entering a PIN, which the PRS provider sends to their handset, ComReg was unable to definitively determine whether the end user had in fact subscribed.
- 49 To address this situation, ComReg proposed introducing a double opt-in process for all subscription PRS, which would require that after initially indicating their intention to subscribe to a PRS by responding to a promotion,
- a. end users would first receive an SMS setting out the cost of the PRS and the keyword that must be sent to the PRS provider in order to subscribe, and
  - b. end users would then be required to send an SMS with the PRS providers designated “keyword” from their handset in order to complete the subscription.
- 50 The purpose of these proposals was to provide a greater level of consumer protection than previously existed by,
- a. ensuring that end users were clearly made aware of the recurring cost of the PRS in the first SMS they receive from the PRs provider, and
  - b. to provide a verifiable audit trail that would allow ComReg to determine whether an end user had, in fact, responded to the initial SMS by sending an SMS of their own confirming their intention to subscribe.

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<sup>14</sup> ComReg document 10/92a  
[http://www.comreg.ie/fileupload/publications/ComReg\\_1092a.pdf](http://www.comreg.ie/fileupload/publications/ComReg_1092a.pdf)

These proposals would therefore ensure that end users were provided with a standard level of price clarity for subscription PRS and ComReg would have the means to verify whether or not an end user had subscribed to a PRS.

- 51 In their submissions to ComReg's proposals, some members of the PRS industry submitted *inter alia* that:
- a. The draft provisions were too onerous for end users and end user apathy could result in up to 97% of potential end users failing to proceed to subscribe if the proposals in the draft Code were implemented,
  - b. The industry would suffer a significant downturn as a result of the loss of new subscriptions, and
  - c. If ComReg were to introduce a double opt-in requirement, then it should only do so for subscription PRS above a certain price threshold in a similar manner to the £4.50 threshold that applies in the UK.
- 52 In July 2011 ComReg published its "Response to Consultation 10/92a and Further Consultation"<sup>15</sup> in which is set out its rationale for retaining the draft proposals requiring a double opt-in, which were supported by the National Consumer Agency ("NCA"), the Office of the Data Protection Commissioner ("ODPC") and some PRS providers.
- 53 Some PRS providers submitted that the proposed positive confirmation methodology was obsolete as it took no account of "*the user flows and information provided by the most common forms of sign up, namely the fixed and mobile web*", which use a PIN sign-up mechanism. Other PRS providers submitted that "*requiring end users to send an SMS to confirm their unambiguous consent to subscribe would damage the "user experience" as the end user would have to exit from a web session to send the SMS and subsequently open a new web session to continue engaging with the PRS.*"
- 54 ComReg carefully considered all submissions, including that from the ODPC, which highlighted a requirement under recently enacted Data Protection Regulations<sup>16</sup>, which, in respect of any proceedings relating to unsolicited communication, placed the onus of establishing that the subscriber or user **unambiguously** (emphasis added) consented to the receipt of the communication or call on the defendant (i.e. PRS provider).

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<sup>15</sup> ComReg document 11/51 <http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

<sup>16</sup> Regulation 13(14) of S.I. 336 of 2011 "*If, in proceedings for an offence under this Regulation, the question of whether or not a subscriber or user consented to receiving an unsolicited communication or call is in issue, the onus of establishing that the subscriber or user concerned unambiguously consented to the receipt of the communication or call lies on the defendant.*"

- 55 In April 2012 ComReg published its “Response to Consultation 11/51 and Decision<sup>17</sup>”, which accompanied the publication of the new Code. ComReg retained the requirement for end users of all subscription PRS to confirm their intention to subscribe by sending an MO<sup>18</sup> SMS in response to an SMS, containing the relevant pricing information from the PRS provider. ComReg provided the following rationale for not including a clause that would require the double opt-in requirements to apply only in respect of subscription PRS above a certain price threshold, as is currently required in the UK, for instance, where subscription PRS costing over £4.50 per week are required to have end-users confirm their intention to subscribe,
- a. Based on ComReg’s experience investigating consumer complaints, it is clear that end-users are, typically, unaware that they have subscribed to a PRS, irrespective of the cost. As such, ComReg considers that the issue at hand relates to an end-user’s awareness of the transaction that they are entering and this is best addressed through the requirement for a positive confirmation to be charged from end users.
  - b. There is a legal requirement, as explained in the submission from the ODPC for PRS providers to be able to demonstrate that a subscriber or end user concerned unambiguously consented to the receipt of a PRS. In this regard, there are existing shortcomings and limitations to how consumer consent is acquired and verified.
  - c. There is common use of “joining fees” in addition to a recurring charge for subscription PRS. The requirement for all subscription PRS to use double opt-in will clarify the regulatory requirements for end users and PRS providers and eliminate the need for alternative provisions such as requiring sign-up fees (i.e. immediate charges) to be included as part of the subscription fees in the initial subscription period.
  - d. If a price threshold applied to weekly subscription charges, this may incentivise a PRS provider to amend the cost structure of their PRS in an alternative way through one-off payments, which would nominally place their PRS below the threshold. The relatively high numbers of end users indicating difficulty in identifying a PRS mitigates the suitability of a price threshold for double opt at this time.

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<sup>17</sup> ComReg document 12/28 <http://www.comreg.ie/fileupload/publications/ComReg1228.pdf>

<sup>18</sup> “MO” means Mobile Originated; an SMS that is sent by the end user as opposed to an “MT” or Mobile Terminated SMS, which is received by the end user

- 56 Although it did not introduce a price threshold for subscription PRS at that time ComReg committed to keeping the matter under review and undertook to monitor developments in the market once the new Code was in place and to revisit the appropriateness of a price threshold above which positive confirmation is required.
- 57 ComReg has now set out below relevant factors and its preliminary position in respect of whether it should remove or modify the double opt-in provisions for subscription PRS below a certain monetary threshold. In arriving at its preliminary position, ComReg has considered the various methods through which end users can subscribe to PRS.

#### **4.3.2 Purpose of the Double Opt-in requirements**

- 58 The double opt-in process, which came into full effect on 25 July 2012, was introduced by ComReg in order to,
- a. Provide end users with standardised pricing information in a durable medium (i.e. SMS) in order that they can make informed transactional decisions in respect of subscription PRS, which, because of their open-ended nature, are contracts of indeterminate duration and cost.
  - b. Allow ComReg to verify, by obtaining corroborating information from any/all PRS providers involved in supplying the PRS, for example a mobile network operator, whether an end user had, in fact, subscribed to a PRS.
- 59 The introduction of the double opt-in provisions greatly enhanced consumer awareness of the costs that accompany PRS subscriptions and further assists ComReg, in the event of a dispute, to assess the veracity of the information and assertions by both the PRS provider and the end user. ComReg would not lightly dispense of these benefits irrespective of a price point, as it considers the provisions are essential in achieving its statutory objective<sup>19</sup> “*to protect the interests of end users of PRS*”.

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<sup>19</sup> In accordance with Section 12 of the Communications Act, 2002 to 2010

- 60 It is ComReg's preliminary view that the introduction of any threshold value and subsequent removal or modification of the existing double opt-in requirements below this threshold value should not have the effect of reducing the price clarity provided to consumers and the means of verifying a subscription available to ComReg, end users and PRS providers, irrespective of the price. As such, when appraising whether to modify, or remove the current double opt-in provisions set out in Sections 5.13 to 5.18, inclusive, of the Code through the introduction of a threshold level, ComReg will consider any benefits that would arise from such new arrangements while still ensuring price transparency for end users and "auditability"/verifiability of transactions for ComReg and PRS providers.
- 61 It is in this context that ComReg has set out below the various means by which end users may subscribe to a PRS and assesses whether it may be appropriate or acceptable to introduce a threshold value, below which the "Double Opt-in" requirements set out in Section 5.13 to 5.18 of the Code would not apply or might apply in a modified manner, in each case.
- 62 The full provisions setting out the double opt-in requirements are included in Sections 5.13 to 5.18, inclusive, and are set out in Figure 1 below. The question that arises is whether there is an appropriate price point at which the requirement for the end user to confirm their intention to subscribe to a subscription PRS by sending an SMS from their handset in response to a Subscription Request Message, the content of which is prescribed in Sections 5.14 and 5.15, can be removed or modified.





**Figure 1 – Double Op-in Requirements (Section 5.13 to 5.18, inclusive)**

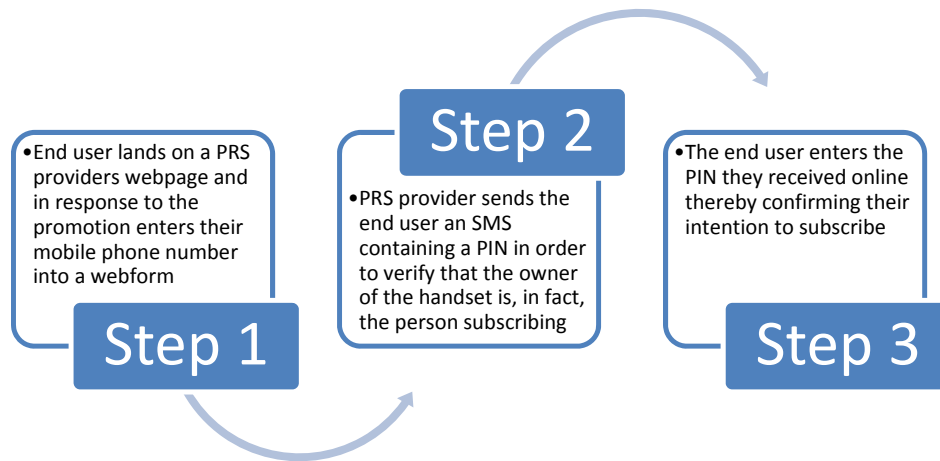
63 Subscription PRS as defined in the Code are those for which a recurring charge is imposed on an end-user who has subscribed to, and thereby agreed to receive and pay for, such a service and to which the provisions set out in Figure 1 above apply.

### 4.3.3 Various Means of Subscribing

64 PRS can be advertised across many media platforms including TV, radio, print, online, and direct marketing messages sent (“pushed”) to end users handsets. ComReg has expanded below on some particular features of each promotional medium and whether it would be appropriate to introduce a threshold value below which the Double Opt-in requirements would apply or might apply in a modified manner in respect of subscription PRS that are accessed on any or all of these platforms.

#### Online Subscriptions (including subscriptions using PC/Tablet)

65 Prior to the introduction of the new Code, many end users subscribed to a PRS by entering their mobile phone number online. In order to prevent a person subscribing someone else to the PRS, the PRS provider responded by sending an SMS containing a PIN<sup>20</sup> to the end users mobile handset. The recipient of the PIN was then required to enter the PIN online to confirm their intention to subscribe. This practice is illustrated below,



**Figure 2 – Operation for Online Subscription PRS**

66 While this practice is a form of double opt-in, insofar as it is a two-stage process where the end users has to first enter their mobile phone number online and subsequently enter the PIN they receive by SMS from the PRS provider, it was shown to be deficient in several respects, as follows:

- a. It was evident to ComReg that the cost of the PRS was not always provided on the website where the end user first entered their mobile phone number and when the pricing information was provided it was not

<sup>20</sup> Personal Identification Number (“PIN”) typically a 4-digit number

always prominent. In this regard, end users were often unaware that, if they proceeded, they would incur costs at all or on an on-going basis.

- b. No pricing information was provided by the PRS provider in the PIN message, which would have amended and alleviated any shortcomings that existed in the web promotions.
  - c. Because all actions by the end user took place online (i.e. they entered both their mobile phone number and PIN into online webforms), there was no means for ComReg to corroborate the often conflicting positions of the PRS provider, which contended that the end user had completed both stages of the subscription and end users who frequently denied that they had subscribed to the PRS.
- 67 This situation was clearly unsatisfactory and ComReg therefore introduced the new provisions, illustrated in Figure 1 above, which ensure that,
- a. the end user receives clear pricing information in the Subscription Request Message, thereby ensuring that the can make an informed transactional decision, and
  - b. by having to send an SMS to confirm their intention to subscribe, end users provide a verifiable audit trail with their mobile network operator, which ComReg and PRS Providers can use to resolve any disputes that may arise between the end user and the PRS provider if the end user were to deny subscribing to a PRS.
- 68 If ComReg were to remove the requirement for end users to send a confirmatory SMS from their handset in respect of subscription PRS promoted online and below a set monetary value, this would result in ComReg, once again, being unable to definitively determine whether an end user had, in fact, provide their consent to subscribe.
- 69 ComReg acknowledges that technological developments now allow third party companies, not involved in the provision of the PRS, to retain and provide evidence that an end user entered the PIN and these matters are discussed in greater detail below. Notwithstanding this, because subscription PRS are almost exclusively contracts of indeterminate length and therefore of indeterminate cost, ComReg's preliminary position is that there is no benefit to end users of subscription PRS to removing the double opt-in provisions, irrespective of the cost, for subscription PRS promoted online.

- 70 Therefore, it is ComReg’s preliminary view that the reasons for introducing the double opt-in requirements set out in the Code remain valid for all subscription PRS that are promoted online and any dilution of the benefits that accrue to end user through enhanced price clarity or the reduction in ComReg’s ability to investigate such matters even for lower value PRS would be a retrograde move.

### Mobile Browsing

- 71 The development and proliferation of smartphones has resulted in mobile browsing being largely similar, in most respects, to online browsing using a PC or laptop. However, there are some aspects that are unique to mobile browsing, which influence ComReg’s decision whether to introduce a threshold value below which the provisions of Sections 5.13 to 5.18 would not apply or might apply in a modified manner to subscriptions commenced through this medium, including
- a. MSISDN forwarding, and
  - b. Developments in digital marketing practices.
- 72 “*MSISDN forwarding*” is the practice whereby a consumer’s contracted Mobile Network Operator (MNO) passes the end user’s MSISDN i.e. mobile telephone number to a PRS provider in order to facilitate the end user to purchase a PRS. The stated purpose of MSISDN forwarding is “*to improve the customer experience within WAP or mobile sites*” by allowing end-users to purchase a PRS by “clicking” on a link or button within a WAP/mobile site.
- 73 ComReg recognises that MSISDN forwarding can simplify how end users purchase and/or subscribe to a PRS, without having to stop to enter their mobile phone number or exit their browsing session in order to retrieve a PIN that was received by SMS. Nonetheless ComReg has some concerns in respect of this practice, as follows:
- a. MNOs do not provide MSISDN facilities for all PRS providers and so end users will sometimes be required to enter their mobile phone number in order to purchase PRS, though not in respect of PRS operated by PRS providers, to whom MSISDN forwarding is not available. Accordingly, end users purchasing experience is inconsistent in respect of PRS provided by different providers.
  - b. PRS providers which do avail of MSISDN forwarding facilities do not appear to have consistent and uniform “check out” pages i.e. end users are presented with differing promotions and means of providing their consent to purchase even when purchasing PRS from the same PRS providers. In this regard, even if an end user was aware that they were

purchasing a PRS in one instance, it is quite conceivable that they may be unaware in another, even when purchasing another PRS from the same PRS provider.

- c. In accordance with Data Protection legislation, there is a requirement for PRS providers, to who MSISDN forwarding facilities have been extended by the MNOs, to notify end users, prior to any purchasing transaction, that their personal data i.e. their mobile phone number will be requested from their MNO in order to complete the purchase. It would appear, however, that although such notifications are provided, some end users who raise PRS-related issues with ComReg still question how a PRS provider obtained their mobile phone number. ComReg is currently examining certain aspects of MSISDN forwarding and may, subject to further consultation, propose further amendments to the provisions of the Code.

74 Although MSISDN passing is currently made available to some PRS providers for single (one-off) purchases, it could also be used to allow end users to subscribe to a PRS with a single click of a button, were ComReg to introduce a threshold value below which the double opt-in requirements would not apply. However, because MSISDN forwarding is not universally available to all PRS providers, the result of introducing a threshold value below which the double opt-in requirements would not apply, would be a wholly inconsistent purchasing experience for end users whereby end users would, depending on the PRS provider:

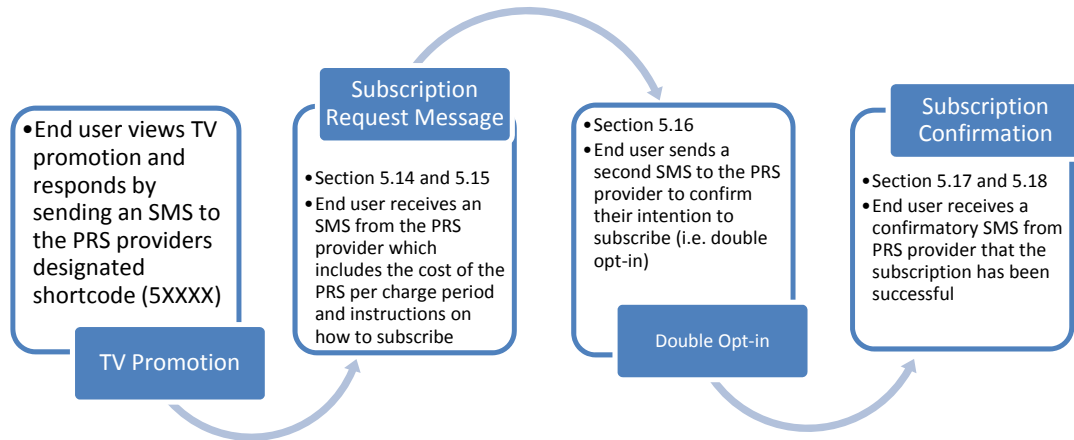
- a. Not have to supply their mobile phone number in respect of a subscription PRS that were supplied by a PRS provider which did have MSISDN forwarding facility,
- b. Have to provide their mobile phone number in respect of a subscription PRS that were provided by a PRS provider which did not have MSISDN forwarding facility, and
- c. Have to provide their mobile phone number in respect of a subscription PRS the cost of which exceeded the threshold value, irrespective of whether the PRS provided did or did not have MSISDN forwarding facility.

These potential inconsistencies, coupled with the other reasons outlined in this consultation document, suggest that the introduction of a threshold value below which the double opt-in requirements would not apply could be problematic from an end user perspective.

- 75 The result of MSISDN forwarding is that end users are currently provided with differing mechanisms for purchasing single-charge PRS, which may lead to some confusion the effect of which may be that some end users are unable to identify PRS and the associated charges. This is supported by the high number of PRS-related issues raised with ComReg's consumer care team, which clearly illustrate that the vast majority of end users are not aware that they have engaged with a PRS. This situation would then be compounded were ComReg to introduce a threshold value below which the double opt-in provisions would not apply as end users may inadvertently agree to pay recurring charges of indeterminate value, without having provided their mobile phone number.
- 76 In this context, it is ComReg's preliminary position that it would not be in end users interests and, therefore, contrary to ComReg's statutory objective for it to introduce a threshold value under which the double opt-in requirements would not apply to subscriptions PRS commenced through mobile browsing.
- 77 Digital marketing practices have developed considerably in the recent past and end users, who use their mobile handset for internet browsing, are likely to encounter pop-up advertisements and/or "in-app" advertising i.e. adverts that appear when the end user is using an application ("app") or perhaps a game that they downloaded. PRS providers, or an outsourced marketing agent (referred to as an "Affiliate marketer") pay to have their advertisements appear or "pop-up" either within apps or on certain websites, where end users will encounter them when browsing on their mobile handset. It is, however, not always clear that the initial pop-up or banner advertisement (or some other digital marketing practices discussed in more detail below) is associated with a PRS and may result in the end users being conditioned into believing, for example, that they may be in line to win a prize and, therefore, unaware that they are inadvertently engaging with a PRS.
- 78 In such circumstances, it is ComReg's preliminary view that it should retain the existing double opt-in provisions of the Code for all subscription PRS regardless of cost, which provide an adequate level of consumer protection, in respect of subscription PRS that are commenced through mobile handsets.
- 79 The double opt-in requirements afford the end user the opportunity to make an informed transactional decision and to explicitly acknowledge to the PRS provider that by subscribing to the PRS and, in ComReg's preliminary position, these principles should apply at any price point.

### **Television/Radio**

- 80 In accordance with the current provisions of the Code, the steps to be taken in order for an end user to subscribe to a PRS promoted on TV or radio are as follows,



**Figure 3 – Operation of Subscription PRS promoted on TV**

- 81 ComReg has considered whether the second and third stages in Figure 3 above (i.e. the sending of a SMS by the PRS provider to the end user and the end user responding, in turn, by sending a confirmatory SMS from their own handset to clearly indicate their intention to subscribe), could be removed or modified in respect of PRS below a particular threshold value that are promoted on TV and/or radio.
- 82 When the double opt-in provisions were first proposed by ComReg, some PRS providers submitted that if the pricing information in the initial TV/radio promotion is sufficiently clear then the second and third stages are unnecessary and intrusive and would lead to a significant number of end users not completing the process because it is “too cumbersome” and/or due to “consumer apathy”. In arriving at its decision in respect of the double opt-in provisions, ComReg considered the results of qualitative research<sup>21</sup>, and the volume and nature of consumer complaints that it was receiving at that time.
- 83 ComReg’s qualitative research revealed specifically that some TV promotions for subscription PRS were unbalanced in terms of the presentation of the competition or service related information, compared to the T&Cs (i.e. price) related information. The research concluded that “*This one-sided communication style served to amplify respondents’ cynicism and prove that many of their negative issues with PRS was vindicated*”.

<sup>21</sup> ComReg document 11/51b <http://www.comreg.ie/fileupload/publications/ComReg1151b.pdf>

- 84 ComReg also noted that the statistics from ComReg's consumer care centre, at that time, consistently demonstrated that subscription PRS continued to raise a disproportionate number of consumer issues, relative to both the PRS sector and the wider telecoms sector. Accordingly, ComReg concluded that the double opt-in requirements were both necessary and appropriate for the Irish PRS market and should apply to TV promotions, which accounted for a significant number of consumer contacts.
- 85 From ComReg's previous qualitative research, prior to the introduction of the double opt-in requirements in the Code, end users, who reviewed some TV ads that had aired in or around that time, reported the following:
- a. The pace of the ad in terms of the information provided about the offer was seen to be quite high tempo,
  - b. The promotion did not appear to be for a subscription PRS,
  - c. The terms and conditions, including the price, were introduced at the same times as the information about how to win the prize. This meant that respondents could not effectively digest all of the information presented on the screen.
  - d. The repetition of the word "win" was seen as a ploy to circumvent an end users consideration of the T&C's
- 86 Clearly it cannot be assumed that all TV advertisements for subscription PRS were, or would be, presented in such a manner, however, it is nonetheless clear that there are limits to the amount of information that a person can assimilate while viewing a short 30 second TV advertisement and then subsequently enter into a contract for.
- 87 There are, however, some PRS providers that continue to use TV advertising in respect of their subscription PRS and ComReg considers that the double opt-in provisions in the Code continue to remain relevant regardless of the price. The provisions of Section 5.14 and 5.15 serve to ensure that end users, who may respond to a TV advert for a subscription PRS, will be afforded the opportunity to reflect on the recurring cost and, therefore not be adversely affected by TV adverts, which may contain an imbalance, real or perceived, in terms of the presentation of the competition or service-related information compared to the price-related information. The double opt-in provisions afford end users the opportunity to appraise the recurring cost of the PRS via the SMS they are required to receive prior to completing their subscription by providing their informed and explicit consent to pay.



- 88 A subscription PRS is a contract of indeterminate duration, regardless of its recurring cost, and in ComReg's preliminary position to change the process to permit such contracts to commence through a single response to a transitory TV advertisement would not be in end users interests, irrespective of price and therefore not in accordance with ComReg's statutory objectives.
- 89 It is, therefore ComReg's preliminary view that the double opt-in requirements should remain unchanged in respect of subscription PRS that are promoted on TV and/or radio.

### **Print (including billboards / posters)**

- 90 Subscription PRS may also be promoted in print, which can include newspapers, magazines, posters or billboards. However, in ComReg's experience, very few PRS are promoted through this medium. The benefit to end users whom may engage with a subscription PRS that is promoted in print is that they have the opportunity to take time to examine the terms and conditions, including the cost, before deciding to subscribe. In this regard, PRS promoted in print may be the most appropriate medium to consider easing the double opt-in requirements pertaining to subscription PRS.
- 91 However, in assessing the possibility of introducing a threshold value below which the current double opt-in requirements would not apply, it is also necessary to consider the following,
- a. Because a PRS is promotion is in print it does not necessarily follow that end users will be provided with all relevant information required for them to make an informed transactional decision. Although print is a relatively durable medium that cannot be quickly amended, it is not implausible that essential pricing information could be unintentionally torn/removed from a print promotion and, absent the protection afforded to end users by the double opt-in requirements, end users may inadvertently subscribe to a PRS without being fully aware of the associated costs.
  - b. Although the rationale in sub-paragraph "a" above may appear a particularly cautious approach, the main concern for ComReg when considering whether it would be possible to introduce a threshold value solely for subscription PRS promoted through a particular media, in the print media for example, is that it may establish a dual process. This could lead to end user confusion if, for example, ComReg were to decide that subscription PRS that are only promoted in print media and cost below a certain price threshold may operate without adhering to the double opt-in requirements set out in Sections 5.13 to 5.18 of the Code. Any such decision would primarily be based on the fact that end users would have the opportunity to make themselves fully aware of the costs of the PRS

before deciding to subscribe. However, other PRS, for example those promoted on TV or online, either

- (i). do not afford the end users a similar opportunity to re-check the cost as is the case with TV promotions, which have a short airing time, or
- (ii). perhaps also include a potential to mislead through association with purportedly free offers, such as those that ostensibly offer the “*Chance to win an iPad*” which is an extensively used tactic by some online digital marketers.

92 Accordingly, it is ComReg’s preliminary view that it should not change the current double opt-in requirements in respect of subscription PRS that are promoted in print media, regardless of the recurring cost.

93 In considering the various media platforms that PRS providers use to promote subscription PRS, ComReg does not consider that it is in end users interest to have varied regulatory requirements for subscription PRS and a consistent, uniform approach offers a degree of certainty that will benefit both end users and PRS providers. In addition, if ComReg were to introduce a threshold value for some promotional media it could also arise that ComReg would be unable to determine whether a breach of the Code had occurred as the PRS provider may publish the same promotion on different media platforms for which different provisions would apply.

#### **4.3.4 Additional Considerations**

##### **Recent Industry Practices**

94 Having regard for the various means of subscribing to a PRS set out above and before arriving at its preliminary position as to whether it would be appropriate to introduce a threshold value below which the provisions of Sections 5.13 to 5.18 would not apply or would apply in a modified manner, it is necessary to consider relevant industry developments, which have impacted or clearly have the potential to impact end users decisions to engage with PRS. Some such developments are the increased use of “affiliate marketing” and a corresponding, if not always related, increase in misleading digital practices.

## Use of Affiliate Marketing

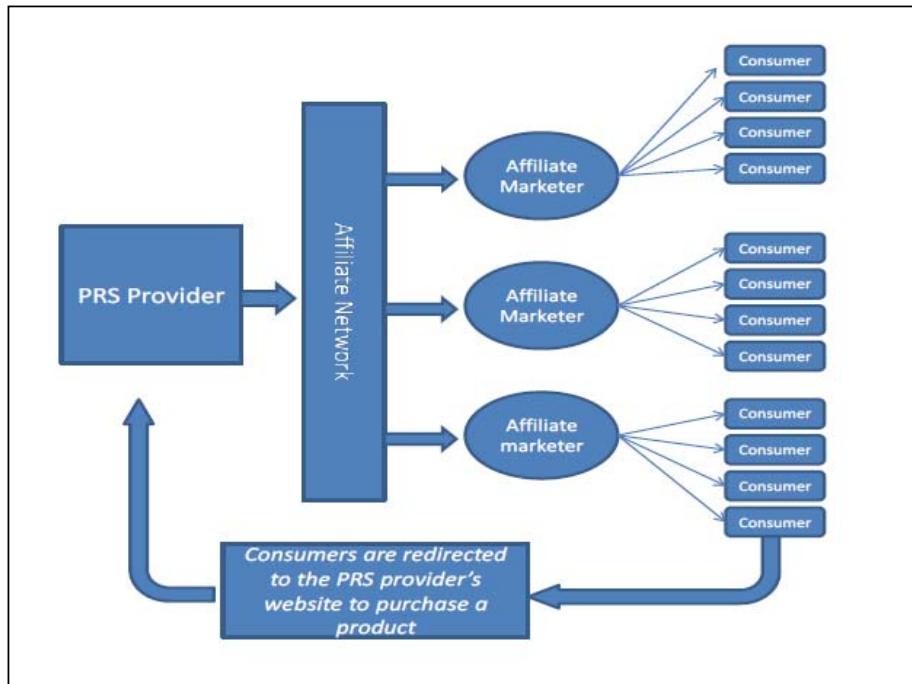
- 95 It has become commonplace for traders, including PRS providers, to “outsource” their online/digital marketing to individuals or businesses generally known as “*affiliate marketers*”, “*affiliate networks*” or “*lead generators*”. In explaining the role of affiliates below, ComReg has drawn considerable information published in a recent consultation<sup>22</sup> by PhonepayPlus, the UK regulator of PRS, in relation to digital marketing practices but all of the marketing practices set out below are also in operation in the Irish PRS market.
- 96 The purpose of this subsection is to outline the role that affiliate marketers play and how the current double opt-in provisions mitigate against the potentially misleading practices that some affiliate marketers may engage in.
- 97 Some relevant information pertaining to affiliates is as follows:
- a. Affiliates can offer specific expertise and tools to help businesses reach consumers and tend to be, though not necessarily, paid on a performance basis – i.e. they are paid for every consumer who purchases a PRS after the affiliate has directed them to the merchant’s website. As such, the PRS provider only pays an affiliate marketer or network if a new client registers with their service (and thereby consents to a charge).
  - b. The advantage for PRS providers in using affiliates can be two-fold. Firstly, they can gain access to marketing tools and techniques that they may not have in house. Secondly, because affiliates are paid on a performance basis, the merchant only pays for results and does not risk incurring marketing costs that are unrelated to commercial performance
  - c. However, there are also potential financial and reputational risks for PRS providers who sign up with affiliates. Considering the way in which they are paid, affiliates have strong incentives to drive consumers to purchase the relevant PRS service. This can be a good thing if it is done legitimately, but it can also incentivise less scrupulous affiliates to mislead consumers in order to increase their revenue. This can be particularly the case where affiliates are small and have no particular interest in maintaining relationships or a brand reputation.
  - d. In the UK affiliates have been behind many of the misleading digital marketing practices seen in the PRS market over the past year. The risk for PRS providers contracting with such affiliates is two-fold. Firstly, their

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<sup>22</sup> [http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~/\\_media/Files/PhonepayPlus/Consultation%20PDFs/Consultation\\_Digital\\_marketing\\_practices\\_May\\_2013.pdf](http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~/_media/Files/PhonepayPlus/Consultation%20PDFs/Consultation_Digital_marketing_practices_May_2013.pdf)

brand can be damaged by being associated with such misleading practices. Secondly, an PhonepayPlus Independent Tribunal in the UK has decided that PRS providers remain responsible for the promotion of their services, even where it is carried out by a third party. Therefore if an affiliate promotion has breached the Code, then the relevant provider will be deemed responsible.

- e. In Ireland not all PRS providers contract directly with affiliate marketers who drive end users to the PRS provider’s website as illustrated in Figure 3. Nonetheless, in a recent finding of non-compliance against a PRS provider, ComReg came to an equivalent conclusion to PhonepayPlus’ Tribunal that the PRS providers remain responsible for the promotion of their PRS.



**Figure 3 – Typical Affiliate Marketing Network (diagram from PhonepayPlus consultation)**

**Misleading Digital Marketing Practices**

98 The double opt-in provisions set out in the Code can benefit a PRS provider by allowing it to prove that an end user provided unambiguous consent to subscribe and, if an end user were to lodge a complaint and deny they had subscribed, it allows the PRS provider to robustly defend its position. This may become an important consideration with the development of some marketing practices, which have the potential to mislead end users into subscribing to a PRS, when they otherwise would not have.

- 99 Recent experience in the UK indicates that digital marketing now represents around 40% of all complaints received by PhonepayPlus and in 2012 alone PhonepayPlus' tribunals adjudicated on ten cases directly related to digital marketing and imposed fines totalling GBP £1.38 million against PRS providers deemed to have breached the Code. It is noteworthy that of the ten cases, subscription -based quiz services were especially prominent. This is of particular concern given that subscription based services can result in high cumulative spends and therefore have significant potential for consumer harm.
- 100 In July 2012, ComReg similarly made a finding of non-compliance<sup>23</sup> against a PRS provider, where it found that some end users were misled into engaging with a subscription PRS, which was charged at €12 per week with an additional €8 join up fee. ComReg found that the PRS provider, or an affiliate marketer acting on its behalf had engaged in a misleading digital marketing practice called "typosquatting" in order to direct end users to the PRS providers website. Details of "typosquatting" and other misleading, or potentially misleading digital marketing practices are explained in further detail below. It should be noted that some of these practices, particularly the use of "typosquatting", banner ads, pop ups and pop unders, have been and are used by PRS providers and/or their affiliate marketers in the Irish market.
- 101 "Typosquatting", sometimes known as "URL hacking" or "cybersquatting", is a practice which involves registering internet domains that are intentionally misleading to consumers. Misspelt domain names, such as "Dacebook" instead of Facebook, "Twtter" instead of Twitter and "Wikapedia" instead of Wikipedia, are registered in order to redirect consumers away from their intended destination, leading them to web pages that imitate or resemble that destination. In PRS terms, such web pages invite consumers to purchase PRS products that the consumer may believe is associated with another, more trustworthy, brand. The misleading association is often compounded by a lack of pricing transparency resulting in the end user being unaware that they have engaged with a PRS and, consequently incurred (on-going) costs.

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<sup>23</sup> Details of this finding of non-compliance is published on [www.phonesmart.ie](http://www.phonesmart.ie) under the Code of Practice tab [http://www.phonesmart.ie/Code\\_of\\_Practice/133#.UhQYGNjpyvN](http://www.phonesmart.ie/Code_of_Practice/133#.UhQYGNjpyvN)

- 102 “*Clickjacking*”, which is often referred to as “User Interface (“UI”) readdress attack” is designed to hijack mouse clicks from one webpage, redirecting users to a different webpage, possibly hosted on a different domain. Essentially, the user is unknowingly redirected away from their intended destination. Users will often be unaware of the exploit as the link to the webpage they arrive at may be disguised as something else. This is achieved by layering one or more transparent layer (“iframes”) on top of the website the end user thinks he or she is viewing. As a result, rather than being directed to the intended website, a consumer is actually clicking on another link and thus directed elsewhere. In PRS terms, the consumer will be unknowingly redirected to a website offering a PRS. Even where the consumer is then directed to a Code-compliant website, the affiliate marketer may again use i-frames to obscure price or other information in order to increase the chances the consumer will purchase/subscribe.
- 103 “*Likejacking*” is a practice that has emerged with the growth in popularity of social media platforms, such as Facebook. Such platforms have opened new opportunities for the legitimate digital marketing of all manner of products, including PRS. While marketing on social media is perfectly legitimate when Code compliant, Likejacking is a form of Clickjacking aimed at tricking users into ‘liking’ something they did not intend to. In PRS terms, the consumer might click on an offer that one of their contacts has ‘liked’. The end user is then taken to a seemingly blank page with a large message stating “*click here to continue*” but In reality, clicking on the link can do two things:
- a. direct the user to the PRS promotion that will enable him or her to engage in the promotion that their contact supposedly ‘liked’, and
  - b. cause the end user to unknowingly ‘like’ the original link, therefore posting the link on their wall/page too, propagating the promotion. In this way the PRS provider will benefit from the credibility garnered from the apparent recommendation and leverage an unknowing end user’s network of contacts to promote its PRS.

- 104 *Banner ads, pop-ups and pop-unders* are forms of online advertising intended to attract traffic to a website. Banner ads are embedded on an existing webpage, whereas pop-ups and pop-unders generally open a new web page either on top of the viewer's active window or, in the case of pop-unders, below it. In all three scenarios, when the end user "likes" something on the banner ad, pop-up or pop-under they are knowingly led to a website, where they will potentially purchase a PRS. In such terms, the vast majority of banner ads, pop-ups and pop-unders are compliant with the Code. However, PhonepayPlus have noticed that consumers are being enticed to click on a banner ad, pop-up or pop-under under false pretences with some advertisers stating that consumers have "*won an iPad*" or similar on a pop-up in order to encourage them to pursue a link, when in reality they have not yet won anything. However, this practice can entice and condition end users to provide their mobile phone number which is required to charge them for a PRS that they inadvertently engaged with. This practice is considered to be intentionally misleading.
- 105 Finally, end users may be enticed and misled into purchasing a PRS in order to access unrelated content, access to which is locked until the end user has gone through a number of steps where charges might be incurred. This practice is referred to as "*content locking*". In PRS terms the consumer experience is as follows:
- a. An end user sees a link to download, for example, the latest blockbuster film for free on a search engine results page.
  - b. The consumer clicks on the link and is directed to a website, where the offer is described in more detail. The consumer is then invited to click again to begin the download process.
  - c. Having attempted to download the film, the consumer is then presented with a dialogue box asking them to complete an online survey in order to access the content they originally intended to download - the content has effectively been locked.
  - d. The survey asks the consumer to enter his or her mobile phone number and to agree to enter the survey at a certain cost per entry (although this is not always clear and transparent). More often than not, this survey is linked to a competition to win the latest iPad, iPhone or iPod.
  - e. The end user then receives a pin code by SMS to their mobile phone, which they then re-enter and the PRS service begins.
  - f. The end user is then charged for the unrelated PRS service, often a subscription based quiz service, in order to complete the download of the original film. In the case of a subscription-based PRS the costs incurred

can be substantial. In most cases, the original content (the film in this example) is then unlocked, however, this is not always the case.

- 106 It is clear that the existence of such practices are misleading or have the potential to mislead end users into engaging with a PRS that they did not intend to. The current provisions of the Code pertaining to subscription PRS, which require that before subscribing end users must receive a Subscription Request Message, which includes the cost of the PRS and how to proceed to subscribe mitigates against the effects of misleading digital marketing in respect of subscription PRS.
- 107 The emergence of affiliate marketers, who are primarily incentivised by the number of PRS purchases that they can generate, means that they may not be particularly concerned about the welfare of end users who encounter their promotions. As such, there is an ever-present temptation for affiliate marketers to drive PRS sales, which may result in some engaging in some misleading practices to the detriment of end users interests. This is not fair to both compliant PRS providers and end users.

**Consumer Care Statistics**

- 108 It is noteworthy that the number of PRS-related issues raised by consumers with ComReg has not significantly decreased since the introduction of the double opt-in requirements in July 2012. ComReg publishes its consumer care statistics on a quarterly basis on its consumer website [www.askcomreg.ie](http://www.askcomreg.ie). The statistics<sup>24</sup> for each quarter since the introduction of the double opt-in requirements clearly indicate that price transparency remains a key issue for end users, with the overwhelming majority of end users either denying or having no recollection that they had engaged with a PRS. These statistics are summarised below,

Time Period	Total Number of PRS-related issues raised	Number of Consumers denying/not recollecting engaging with a PRS	Denial of engagement as a % of total PRS contacts
Q3 2012	2,851	2,243	79%
Q4 2012	2,750	2,342	85%
Q1 2013	3,154	2,917	92%
Q2 2013	3,029	2,854	94%

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<sup>24</sup> [http://www.askcomreg.ie/tell\\_us/consumer\\_statistics\\_q4\\_october\\_to\\_december\\_2012.403.LE.asp](http://www.askcomreg.ie/tell_us/consumer_statistics_q4_october_to_december_2012.403.LE.asp)



- 109 The consumer care statistics over the past year since the double opt-in provisions were introduced indicate that there has been no significant change in the total number of PRS-related issues raised with ComReg by end users. However, it should be noted that of those issues that warranted a formal investigation by ComReg, more than 50% are related to PRS that appear not to have a double opt-in mechanism in place, which would have provided the price transparency that some end users assert was missing in the course of their interaction with the PRS. ComReg is currently investigating these matters in accordance with its statutory objective to protect the interests of end users.
- 110 In the context of these statistics, where end users clearly have some difficulty identifying PRS, it is difficult to advocate why ComReg should contemplate relaxing the current double opt-in provisions even for lower value subscription PRS, which guarantee an adequate of price transparency in respect of subscription PRS.
- 111 What would also appear to be evident is that due to emerging new promotional practices further amendments to the Code may be required in order to provide greater levels of transparency and protection for consumers, who should be required to provide their informed consent before being charged for a PRS, not only in respect of subscription PRS but also single purchase “once-off” PRS. ComReg is currently collecting further details of the issues raised by consumers in respect of these new practices. In addition, ComReg is evaluating information derived from its own compliance actions against non-compliant PRS providers and engaging with PRS regulatory authorities in other jurisdictions. Resulting from a review of relevant information gathered ComReg may consider publishing a further consultation proposing appropriate amendments to the Code.
- 112 To ensure it is compliant with its statutory objectives, ComReg is required to consider all of these industry practices when assessing whether it would be possible to introduce a threshold under which the double opt-in provisions would not apply.

### **Section 3.3 of the Code – Meeting the Code by Alternative Means**

- 113 Section 3.3. of the Code provides

*“Where, in respect of a particular PRS, a PRS Provider satisfies ComReg that any requirement of the Code can be adequately met by alternative means to that specified in the Code, ComReg may, in its sole discretion, permit such alternative means to be used by the PRS Provider concerned in respect of that particular PRS. Such alternative means may not, however, be used by the PRS Provider concerned unless and until such time as ComReg has given its prior written permission for it to do so. Subject to issues of confidentiality, ComReg will publish details of such alternative means permitted by it. Such permission may be withdrawn, or varied by notice if ComReg determines that the alternative means have proved inadequate or are causing unanticipated difficulties of a serious nature.”*

This provision allows PRS providers to propose to ComReg alternative means of meeting the requirement of the Code and ComReg may, having considered the submissions received, grant permission once it considers that the proposal does not reduce the protections that are currently afforded to end users under the Code.

- 114 In April 2013, ComReg highlighted to industry, by way of an Information Notice<sup>25</sup> that it would permit the use of a third-party PIN verification system in lieu of the double opt-in requirements set out in Sections 5.13 to 5.15, inclusive, once certain standards were met, including.
- a. the PIN message which is sent to users of the service by SMS contains pricing information in relation to the service,
  - b. The end user must enter their number manually on to a web form for the purpose of receiving a unique PIN to their phone,
  - c. A record is taken by the verification system provider of the end user opting-in, and this record is time-stamped in an appropriately secure web format (e.g. https) that cannot be tampered with or amended retrospectively.

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<sup>25</sup> Information Notice titled “The Use of Third Party PIN Verification Systems - Alternative Means of Complying with the Code of Practice”  
<http://www.comreg.ie/fileupload/publications/ComReg1336.pdf>

- 115 ComReg has recently approved a submission<sup>26</sup> from a PRS provider to use a PIN opt-in system for online subscriptions, similar to that which was prevalent before the introduction of the Code. A PIN system will be used instead of the requirement for the end users to send an SMS to confirm their intention to subscribe. The PIN opt-in process is similar to that illustrated in Figure 2 above, with some notable exceptions, a follows:
- a. An independent third party, not involved in the provision of the PRS, receives and retains the end users mobile phone number (personal data) and administers sending the PIN message to the end user in order for the end users to confirm their intention to subscribe. The PRS provider does not have sight of the end users phone number until such time as the subscription is completed,
  - b. The independent third party captures and stores a copy of the PRS providers landing page which, if necessary, can be made available to ComReg if an end users were to dispute that they had provided their informed consent to subscribe,
  - c. The PIN message contains the relevant pricing information that allows the end users to make an informed transactional decision in a similar manner to the standard Subscription Request Message,
  - d. ComReg is provided with real-time access to original records (i.e. raw opt-in data not a reproduction or transcription of the data into other formats) held by the third party PIN provider and not the PRS provider, in the event of a dispute arising between the end user and the PRS provider.

116 As such, there is currently a means available to PRS providers to provide subscription PRS without necessarily operating precisely as specified in Sections 5.13 to 5.18 of the Code once the level of consumer protection is considered by ComReg not to have been lowered.

### **Impact of Double Opt-In on the PRS Industry**

117 Although ComReg's primary focus is to protect interests of end users it should be noted that that the introduction of the double opt-in requirements would not appear to have had the catastrophically negative impact on the PRS industry that was predicted by some PRS providers when the provisions were first proposed. Although ComReg has not yet finalised its reports, early indications are that the overall size of the PRS market has not dramatically changed between 2012 and 2013, a year after the double opt-in requirements came into force.

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<sup>26</sup> Please see [www.phonesmart.ie](http://www.phonesmart.ie)

- 118 The preliminary statistics indicate that any decline in the overall size of the PRS market has equally affected mobile PRS and voice PRS. Any impact on voice PRS cannot be attributable to the double opt-in provisions, which only apply to mobile subscription PRS. As such, it is reasonable to assume that any decline in the PRS market may be attributable to the decline in the general economy and cannot be solely attributed to the introduction of the double opt-in requirements.

### **Considerations in respect of setting a threshold?**

- 119 As stated throughout this paper, ComReg's statutory objective is to protect the interests of end users of PRS. It is therefore reasonable for ComReg to infer that ensuring that end users can engage with and purchase PRS with confidence is consistent with its statutory objective. The double opt-in provisions are there to ensure that end users make conscious and informed decision to subscribe to a PRS, i.e. enter into a contract with a PRS provider, by explicitly acknowledging their obligation to pay. These requirements are in accordance with most, if not all, of the online purchasing practices which have a 2-stage or 3-stage checkout process.
- 120 The removal or modification of the current double opt-in requirements below a set monetary threshold would reduce the level of engagement required for end user to subscribe to those PRS that fell on or below the threshold and as such could also, potentially, lead to greater numbers of end users inadvertently subscribing. However, as set out earlier, the current numbers of end users raising PRS-related issues with ComReg and the nature of these issues would prompt ComReg to carefully consider removing or modifying the current provisions for subscription PRS below a certain monetary value, which offer an adequate level of protection.
- 121 Introducing a threshold value below which the double opt-in requirements would not apply or might apply in a modified manner is to suggest that the cost of the PRS is sufficiently insignificant so as not to warrant the protection that is afforded to end users by these provisions. In other words, the cost of the PRS does not warrant the end user taking the time or trouble to explicitly acknowledge their intention to contract and a single-step subscription acknowledgement would suffice. This approach, however, overlooks how some end users view the cost of PRS and assumes that there is a uniform approach and attitude to PRS costs from all end users.

- 122 Previous quantitative research<sup>27</sup> published by ComReg illustrated that nearly half (48%) of all end users who experienced difficulty with a PRS did not make a complaint, while just over half (51%) stated that they took the time to do so (1% of respondents stated that they did not know if they had complained). Of those who did not complain 48% stated that they did not know how to lodge a complaint and a further 26% stated that they couldn't be bothered. This is in stark contrast to the 51% of respondents, who lodged a complaint after experiencing a problem with a PRS. What this clearly shows is that end users react in greatly varying degrees if they feel that they have suffered harm or been wronged.
- 123 Although ComReg's research does not include details of what costs were incurred before end users were prompted to complain, or indeed what costs were incurred by those that decided not to complain, it is reasonable to assume that this amount would vary across the respondents depending on such factors as age, gender, social class, disposable income, etc. In this context, the selection of a price threshold below which the protections already afforded by the double opt-in requirements would not apply is largely an arbitrary exercise depending on several factors, such as:
- a. deciding on monetary value where the double opt-in provisions would not be required or considered as benefitting end users,
  - b. the end users disposition to pursue any perceived wrong and,
  - c. perhaps their capacity to absorb any financial loss that they may have incurred,
- 124 Additionally, if introduced, such a threshold value would, presumably, not remain fixed *ad infinitum* or else the real value of the PRS to which the double opt-in provisions would not apply would decrease over time. ComReg would therefore have to consider linking any such threshold to a variable such as the consumer price index (CPI), for example.
- 125 In this regard, a consistent approach to all subscription PRS, regardless of cost is also of benefit to PRS providers, which will not be required to amend processes and systems to comply with different regulatory requirements depending on the cost of the PRS.

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<sup>27</sup> [http://www.comreg.ie/\\_fileupload/publications/ComReg1151a.pdf](http://www.comreg.ie/_fileupload/publications/ComReg1151a.pdf)

126 In ComReg's preliminary position, such an exercise would be unnecessarily burdensome and disproportionate and any benefits that may accrue to PRS providers as a result of a simpler subscription process would not justify removing the current provisions of the Code, which offer end users a high degree of protection in respect of subscription PRS.

#### **4.3.5 Summary of Issues Relating to Threshold Value**

127 Subscription PRS, which are contracts of indeterminate duration<sup>28</sup>, and can, therefore, result in end users incurring significant costs even if there is a relatively low cost per charge period. Because of the uncertain nature of the costs, it is considered essential that end users provide their informed consent to subscribe and this condition is met by the current double opt-in requirements in the Code.

128 ComReg recognises that requiring end users who wish to subscribe to a PRS to exit a browsing session or an application in order to open an SMS and to then compose a further SMS to confirm their intention to subscribe may be considered cumbersome by some end users. The result would be a fall-off in subscription uptake for some PRS. However, as clearly expanded upon throughout the extensive consultation process which resulted in the introduction of the current double opt-in requirements, if an end user considers that the PRS is of benefit to them they will proceed with the subscription process.

129 In addition, in relation to online browsing with a mobile handset, ComReg does not consider it acceptable that end users, including children, should be subscribed to a PRS as a result of an inadvertent click. This scenario could transpire were ComReg to remove or relax the current double opt-in requirements and an end user were to inadvertently engage with a subscription PRS, which was operated by a PRS provider that has access to MSISDN forwarding facilities.

130 ComReg considers that regardless of the fact that some promotional platforms offer greater consumer protection than others because end users have a greater opportunity to examine the price, terms and conditions of the PRS, it is necessary for ComReg to adopt a uniform approach with respect to introducing a threshold value below which the double opt-in requirements would not apply or would apply in a modified manner. A varied or inconsistent regulatory approach, which introduced a threshold value for PRS promoted in print, for example, would potentially cause confusion among end users, PRS providers and ComReg.

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<sup>28</sup> ComReg has not encountered a subscription PRS of fixed duration or fixed monetary value

- 131 ComReg does not consider that it is in end users interests to have a different or varied transactional experiences/processes for subscribing depending on the cost of the PRS. A uniform approach to subscribing to PRS will provide a level of certainty that will benefit both end users by increasing ability to identify a PRS and, consequently their confidence to purchase PRS. In addition, consistent regulatory requirements for subscription PRS promoted over different media platforms, provides certainty for PRS providers and provides for a conformity of approach across all PRS, regardless of how they are promoted.
- 132 If ComReg were to introduce a threshold value for some subscription PRS depending on how they were promoted it could also arise that ComReg would be unable to determine whether a breach of the Code had occurred as the PRS provider may publish the same promotion on different media platforms for which different provisions would apply. As an example, it would be highly confusing if some lower cost PRS promoted through print media did not have to comply with the double opt-in requirements while other, more expensive PRS, promoted in the same manner, would have to adhere to the double opt-in requirements. To add to any confusion, the same lower cost PRS, which if promoted on TV, may be required to operate the double opt-in requirements because the end user does not have the opportunity to examine and reflect on the cost of the PRS. In this way, end users purchasing the same PRS may have a different purchasing experience depending on what promotional medium they were responding to.
- 133 ComReg has particular concerns about the number of subscription PRS-related issues that are still raised by end users of PRS. The ongoing high levels of consumer dissatisfaction with Subscription PRS suggest that the PRS industry in Ireland, as a whole, still requires double opt-in as a consumer protection so as to allow consumers to purchase PRS with confidence. This fact, coupled with the possibility that if a threshold value were to be introduced some PRS providers would undoubtedly position their PRS at the designated threshold level and the harm, which the double opt-in requirements are intended to prevent would continue. There is strong evidence<sup>29</sup> to suggest that this has happened in the UK, with several adjudications being made in relation to PRS that are priced on or below £4.50 per week, which is the UK threshold value below which the double opt-in requirements are not required.

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<sup>29</sup> In 2013 to date, PhonepayPlus' Independent Tribunal adjudicated that a total of 14 subscription PRS did not comply with the Code and of these 11 (or 79%) were priced at £4.50 per week, or lower.



- 134 The development of some digital marketing practices, coupled with the proliferation of affiliate marketers, who may be incentivised into adopting some of the misleading digital practices outlined above, also holds some concerns for ComReg. These are relatively new developments and it remains to be seen how much influence and control PRS providers exercise over their affiliate marketers. In such circumstances, it is justifiable for ComReg to adopt a cautious approach by at least not reducing or removing any of the current protections afforded to end users of PRS by the double opt-in requirements. ComReg may have to consider additional arrangements to the Code depending on industry practices in this regard.
- 135 There is flexibility available for PRS providers under Section 3.3 of the Code, which permits PRS providers to meet the provisions of the Code by alternative means. ComReg has already granted permission for a PRS provider to operate a third-part PIN verification system as an alternative to the double opt-in requirements in the Code. However, in granting permission to meet the provisions of the Code by alternative means ComReg has also ensured that the advantages of the double opt-in requirements, for end users and ComReg, are maintained, while facilitating developments in this area and helping PRS providers to enhance an end users PRS experience.
- 136 The introduction of the double opt-in requirements have not resulted in a catastrophic collapse of the PRS industry and it is arguable that greater consumer protections will enhance consumer confidence and will, in the long run, benefit the industry.
- 137 Having regard for the totality of the above, it is ComReg's preliminary position that it is neither appropriate nor necessary to introduce a threshold value below which the double opt-in requirements set out in sections 5.13 to 5.18 of the Code would not apply or might apply in a modified manner.

Q. 3 Do you agree with ComReg's preliminary position not to introduce a threshold value below which the Double Opt-in requirements, set out in Sections 5.13 to 5.18 of the Code would not apply? Please give reasons to support your view.

Q. 4 Do you agree with ComReg's preliminary position not to introduce a threshold value below which the Double Opt-in requirements, set out in Sections 5.13 to 5.18 of the Code might apply in a modified manner? Please give reasons to support your view.



## 5 Regulatory Impact Assessment (RIA)

- 138 A RIA is an analysis of the likely effect of a proposed new regulation or regulatory change. The RIA should help identify regulatory options, and 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.
- 139 ComReg's approach to RIA is set out in the Guidelines published in August 2007, ComReg Document No. 07/56 & 07/56a. In conducting this RIA, ComReg takes account of the RIA Guidelines<sup>30</sup>, adopted under the Government's Better Regulation programme.
- 140 Section 13 (1) of the Principal Act<sup>31</sup>, as amended, requires the ComReg to comply with certain Ministerial Policy Directions. Policy Direction 6 of February 2003 requires that 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 Government's Better Regulation programme. In conducting the RIA, ComReg also has regard to the fact that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements can be quite different to regulation that arises by the enactment of primary or secondary legislation.
- 141 In this Consultation, ComReg proposed:
- a. Minor amendments to Sections 4.8 and 5.20 of the Code. The proposed amendments do not change the original spirit or intent of the provisions but are merely aimed at providing greater clarity and transparency.
  - b. Maintaining the *status quo* by not introducing a threshold value below which the double opt-in requirements set out in Sections 5.13 to 5.18 of the Code would not apply or might apply in a modified manner.
- 142 Accordingly, as ComReg is proposing not to impose any regulatory obligations beyond what already substantially exists and for which a RIA was conducted and included as Appendix A to ComReg's document 12/28<sup>32</sup> titled "*Response to Consultation 11/51 and Decision - Code of Practice for PRS*", no detailed draft RIA is included with this consultation.

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<sup>30</sup> See: [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_2011/Revised\\_RIA\\_Guidelines\\_June\\_2009.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf)

<sup>31</sup> Communications Regulation Acts 2002 to 2011

<sup>32</sup> [http://www.comreg.ie/\\_fileupload/publications/ComReg1228.pdf](http://www.comreg.ie/_fileupload/publications/ComReg1228.pdf)

143 Nonetheless, it worth highlighting the following:

- a. ComReg is proposing to maintain the status quo and, as such, not proposing to impose any regulation beyond what is already in place. Accordingly, ComReg's proposals would have no impact on consumers or industry and although ComReg is under no obligation to consider any competition issues, it does not consider that any such issues arise as a result of its proposals.
- b. The introduction of a threshold value below which the double opt-in provisions would not apply or might apply in a modified manner would, in fact, represent a roll-back on existing regulation. As set out above in this paper, it is ComReg's preliminary position that any such roll-back would, potentially, have a greater detrimental effect on end users of PRS than any benefits that would accrue to end users and/or PRS providers and is, therefore, not justified at this time.

## 6 Next Steps

144 The responses will be taken into account in ComReg's Response to Consultation document, which will be published following analysis of all submissions made.

145 The consultation period will run from 6 September 2013 to 4 October 2013

146 Responses must be submitted in written form (post or email) to the following recipient, clearly marked "Submissions to ComReg 13/84":

Commission for Communications Regulation  
Irish Life Centre  
Abbey Street  
Freepost  
Dublin 1  
Ireland

Phone: +353-1-8049600

Email: [retailconsult@comreg.ie](mailto:retailconsult@comreg.ie)

147 All comments are welcome; however it will make the task of analysing responses easier if comments are referenced to the relevant question numbers from this document. In all cases please provide reasons in support of your views.

148 As all responses will be published, those submitted electronically must be unprotected, to facilitate online publication. In submitting any response, please also set out your reasoning and supporting information for any views expressed.

149 Finally, it may be necessary for respondents to provide confidential or commercially sensitive 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<sup>33</sup>.

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<sup>33</sup> See Document 05/24 at [http://www.comreg.ie/\\_fileupload/publications/ComReg0524.pdf](http://www.comreg.ie/_fileupload/publications/ComReg0524.pdf)

# 7 Questions

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## Annex: 1 Proposed Section 4.8

*“4.8 (a) PRS Providers must ensure that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge. ~~To this end, PRS providers are required to ensure that:~~*

*(b) Costs must be presented in Euro, inclusive of VAT unless no VAT applies, and include the Euro symbol (€) or, where that is not possible, use the word "EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"*

~~(a) charges and prices are inclusive of VAT, where appropriate,~~

~~(b) where applicable,~~*(c) Without prejudice to the generality of the requirement imposed by Section 4.8(a) above, PRS providers must, where appropriate, provide the following information is conveyed in a transparent, prominent and clear manner:*

*(i) any costs, additional to the cost of the service, relating to delivery or other charges,*

*(ii) any sign-up cost,*

*(iii) that **additional** network data charges may apply,*

*(iv) the price per message and the number of messages required to complete the transaction,*

*(v) the duration of any "free" or discounted period and the relevant charges that will apply thereafter, and*

*(vi) if it is a Subscription Service, the charge per period and that charge period,*

~~*(vii) (i) the numerical price per minute for time based/charged services, or (ii) the total cost to the end-user and, if applicable, include the minimum duration of the call necessary to participate, or (iii) whichever of (i) or (ii) is most relevant to the end-user making an informed decision to proceed with a transaction, and*~~

*(viii) in respect of voice services states the **price relates to costs** for calling from the Eircom network and that calls from other networks may be higher.*

## Annex: 2 Proposed Section 5.20

5.20 (a) For Subscription Services, ~~every time an end-user has spent a total of €20 on the Subscription Service a~~ *PRS providers must ensure that end users receive periodic Regulatory Update Messages, containing the information set out in Sections 5.21 and 5.22,*

*(b) Such Regulatory Update Messages must:*

*(i) be sent via a free standard SMS, and*

*(ii) be received by an end user each and every time an end-user spends a total of €20, or some lesser amount, on the Subscription Service; and*

*(c) be sent at a time that allows an end-user a reasonable period of time within which to unsubscribe before any further charges are incurred.*