



Commission for
Communications Regulation

Response to Consultation 11/51 and Decision

Code of Practice for Premium Rate Services

Response to Consultation 11/51 and Decision

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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1. INTRODUCTION

- 1.1 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 bill. At present PRS are mostly provided via premium rate telephone numbers (starting with the prefix 15XX) and short-codes (in the form 5XXXX) and usually offer information and entertainment services. Some examples of PRS include quiz television services, chat-line services, ringtones, sports alerts, weather alerts, television voting and competitions.
- 1.2 In May 2008, the Minister for Communications, Energy and Natural Resources announced the Government’s intention to place the regulation of PRS on a statutory footing and clearly articulated the concerns that precipitated this decision; “*There is right and real anger from the public in relation to premium rate text and phone services.*”¹ The Oireachtas subsequently passed the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010 (“*the Act*”²), which came into force on 12 July, 2010, thereby transferring regulatory responsibility for the sector from the previous Regulator of Premium Rate Telecommunications (“*RegTel*”) to the Commission for Communications Regulation (“*ComReg*”). The Act amended ComReg’s functions and objectives by requiring ComReg, in addition to its existing functions, 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*”.
- 1.3 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 (“*new Code*”) to be followed by providers of PRS with respect to the provision, content and promotion of PRS,. This *new Code* will replace the current Code (“*current Code*”) as published by RegTel in October 2008.
- 1.4 Accordingly, on 1 December 2010, ComReg consulted (ComReg Document 10/92a³) on the draft provisions for a new Code. Due to the broad range of matters under consideration and the responses received, ComReg considered it appropriate to publish a revised draft Code (“*revised draft Code*”) (ComReg Document 11/51d⁴), and issued a further consultation,

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<http://www.dcenr.gov.ie/Press+Releases/2008/Broadcasting+Bill+to+tackle+premium+rate+sca ms.htm>

² *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010* <http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0002.PDF>

³ http://www.comreg.ie/fileupload/publications/ComReg_1092a.pdf

⁴ <http://www.comreg.ie/fileupload/publications/ComReg1151d.pdf>

which was published on 22 July, 2011 (ComReg Document 11/51⁵). ComReg also published a draft Regulatory Impact Assessment (“*draft RIA*”) on the provisions of the *revised draft Code* as an appendix to Consultation 11/51 (ComReg Document 11/51c⁶).

- 1.5 ComReg has carefully considered the responses to Consultation 11/51 and has now made final decisions which are incorporated in the *new Code* which ComReg has published as part of this Response to Consultation. The rationale for these decisions is set out in this document and the *new Code* will replace the *current Code*, published by RegTel in 2008. ComReg has also revised the draft RIA based on responses received and the final RIA is attached as Appendix A to this document. PRS providers will require a period of time to make technical adjustments to bring their PRS into alignment with the *new Code* and for that reason the *new Code* will not come into effect until Tuesday 5 June 2012.
- 1.6 ComReg believes that the *new 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. ComReg is firmly of the opinion that increased end-user protection will lead to increased confidence in PRS and this will ultimately benefit the PRS industry as it innovates and brings new exciting services to the market. ComReg will keep the provisions of the *new Code* under review and may, as provided for in Section 15 of the Act, consult on existing provisions or any potential new provisions to ensure that it remains appropriate as the PRS market evolves.

Alex Chisholm
Chairperson
Commission for Communications Regulation

⁵ <http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

⁶ <http://www.comreg.ie/fileupload/publications/ComReg1151c.pdf>

2. EXECUTIVE SUMMARY

- 2.1 Section 15 of the Act requires ComReg to publish a new Code of Practice to be followed by providers of PRS with respect to the provision, content and promotion of PRS. The *new Code* will replace the *current Code of Practice*, which was published by RegTel in October 2008. Section 15 of the Act also requires that ComReg first consult with PRS providers, other interested parties and, as it considers relevant, other regulatory bodies in the State, in order to prepare and publish any *new Code*.
- 2.2 In accordance with Section 15 of the Act, on 1 December, 2010, ComReg issued a public consultation (ComReg Document 10/92a) on the draft provisions for a new Code. A *draft Code of Practice* (ComReg Document 10/92b) was also published in association with the initial consultation document.
- 2.3 Due to the broad range of matters under consideration, and the responses received to ComReg Consultation Document 10/92a, ComReg considered it appropriate to publish its preliminary conclusions, which were set out in a "*revised draft Code*⁷", and which were the subject of further consultation (ComReg Document 11/51) published on 22 July, 2011. ComReg also published a draft Regulatory Impact Assessment ("*draft RIA*") on the provisions of the *revised draft Code* as an appendix to Consultation 11/51.
- 2.4 ComReg has now considered the responses to Consultation 11/51 and made decisions, which are incorporated in the *new Code of Practice*. The rationale for these decisions is set out in this document and the *new Code* replaces the *current Code*, published by RegTel in 2008. ComReg has also revised the draft RIA based on responses received and the final RIA is attached as Appendix A to this document. ComReg recognises that PRS providers will require a period of time to make technical adjustments to bring their PRS into alignment with the *new Code* and for that reason the *new Code* will not come into effect until Tuesday 5 June 2012.
- 2.5 ComReg believes that the *new Code* provides greater protection for end-users in their dealings with PRS, through the provision of clear information to consumers, in particular transparency of tariffs and conditions, and, where there are recurring costs, the requirement for PRS providers to obtain positive confirmation from end-users of their consent to be charged on an on-going basis. The PRS industry makes up approximately 1.5% of the entire telecommunications industry in Ireland, yet as ComReg statistics show that PRS-related queries and complaints account for approximately 36% of all issues raised with ComReg and, as such, increased end-user protection is required. ComReg, therefore, believes that the provisions of the *new Code* will lead to increased end-user protection, which will increase confidence in

⁷ http://www.comreg.ie/_fileupload/publications/ComReg1151d.pdf

PRS and should ultimately benefit the PRS industry as it strives to innovate and bring new services to the market.

- 2.6 This document sets out the summary of the responses received to the second consultation on the *revised draft Code* (ComReg Document 11/51d) and provides a rationale for ComReg’s position, which is incorporated in the provisions of the *new Code*. This document also provides a summary of the responses received to the *draft RIA* and ComReg has revised, where appropriate, the RIA taking into account the responses received.
- 2.7 Finally, as set out in an Information Notice (ComReg Document 11/53⁸), ComReg has, out of an abundance of caution, notified the *new Code* to the European Commission pursuant to Article 8 of Directive 98/34/EC (as amended), and has observed a three month standstill period, in accordance with Article 9 of that Directive.

Responses Received to Consultation 11/51

- 2.8 ComReg received responses from twenty individuals or companies to the second consultation (ComReg document 11/51) on the *revised draft Code*. The list of respondents is set out below:
- Association for Interactive Media and Entertainment (UK) (“AIME”)
 - Community Alliance Sligo
 - Dialogue Communications Ltd. (UK) (“Dialogue”)
 - Eircom Group (“Eircom” & “Meteor”)
 - Ericsson IPX AB (“Ericsson IPX”)
 - FDX Limited (“FDX”)
 - Irish Phone Paid Service Association (“IPPSA”)
 - Irish Tarot
 - Magnum Billing (“Magnum”)
 - Modeva
 - Office of the Data Protection Commissioner (“ODPC”)
 - Rathúla
 - Realm Communications Ltd.
 - RTE
 - Spiritsconnect.com
 - Telefonica Ireland Ltd. (“O2”)
 - Terry Hurley

⁸ <http://www.comreg.ie/fileupload/publications/ComReg1153.pdf>

- Telecommunications and Internet Federation (TIF) - Mobile Payments Forum
- Vodafone Ireland Ltd.
- Zamano

2.9 ComReg has collated the responses⁹ in this document in accordance with the format, sequence and structure of the consultation document (ComReg Document 11/51) and the layout of the *new Code* maintains the structure of the *revised draft Code*.

Section 3 of the new Code - Provisions Applicable to all Premium Rate Services

2.10 ComReg sought responses on the provisions of Section 3 of the *revised draft Code*, which set out the general conditions applicable to all PRS and were categorised under the following headings:

- (a) General Provisions,
- (b) Legality,
- (c) Data Protection,
- (d) Decency,
- (e) Honesty,
- (f) Avoidance of Harm, and
- (g) Due Diligence.

ComReg has retained these category headings but has revised some provisions, as set out below.

2.11 Section 3.3 of the *new Code* provides that a PRS provider may meet the requirements of the Code by alternative means, subject to obtaining prior written permission from ComReg. Having considered the objections received from some respondents regarding the transparency of such a provision, ComReg has, for the purposes of clarification and transparency, made it clear in the revised text of Section 3.3 that ComReg will, subject to confidentiality, publish details of any alternative means of meeting the requirements of the *new Code*.

⁹ Several of the respondents submitted responses that were either similar or identical and ComReg has identified, where appropriate, where such shared submissions were made. In addition, ComReg has attempted to ensure that all respondents' views have been expressed. However, not all comments can be addressed individually because of the volume of responses received (to both consultations) and if a particular comment has not been responded to it does not mean that ComReg should be taken to be in agreement or otherwise conceding its position on the matter.

- 2.12 ComReg has also revised the provisions of Section 3.17, which previously required that PRS promotions aimed at persons 18 years and over must carry an age warning. This requirement has been clarified to now require PRS promotions to make it clear the market that is being targeted and an appropriate clarification is required not just for the over 18s category.
- 2.13 ComReg has also revised the text of Sections 3.19, 3.21 and 3.22, which relate to the requirement for PRS providers to conduct a due diligence exercise on their contractual partners. ComReg still considers that PRS providers should take a proactive approach to ensuring, within the scope of their role in the provision of a PRS, that end-users of that PRS are not harmed. ComReg recognises, however, that PRS providers may not always be able to absolutely determine if a breach of the *new Code* has occurred, but ComReg does consider it appropriate that PRS providers should:
- (a) not knowingly engage in or permit the involvement in the provision of PRS of another PRS provider in respect of whom a sanction, which has been published, has been imposed by ComReg so as to enable such person to operate in breach of that sanction, and
 - (b) upon becoming aware of an apparent breach of the new Code by a contracting partner, communicate details of that apparent breach to ComReg.

As such, the provisions of the *new Code* have been changed to reflect these principles.

Section 4 of the New Code - Promotion of PRS

- 2.14 Section 4 of the *revised draft Code* was drafted as follows:
- (a) Sections 4.1 to 4.5, inclusive, set out general principles that apply to all PRS promotions and stated that the remaining provisions of Section 4 would be interpreted in light of these general principles.
 - (b) Sections 4.6 to 4.20 included provisions relating to pricing and other relevant information that would allow end-users to make an informed decision to purchase the PRS,
 - (c) Sections 4.21 to 4.23, inclusive, prescribed provisions relating to the promotion of Subscription Services, and
 - (d) the remaining provisions of Section 4 relate to specific categories of PRS, such as Chatline Services, Virtual Chat Services, Contact and Dating Services, Competition Services, Children's Services etc.
- 2.15 Section 4 of this paper addresses the arguments raised by some of the respondents regarding the compatibility of the Code with the requirements of the Unfair Commercial Practices Directive¹⁰ ("*UCPD*"). ComReg considers that the provisions in Section 4 of the *new Code* are in accordance with the *UCPD*. The recitals of the *UCPD* provide that regulatory bodies should

¹⁰ Directive 2005/29/EC which is transposed in Ireland as the Consumer Protection Act, 2007

exercise their faculty of judgement to determine the reaction of the “average consumer” to a promotion¹¹. Any concealment of the price among other information would be contrary to the provisions of the *UCPD*. As such, ComReg’s conclusion is that the provisions in Section 4 of the *new Code*, relating to pricing information in visual promotions, will greatly assist in ensuring that promotions for PRS are clear and transparent, and do not breach any of the requirements of the *UCPD*.

- 2.16 While the principles set out in Sections 4.1 to 4.5 of the *revised draft Code* were broadly welcomed, some respondents considered that the proposed provisions in Sections 4.6 to 4.23, inclusive, were disproportionate to achieve the stated objective to adequately inform the “average consumer”¹² to enable him or her to make an informed transactional decision.
- 2.17 Sections 4.6 to 4.23 of the *revised draft Code* incorporated provisions that require PRS providers to ensure their promotions include, but are not limited to, the following:
- (a) comply with applicable legal requirements in regard to marketing and/or relevant data protection requirements,
 - (b) ensure end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge,
 - (c) display pricing information prominently in the promotion, not solely in the terms and conditions, but beside the “call to action”¹³ for the PRS be of a minimum font size that is at least 33% of the size of the call to action, or 9 point, whichever is larger,
 - (d) state the name and description of the PRS,
 - (e) ensure that the cost of the PRS is spoken on radio or TV if the cost is more than €2,
 - (f) ensure that certain information, including the fact that the PRS is a Subscription Service and the cost of that subscription, is clearly spoken in TV and radio promotions and ensure that the term “Subscription Service” is prominently displayed in TV, online and print promotions, and
 - (g) ensure that the duration of any “free” period is clearly identified and that any cost that may be incurred at the expiration of the free trial period is also included.

¹¹ While having regard to the Case Law of the Court of Justice (see further Section 4 of this paper)

¹² ComReg has removed the definition of ‘Average Consumer’ from the new Code of Practice as it is not specifically defined in the *UCPD* or the *Consumer Protection Act, 2007*. However, this is further discussed in Section 4 of this paper which addresses the relevance of Recital 18 of the *UCPD* (and the subsequent transposition at Section 2(2) of the *Consumer Protection Act, 2007*) to PRS end-users.

¹³ “Call to Action” is defined in the new Code and is the primary mechanism that enables end users to request or subscribe to the PRS being promoted

- 2.18 Having considered the responses received, ComReg has amended the text of Section 4.6 to provide that all relevant information must be provided within the broader “*promotion of a PRS*” and not in the narrower “*invitation to purchase*”. The information required in an “*invitation to purchase*” includes the information which enables the end-user to purchase the PRS and the cost of the PRS. This change has also been reflected in Sections 4.11 to 4.14 inclusive. ComReg considers that this amendment should help to ensure that end-users receive all material information in a timely manner in advance of any charges being incurred, but not necessarily at the same time. Further, ComReg does not believe that there are any impediments as to why pricing information should not be provided in accordance with the provisions of the *new Code*. As such, ComReg has reduced the obligation on PRS providers allowing them to provide material information at a minimum font size without compromising the PRS provider’s ability to market their PRS as they see fit.
- 2.19 In relation to spoken requirements, the provisions of Section 4.15 set out material information to be given to end-users to inform their transactional decision. To ensure that this information is distinguished from other terms and conditions, for the benefit of end-users, ComReg considers it appropriate and proportionate that this information should be spoken as part of any invitation to purchase on radio or TV. The requirement to speak certain information is consistent with the requirement of the *UCPD* which prohibits the concealment or omission of information which enables end-users to take an informed transactional decision. Nevertheless, based on the responses received, including the comments from the ODPC, ComReg considers that it may be overly burdensome on PRS providers to require them to include information required under data protection legislation in the spoken requirements of an invitation to purchase and has amended the Provisions of Section 4.15 in the *new Code* accordingly.
- 2.20 ComReg believes that, having considered the responses to the latest consultation and the relevant legislative requirements and the fact that the provisions of Section 4 are reasonable, proportionate and justified. In addition, ComReg considers that the provisions of Section 4 of the *new Code* ensure that the average end-user is provided with, in a clear and comprehensive manner, the material information required to make an informed transactional decision and balances this requirement with the commercial interests and flexibility of the PRS provider to promote its services in a manner it sees fit.

Section 5 of the New Code

- 2.21 Section 5 of the *new Code* outlines the general provisions applicable to all PRS and then deals with issues relating to specific PRS.

Purchase Confirmation Receipts

- 2.22 ComReg had proposed, in the *revised draft Code*, that PRS providers must furnish end-users with a Purchase Confirmation Receipt only when the PRS

includes the use of a facility for making a payment for goods and services that does not involve the delivery of any content to the end-user's handset. It is not ComReg's intention to impose unnecessary requirements or expense on PRS providers, but it seems logical and reasonable that if a PRS enables phone payment to be used to purchase goods and services then they should also have factored in to it the requirement to provide end-users with Purchase Confirmation Receipts. In this regard, ComReg has amended the text of Section 5.7 of the *new Code* to state that the PRS provider must take steps to ensure that the end-user receives a Purchase Confirmation Receipt. The duty on the PRS provider involved in a PRS that is used for making payments for goods and services, which do not involve the delivery of any content to the end-user's handset, is to ensure that end-users will be provided with a receipt, but does not necessarily have to provide such a receipt itself.

- 2.23 ComReg has also amended the text of Section 5.7 to provide that the receipt is to be provided in a durable medium which is available and accessible to the end-user. This amendment removes the obligation to provide a receipt that may be stored on the end-users handset, creating greater flexibility for the process, while still providing end-users with a record of purchase.

Subscription Services

- 2.24 Subscription PRS continue to be the predominant reason why end-users of PRS contact ComReg's Consumer Helpline. Subscription PRS account for approximately 85% of all PRS-related issues raised with ComReg. This pattern has continued for the last number of years and the transfer of regulatory responsibility from RegTel to ComReg has not had any material effect on the nature of the consumer contacts received to date.
- 2.25 ComReg proposed a number of measures intended to provide greater consumer protection in the *revised draft Code*. These measures are in line with those introduced in other jurisdictions, as set out in Consultation 11/51, where subscription PRS had previously raised similar issues of consumer harm. Foremost in the proposed measures was the "double opt-in" which would require PRS providers to obtain positive confirmation from end-users by sending an SMS, their intention to subscribe to a PRS that has a recurring charge.
- 2.26 The responses received to the 'double opt-in' proposal (outlined in both Consultation 10/92a and Consultation 11/51) included submissions from different parties within the PRS industry opposing the proposal. Responses, however, were received from the NCA, the ODPC, some consumer groups and some industry parties who expressed support for the proposal.
- 2.27 Following analysis of all of the responses, the results of market research, a review of ComReg consumer statistics and research of international regulatory practice, ComReg has decided to introduce in the *new Code* the requirement for consumers to provide positive confirmation of their intention to subscribe to a subscription PRS.

- 2.28 Below is a summary of the reasons why the ‘double opt-in’ requirement is being imposed (these reasons are discussed in further detail in Section 5 of this document):
- (a) there is clear evidence of on-going consumer complaints and harm resulting from subscription PRS,
 - (b) there is no substantiated evidence that the provisions will cause any harm to consumers, in fact the opposite applies,
 - (c) double opt-in will provide more verifiable evidence that an end-user has knowingly subscribed to a subscription PRS than what currently exists,
 - (d) of the eighteen Regulatory Authorities that ComReg has directly contacted, all but two (Italy and Cyprus) require positive confirmation from end-users to receive PRS that have an SMS call to action, and
 - (e) the experience of purchasing “Apps”, which is held up by several respondents as an example of the ideal consumer purchasing experience, requires the consumer to confirm his or her intention to purchase even for a single purchase transaction.
- 2.29 The final three points relating to Subscription Services addressed in Section 5 are as follows:
- (a) the requirement, at Section 5.20, for PRS providers of Subscription Services to supply end-users with a regulatory reminder message at least once per month has been removed,
 - (b) ComReg has retained the requirement, at Section 5.20, for PRS providers of Subscription Services to supply end-users with regulatory update messages via SMS after each €20 spend, to ensure the end-user is informed on an on-going basis. This ensures that WAP messages are not used for delivering Regulatory update messages as they may not display on all handsets (including iPhones and some other smartphones),
 - (c) the requirement, at Section 5.30, for PRS providers of Subscription Services to provide end-users with a mechanism to clarify their intentions, if they are subscribed to multiple subscriptions on the same shortcode, has been removed. The provisions of the new Code require PRS providers, upon receipt of a “STOP” instruction, to unsubscribe the end-user from the last subscription PRS from which they received a charged message.

Live Services

- 2.30 ComReg has amended the provision of Section 5.43 to require that only Entertainment Services be recorded and not Advice and Information Services as previously required, reducing the obligation on PRS providers of Advice and Information Services.

Virtual Chat Services

- 2.31 ComReg accepts the merits of the submissions in respect of the requirement for Virtual Chat Services to operate on the basis of "one message in - one message out" as that provision did not take account of services which offered end-users a "bundle" of unrestricted messaging for a fixed price. ComReg has, therefore, revised Section 5.64 to apply the "one message in - one message out" to those Virtual Chat Services that are charged on a per-message basis.

Section 6 of the New Code

- 2.32 The requirement has been removed from Section 6.6 of the *new Code* for PRS providers to inform end-users in writing that they may pursue their complaint with ComReg. The obligation to inform end-users of their right to pursue their complaint with ComReg remains, but the PRS provider now has the discretion as to how this notification is made.
- 2.33 ComReg intends to assist end-users in determining which PRS provider they are engaging with by expanding the functionality of the "Number Checker" facility which is available on ComReg's consumer-focussed, PRS-related website www.phonesmart.ie.

Refunds

- 2.34 ComReg has set out in revised Regulations¹⁴ the provisions relating to refunding end-users as a result of the actions of a non-compliant PRS provider. The primary responsibility for providing refunds rests with the party against whom ComReg has made a finding of non-compliance, and it is ComReg's intention that it will first require the non-compliant PRS provider to provide any refunds required.
- 2.35 In the interests of transparency, ComReg considers it appropriate to place network operators on notice that, in some exceptional circumstances, ComReg may conclude that it is reasonable and proportionate to require refunds to be made through end-user phone accounts. ComReg is aware of the administrative and financial burden that may be associated with providing refunds through network operators and while it is difficult to cite precise circumstances when it may be appropriate to adopt such a course of action, ComReg will not make such decisions lightly and such decisions will be made only in exceptional circumstances.

Conclusion

- 2.36 As required by statute, ComReg has extensively consulted on the provisions of the *new Code* to be observed by PRS providers with respect to the promotion, content and operation of PRS and considers that it has balanced

¹⁴ In accordance with Section 7 of the Act, ComReg is required to make Regulations setting out the class or type of PRS to be licensed and the conditions to be attached to such licenses.

its statutory objective to protect the interests of end-users of PRS with the interests of the PRS industry to market their services as they see fit. ComReg considers that the *new Code* provides a foundation to meet the requirements of the current PRS market in Ireland. It is likely that the *new Code* may need to be amended over time to address the advent of new PRS and ComReg remains committed to keeping all relevant developments in the PRS industry under review and the Code of Practice up to date as the market evolves

3. Chapter 3 of the Revised Draft Code of Practice – Provisions that are Applicable to all PRS

The Consultation Issues

- 3.1 Having cognisance for the responses previously received to the initial consultation on the *draft Code of Practice* (ComReg Document 10/92a), ComReg set out in Section 3 of the *revised draft Code of Practice* (ComReg Document 11/51d) the provisions that would be applicable to all PRS under the following headings:
- (a) General Provisions,
 - (b) Legality,
 - (c) Data Protection,
 - (d) Decency,
 - (e) Honesty,
 - (f) Avoidance of Harm, and
 - (g) Due Diligence.
- 3.2 The inclusion of the Due Diligence sub-section in the *revised draft Code* addressed the regulatory changes introduced by *the Act*, which recognises that there is typically more than one party (i.e. PRS provider) responsible for the provision of PRS to end-users. As such, each of the parties in the PRS “value chain” bear a varying level of responsibility for the delivery of PRS to the end-user. ComReg considered that there was a shared responsibility for the delivery of PRS to end-users, and the requirement for each PRS provider to carry out due diligence was intended to encourage good commercial practices throughout the value-chain.
- 3.3 ComReg posed the following question with respect to Section 3 of the *revised draft Code*, pertaining to “Provisions Applicable to all PRS”:

Q. 1. Do you agree with the draft provisions applicable to all PRS as set out in Section 3 of the revised draft Code? Please provide reasons to support your position.

Views of Respondents

Section 3.3

- 3.4 Several industry respondents took issue with Section 3.3 of the *revised draft Code*, which provided that where a PRS provider satisfies ComReg that any requirement of the Code can be met by alternative means to that specified in the Code, ComReg may, at its sole discretion, permit such alternative means to be used. The submissions from AIME, Dialogue, FDX Ltd., Magnum and the IPPSA were identical, with the response received from Zamano largely similar. It appeared from the submissions received that the main objection to the provisions of Section 3.3 may be summarised in the following statement from several of the respondents: “*ComReg must publish all special/cosy agreements, including any out of court settlements they reach with individual service providers, such that the market operates in a transparent and non-discriminatory manner*”.

Section 3.9

- 3.5 Section 3.9 of the *revised draft Code* related to data protection matters and required PRS providers, who register with the ODPC, to state that they may disclose data to ComReg for the purpose of ComReg exercising its statutory functions and powers. A number of submissions received stated that the Code should make clear that where the requirements of ComReg “*conflict with the requirements under the Data Protection Acts, that the Data Protection Act requirements are superior*”.

Section 3.17

- 3.6 Section 3.17 of the *revised draft Code* related to the requirement for services that are aimed at persons aged 18 years and over to carry an age warning. The identical submissions received from AIME, Dialogue, FDX, Magnum and the IPPSA proposed that the prescriptive nature of this requirement should be amended to a more general provision, which would require PRS providers to make it clear in their promotion of a service, the target market for that service.

Section 3.18

- 3.7 Section 3.18 of the *revised draft Code* related to a prohibition on charging for PRS which deliver a “busy tone” or “silence”. A number of submissions requested that these terms would be defined to make clear that Section 3.18 only applies to services that have been deliberately designed to mimic silence and network tones, as opposed to those that result from genuine network errors.

Sections 3.19 to 3.22 (inclusive)

- 3.8 Sections 3.19 to 3.22 of the *revised draft Code* related to the requirement for all PRS providers in the PRS “value-chain” (i.e. involved in the delivery of the

PRS) to act with due diligence. These sections were premised on the fact that a number of parties bear a certain and varying level of responsibility in delivering PRS to end-users and, therefore, there is an obligation on each party to:

- (a) comply with the provisions of the Code themselves, and
- (b) take reasonable care that their contractual partners do likewise.

3.9 A number of respondents, including TIF, Eircom, Dialogue, Zamano, FDX, IPPSA, Magnum, O2 and AIME, advocated that the requirements imposed on PRS providers in these Sections were too burdensome and would require PRS providers to, in effect, assume the role of the regulator in ensuring compliance with the Code.

ComReg's Position

Section 3.3

3.10 ComReg is mindful of its responsibilities to act in a transparent and non-discriminatory manner but also has a responsibility to all PRS providers to observe commercial confidentiality, where appropriate. ComReg, therefore, has a duty to balance competing principles. For this reason, the authority to exercise discretion over publishing details of alternative means to comply with the requirements of the Code was included in the drafting of Section 3.3 of the *revised draft Code*. ComReg, however, considers that it is possible to better convey its intended approach in this area by clarifying the text of Section 3.3 to state that it will publish details of alternative means of meeting the requirements of the Code, subject to issues of confidentiality. The provisions of Section 3.3 in the *new Code* have been amended accordingly.

Section 3.9

3.11 Section 3.9 of the *revised draft Code* is correctly aligned with the data protection legislation¹⁵, and in no way impugns the authority of the ODPC. ComReg is required under statute, pursuant to Section 10(1)(d)(ii) of *the Act*, to carry out investigations into the "*promotion, content and provision of PRS*" and, as such, may require information from PRS providers, which may include personal data.

3.12 ComReg has authority within the data protection legislation¹⁶, depending on the circumstances, to require the release of personal data in the course of an investigation. Upon the receipt of any personal data, ComReg is bound to

¹⁵ *Data Protection Act, 1988 and 2003 and European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations, 2011 (SI 336 of 2011)*

¹⁶ *The provisions of Regulation 33 of the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations, 2011 (SI 336 of 2011) which states, inter alia, "The Commissioner (i.e. Data Protection Commissioner) and the Regulator (i.e. ComReg) shall, in the performance of their functions under these Regulations, cooperate with and provide assistance to each other."*

handle and process that data in accordance with its own established practices which are consistent with the requirements of the Data Protection legislation. Accordingly, ComReg does not consider it necessary to amend the provisions of Section 3.9.

Section 3.17

- 3.13 ComReg considers that there is merit to the submissions suggesting amending Section 3.17 of the *revised draft Code*. Rather than only require PRS providers to provide an age warning for PRS that are targeted at persons over 18 years, ComReg considers that a more general provision will provide greater flexibility and address target markets, other than only the over 18's market. Accordingly, the text of Section 3.17 has been amended as suggested in the submissions received.

Section 3.18

- 3.14 The submissions received correctly highlight that there is a considerable difference between those PRS that are deliberately designed to mimic "silence" and "network tones" and those that result from genuine network-related issues. However, irrespective of which PRS provider in the value chain bears responsibility for the delivery of a "busy" tone or "silence", or what their motivation is, the fact remains that end-users of the PRS should not be charged for such PRS¹⁷. ComReg recognises that it may be possible for "genuine" network errors to deliver "silences" or "busy tones" to end-users of a PRS and ComReg will consider any mitigating or aggravating factors in making any finding on such cases or for pursuing any prosecutions on the matter. Accordingly, ComReg considers that no amendment to the provisions of Section 3.18 is warranted.

Sections 3.19 to 3.22 (inclusive)

- 3.15 ComReg considers that there is merit to the submissions received in respect of Sections 3.19 to 3.22 relating to "Due Diligence":
- (a) In respect to Section 3.19, ComReg has amended the text to require PRS providers, in the context of their roles, to take all reasonable steps to assist ComReg in ensuring that the provisions of the new Code are complied with,
 - (b) ComReg has amended the provisions of Section 3.20 to provide that PRS providers must ensure that their direct contractual partners are aware of ComReg's role in the regulation of PRS and the requirement to be licensed,
 - (c) With respect to Section 3.21, ComReg has clarified the text to ensure that there is not an absolute liability placed on PRS providers who engage in, or permit the involvement in, the provision of PRS by

¹⁷ See Section 13(c) of the *Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010* that makes it an offence for a PRS provider to charge for a PRS that was requested but not provided.

another PRS provider against whom a published sanction has been made, so as to enable such a provider to operate in breach of that sanction. ComReg has included the term “knowingly” in the text to reflect the fact that a PRS provider may have exercised appropriate due diligence but, nevertheless, inadvertently engaged with a PRS provider against whom a sanction had been published thus enabling them to operate in breach of that sanction,

- (d) ComReg has similarly amended the provisions of Section 3.22 of the new Code and it now requires PRS providers to notify ComReg upon becoming aware of an “apparent breach of the Code” by a contracting partner. This recognises that it is ComReg, and not a PRS provider, who ultimately makes a finding of non-compliance. However, there is still the requirement for PRS providers to bring what they consider “apparent breaches of the Code” to ComReg’s attention. ComReg has also removed the requirement for PRS providers to take “all reasonable steps to ensure that breaches of the Code are remedied without delay or as soon as possible”, thereby acknowledging that responsibility for correcting instances of non-compliance rests solely with ComReg, and will not oblige PRS providers to take remedial action without a finding of non-compliance from ComReg.

4. Chapter 4 of the Revised Draft Code of Practice - Provisions Relating to the Promotion of PRS

The Consultation Issues

- 4.1 Section 4 of the *revised draft Code* set out the provisions relating to the promotion of PRS. Sections 4.1 to 4.5 of the *revised draft Code* included general principles that apply to all PRS promotions and provided that the remaining provisions of Section 4 will be interpreted in light of these general principles. The general principles in Sections 4.1 to 4.5 proposed that:
- (a) Promotions are unfair if the PRS Provider does not exercise the special skill and care which may reasonably be expected in an honest market practice or fails to act in good faith, and thereby causes, or is likely to cause, an “average consumer” to make a transactional decision they would not otherwise have taken, by impairing their ability to make an informed decision.
 - (b) Promotions must set out in a clear, unambiguous, legible and audible (if spoken) manner, all material information that an “average consumer” needs to make an informed transactional decision.
 - (c) Promotions must not set out false or misleading information in relation to matters such as the main characteristics of the service, the price, and the consumer’s rights.
 - (d) If a PRS Provider can reasonably foresee that a promotion is likely to affect a vulnerable group only, the “average consumer” is an average consumer of that group.
 - (e) The completeness and clarity of the information furnished in a promotion will be assessed by reference to the context, including any limitations as to space and/or time.
- 4.2 Sections 4.6 to 4.20 included provisions relating to pricing and other relevant information that would permit end-users to make an informed decision to purchase the PRS, while the remaining sections related to specific categories of PRS, such as Subscription Services, Competition Services, Children’s Services etc. Sections 4.6 to 4.20 included provisions that required PRS providers to:
- (a) comply with applicable legal requirements in regard to marketing and data protection requirements,
 - (b) ensure end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge,

- (c) display pricing information prominently in the promotion, not solely in the terms and conditions, but beside the call to action for the PRS in an “invitation to purchase”. Pricing information must be of a minimum font size that is at least 33% of the size of the call to action, or 9 point, whichever is larger,
 - (d) state the name and description of the PRS,
 - (e) state if there are any technical limitations or age restrictions,
 - (f) ensure that certain information, including the fact that the PRS is a Subscription Service and the cost of the subscription, is clearly spoken in TV and radio promotions, and
 - (g) ensure that the duration of any “free” period is clearly identified and that any cost that may be incurred at the expiration of the free trial period is also included.
- 4.3 Sections 4.21 to 4.23, inclusive, prescribed additional provisions relating to the promotion of Subscription Services including the requirements to:
- (a) state the name of the PRS that will enable end-users to identify the PRS,
 - (b) ensure that the term “Subscription Service” is prominently displayed in TV, online and print promotions and also spoken in any voice-over promotions, and
 - (c) identify subsequent subscription charges if bonus or incentive offers to encourage participation in the PRS describe the PRS as “free”.
- 4.4 In addition to the general principles set out in Sections 4.1 to 4.5, and the provisions relating to pricing and other relevant information that would permit end-users to make an informed purchase decision that are set out in Sections 4.6 to 4.20, the remaining sections of Chapter 4 included provisions relating to the promotion of specific categories of PRS as follows:
- (a) Section 4.24 related to the promotion of “Sexual Entertainment Services”,
 - (b) Section 4.25 related to the promotion of “Chatline, Virtual Chat and Contact and Dating Services”,
 - (c) Sections 4.26 to 4.29, inclusive, related to the promotion of “Competition Services”,
 - (d) Sections 4.30 and 4.31 related to the promotion of “Entertainment Services”,
 - (e) Sections 4.32 and 4.33 related to the promotion of “Advice and Information Services”,
 - (f) Section 4.34 related to the promotion of “Children’s Services”, and
 - (g) Section 4.35 related to the promotion of “Services for the Benefit of Charitable Organisations”.

- 4.5 Accordingly, ComReg posed the following question with respect to Section 4 of the *revised draft Code*, pertaining to “PRS Promotions”:

Q. 2. Do you agree with the draft provisions relating to the promotion of PRS as set out in Section 4 of the revised draft Code? Please provide reasons to support your position.

Views of Respondents

- 4.6 ComReg received a diverging range of responses to the question relating to the provisions set out in Chapter 4 pertaining to PRS promotions. Some responses cite extracts from EU legislation and, to ensure that ComReg addresses the issues raised, it is necessary, in some instances, to include detailed extracts from some of the responses.

- 4.7 The submissions from Zamano and the IPPSA alleged that while Section 4.2 of the *revised draft Code* refers to providing an “average consumer” with the material information required to make an informed transactional decision, ComReg mandates, in the subsequent sections of Chapter 4, levels of information that go beyond what an “average consumer” requires. The IPPSA quote from the NCA website as follows:

“The European Court of Justice interprets the “average consumer” as “reasonably well informed and reasonably observant and circumspect, taking into account social cultural and linguistic factors”. Where a commercial practice is likely to distort the economic behaviour of a clearly identifiable group who are particularly vulnerable because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, the average member of that group would be regarded as the “average consumer”.

The IPPSA submitted that it is not credible for ComReg to introduce the requirements as being necessary for the protection of the “average consumer”, considering the obligations imposed on ComReg under the Unfair Commercial Practices Directive 2005/29/EC (“UCPD”).

- 4.8 Zamano, AIME, Dialogue, FDX and Magnum took issue with the amount of information that is required to be provided in Sections 4.6 to 4.20. Zamano considered the requirements as “overkill”, which “*will serve only to confuse consumers and render advertising almost impossible*”.
- 4.9 Ericsson IPX, Zamano, RTE and Eircom all proposed amendments to the requirements of Section 4.8 relating to pricing information and the level of detail required.
- 4.10 AIME, Dialogue, FDX and Magnum submitted identical responses in relation to Sections 4.10, 4.14, 4.15 and 4.22, regarding the clarity of pricing information, whether written or spoken. The respondents maintained that the measures proposed would require significant additional promotional space

and place a cost burden on PRS providers that will either have to be passed to end-users of the PRS or render the PRS unviable. Magnum, FDX, Dialogue and AIME also alleged that the implementation of Sections 4.6 to 4.35 would:

- (a) require PRS providers to introduce specific measures for the Irish market that are not required in other European markets,
- (b) be contrary to the UCPD and
- (c) be excessive given the requirement to fully inform end-users of all material facts that would influence their decision to purchase the promoted PRS.

4.11 The IPPSA alleged, *inter alia*, in its response that:

- (a) the vast majority of the measures proposed exceed the obligations required to inform the “average consumer” and, as such, are in breach of the UCPD,
- (b) ComReg has failed to adequately quantify the issues and/or harm to consumers that relates to the current promotion of PRS,
- (c) ComReg has failed to adequately quantify the impact of the proposed measures on consumers, in terms of addressing the perceived issues, or the harm to industry,
- (d) the provisions of Section 4.6 contradict ComReg’s stated objective of ensuring that consumers are provided with all relevant information required to make an informed transactional decision but such information need not necessarily be provided all at the one time,
- (e) ComReg has failed to present any statistics relating to the period in which it has regulated the market, which would support the proposed measures,
- (f) the vast majority of respondents to previous consultations on the Code were opposed to some or all of the key provisions relating to the promotion of PRS and the NCA expressed concerns regarding some of the challenges faced by the “average consumer”,
- (g) ComReg has presented results of its limited survey in an un-objective manner demonstrating a bias that was apparent in previous consultations,
- (h) ComReg’s own research shows that 84% of respondents were aware of the charges for a PRS prior to using the service and only 2% of respondents were completely unaware and, as such, ComReg is proposing to introduce draconian measures to satisfy a small minority of consumers who are not representative of the “average consumer”,
- (i) ComReg “has NO basis for the hugely damaging measures proposed in the draft Code”,
- (j) ComReg has failed to assess the possible impact of the proposed measures on consumers who participate within the PRS industry,

- (k) based on ComReg’s research, only 16% of PRS end-users were not aware of the cost of a PRS and the increased price transparency requirements will therefore have limited benefit,
 - (l) ComReg should not mandate the font size for pricing information but PRS providers should be free to market their product as they see fit for the “average consumer”,
 - (m) the “requirement to speak detailed service terms and conditions in all audio/visual promotions does not represent best practice across all retail services and indeed invites ComReg to provide documentary evidence in support of this claim”, and
 - (n) the “spoken requirements” would be massively damaging to the PRS industry rendering TV advertising almost unviable and, therefore, a more proportionate measure would be similar to the UK where only services above a certain price threshold (currently £3.83 ex-VAT) should be spoken as part of an audio/visual advertisement on the basis that the price of the PRS is such that consumer harm may become an issue.
- 4.12 The ODPC submitted comments supporting Sections 4.7, 4.15 and 4.16 of the *revised draft Code*, which related to the requirement to inform end-users of the use of their personal data for marketing purposes in accordance with any applicable legal requirements. The inclusion of these provisions addressed the concerns expressed by the ODPC, in its response to the previous consultation on the Code (ComReg Document 10/92a), that these elements were not included in the “Visual Display Requirements” or the “Spoken Requirements” and should be.
- 4.13 O2 agreed with the provisions of Section 4 of the *revised draft Code* and stated that “the provisions outlined in this section should introduce transparency and also a fair and reasonable framework for all PRS providers to operate in and will ultimately benefit the customer or end-user of such services”.
- 4.14 Vodafone similarly submitted that it “fully agrees with all the provisions listed in Section 4 of the revised draft Code of Practice. Vodafone added “*We particularly welcome the introduction of measures in relation to clear advertising and promotion obligations that are required to be upheld by service providers*”.

ComReg’s Position

Sections 4.1 – 4.5

- 4.15 Sections 4.1 to 4.5, inclusive, of the *revised draft Code* were broadly welcomed by all respondents. Section 4.2 required that promotions for PRS must clearly and unambiguously provide the average end-user with all material information required to make an informed transactional decision. Following a submission from the NCA to the original consultation on the

Code¹⁸, ComReg considers it necessary to amend the text of Section 4.2 to also provide for the omission, or concealment of, material information that may cause the average end-user to make a transactional decision that he/she would not have taken otherwise. This provision echoes the requirement of Article 7 of the *UCPD*, which is transposed into Irish law as at Section 46 of the Consumer Protection Act, 2007.

- 4.16 The *UCPD* is a "maximum harmonisation" Directive, which requires member states of the European Union to apply the standards set out in the Directive but also provides that member states are not permitted to apply any higher standards in their national legislation. It should be noted that the terminology used throughout Section 4 includes the terms "*invitation to purchase*" and "*promotion*". These terms originate from the *UCPD* and for the purposes of clarity, ComReg has fully set out the definition of "Invitation to Purchase" in the *new Code* and the definition has been written so as to clearly reflect the PRS situation.
- 4.17 Despite the broad agreement of the respondents, the submissions received from Zamano, AIME, Dialogue, FDX, Magnum and the IPPSA alleged that the provisions of Section 4 of the *revised draft Code* exceeded what was necessary for the protection of the "average consumer" and ComReg, therefore, is acting contrary to the "maximum harmonisation" constraints imposed by the *UCPD*. The extract from the NCA's website submitted by Zamano and repeated in the submissions from the IPPSA and Modeva cite the European Court of Justice (the "ECJ") as having interpreted the "average consumer" as "*reasonably well informed and reasonably observant and circumspect, taking into account social cultural and linguistic factors*".
- 4.18 The allegation that ComReg is acting contrary to the *UCPD* is consistent in the almost identical submissions from some members of the PRS industry (Modeva, IPPSA, AIME, Dialogue, FDX and Magnum). It should be noted, however, that there is a clear lack of detail in the submissions received as to how precisely ComReg breaches the provisions of the *UCPD*. AIME, Dialogue, FDX and Magnum cited cost and space issues arising from Sections 4.10, 4.14, 4.15 and 4.22 of the *revised draft Code*. They did not, however, specify any article(s) of the *UCPD* that those sections of the *revised draft Code* allegedly breached.
- 4.19 In response to submissions from Modeva and the IPPSA that "the measures proposed in Section 4 of the Code in relation to the promotion of PRS far exceed those required to ensure that an average consumer is sufficiently informed so as to make an informed decision to purchase is unsupported by any legal basis or evidence", ComReg believes it is helpful to note the full text of Recital 18 of the *UCPD* which states:

"It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive

¹⁸ http://www.comreg.ie/_fileupload/publications/ComReg_1092a.pdf

*84/450/EEC¹⁹ to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. **The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.*** [emphasis added]

ComReg's position is that the measures set out in the *new Code*, which incorporates amendments made as a result of the responses received to the latest consultation, reflect ComReg's considered judgement. ComReg will also have regard to the relevant case law of the Court of Justice on a case by case basis and as is necessary and relevant.

- 4.20 In addition to ensuring that end-users²⁰ are made aware of the material information required to make an informed transactional decision, some provisions of Section 4 of the *new Code* also provide certainty to PRS providers on how ComReg will interpret the requirements of the *new Code*. For instance, ComReg has detailed the specificity that it considers necessary in relation to price transparency in visual invitations to purchase, which includes a minimum font size and the requirement to speak certain prices. These measures are not contrary to the provisions of the *UCPD* and ComReg considers them necessary and proportionate to ensure that material information (i.e. pricing) is sufficiently prominent for end-users to make an informed transactional decision.

Sections 4.6 – 4.35 - Summary

- 4.21 A number of PRS providers objected generally to the provisions of Sections 4.6 - 4.35 of the *revised draft Code*, which relate to the promotion of PRS. These Sections covered a broad range of general and service specific provisions and the lack of particularisation within the responses in general has made it difficult to address whether it is some, or all, of the provisions

¹⁹ EU Directive relating to Misleading Advertising and a precursor to the *UCPD*

²⁰ ComReg has replaced the term "consumer" in the *new Code* with the term "end user" in order to ensure consistency with the provisions of the Act.

that raise the objections from these respondents. ComReg considers, as many of the provisions already exist in the *current Code*, as implemented by RegTel in October 2008, that it may be some of the new provisions in the Code that are the source of the objections from these respondents.

- 4.22 The general matters that were raised by these respondents can be condensed under two separate headings, namely:
- (a) Font size for pricing information and other material information, and
 - (b) Spoken requirements for certain pricing information, Subscription Service description and data protection requirements, if applicable.

These points are discussed in detail below. In summary, ComReg has amended the requirements of the *new Code*, such that end-users can receive the material information in a promotion in a timely manner, without compromising the PRS providers' ability to market their PRS as they see fit.

- 4.23 ComReg will now address the specific Sections that differ from the Regtel Code of Practice and the comments received in relation to these.

Section 4.6 – Material information

- 4.24 ComReg accepts the merit of the submission from the IPPSA that the provisions of Section 4.6, as drafted in the *revised draft Code* (ComReg Document 11/51d), were not aligned with ComReg's previously stated position that end-users must be provided with all relevant information required to make an informed transactional decision, but such information need not necessarily be provided all at the one time. ComReg therefore has amended the text of Section 4.6 to reflect that all relevant information must be provided within the broader "promotion of a PRS" and not the narrower "invitation to purchase", which, among other things, includes the information which enables the end-user to purchase the PRS prior to a charge being incurred. As noted above, ComReg has also made a similar amendment by replacing the term "invitation to purchase" with "promotion" in Sections 4.11 to 4.14, inclusive, and as such, reducing the burden on PRS providers and affording them more flexibility in the promotion of their PRS.

Section 4.7 - Data Protection Matters

- 4.25 The provisions of Section 4.7 reflect data protection requirements²¹. and ComReg believes that it is important to include them to highlight PRS providers' obligations. It should also be noted that the inclusion of the provisions of Section 4.7 have been welcomed by the ODPC in its response to consultation.

²¹ As articulated on the Data Protection Commissioner's website <http://dataprotection.ie/viewdoc.asp?DocID=23>

Section 4.8

- 4.26 Section 4.8 requires end-users to be informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge. A PRS may have many separate cost elements that contribute to the full and true cost to the end-user. Section 4.8 simply requires that, where applicable, these individual cost elements, if not included in the advertised price, are set out so that the end-user can make an informed transactional decision. The variety of constituent costs of a PRS may include:
- (a) VAT – ComReg requires that prices are quoted inclusive of VAT, unless no VAT is to be applied,
 - (b) Any costs, additional to the cost of the service, relating to delivery or other charges,
 - (c) sign-up costs – some PRS include an initial sign-up cost in addition to the stated cost of the PRS and this is considered material information for the end-user,
 - (d) network data charges – some PRS may require end-users to incur network charges for downloading data. These data charges will be applied by the MNO to the end-users' phone accounts separate to the cost of the PRS and these costs are likely to be beyond the control of the PRS provider supplying the PRS (unless that also happens to be the end-user's MNO). ComReg acknowledges the submission from Zamano that it is impossible for most PRS providers to know what charges may apply and so, the text of Section 4.8(b) has been amended to address the fact that the primary PRS provider may not know what data costs apply, only that they may apply,
 - (e) the price per message and the number of messages required to complete the transaction – the delivery of some PRS may require sending the end-user a number of reverse-billed SMS in order to impose the quoted total cost of the PRS e.g. if a good or service costs €5, then the PRS provider may have to send 2 x €2.50 messages to apply the total charge to the end-user's phone account. It is considered material to inform end-users in advance of this happening as the arrival of two charged messages may lead the end-user to believe that they have been charged twice for the PRS, when this is not the case,
 - (f) the duration of any "free" or discounted period and the relevant charges that will apply thereafter – ComReg notes the submission received from the NCA to the Consultation(ComReg Document 10/92) which stated that "the use of the term 'free' in an unqualified sense means that there can be no charges whatsoever. An offer should not be described as free if there is any cost to the consumer, Making a representation that a service is 'free', 'without charge' or anything similar if a consumer has to pay anything other than a necessary and reasonable cost of responding to the representation and having the service delivered, is a prohibited commercial practice for the purposes of the Unfair Commercial Practices Directive". As such, ComReg considers that any subsequent costs, at the expiration of a free or discounted period, are

material to the end-user's decision whether to proceed with the transaction to purchase a PRS, and

- (g) where the PRS is a Subscription Service, the charge per period and that charge period – Subscription Services impose an on-going or recurring charge on end-users and, therefore, it is material to the end-user's decision to purchase that any charges, for example where a subscription PRS may have an initial free entry but end-users subsequently incur periodic charges, are also brought to their attention in order to make an informed transactional decision.

Article 4(c) of the *UCPD* states;

"4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

- (c) *the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be reasonably be calculated in advance, the fact that such additional charges may be payable."*

The clear intention of this provision is that end-users are fully informed of all possible charges, even if these charges cannot be determined in advance. It is ComReg's position that the provisions of Section 4.8 fully reflect the requirements of the *UCPD* and no changes are required.

Section 4.10

- 4.27 Section 4.10 of the *revised draft Code* proposed requiring pricing information in all visual invitations to purchase (in print, promotions to mobile handsets via SMS/MMS/WAP, on TV or online) to be displayed:
- (a) prominently in the body of the promotion, horizontally as clear and correct "stand-alone" information and not solely contained in the terms and conditions,
- (b) beside the call to action, and
- (c) of a size that is at least 33% of the call to action or at a minimum text size of 9 point, whichever is larger.
- 4.28 ComReg has recognised the responses from some PRS providers and lessened the burden in the *new Code* with respect to the relative size of the price to the call to action from 75% to 33%. In addition, ComReg has clarified the requirement that the pricing information has to be beside the call to action for the duration that the call to action is displayed.
- 4.29 Notwithstanding the above, however, ComReg does not accept the arguments as to why pricing information cannot be provided in accordance with these provisions. These provisions ensure that pricing information is not

concealed among other information, which would be contrary to the provisions of the *UCPD*.

- 4.30 Furthermore, specifying the minimum requirements for material information, such as pricing, in an invitation to purchase, will provide regulatory certainty to PRS providers as to the expected standard of these promotions. It will also establish a level of consistency across industry that will benefit end-users and their understanding of PRS promotions, thereby, enhancing consumer trust of the industry.
- 4.31 Finally, ComReg is cognisant of the submission from the NCA to the previous consultation on the Code (ComReg Document 10/92a) which stated the following:

*“In the NCA view, pricing is a contract related obligation as opposed to the general information obligations required elsewhere. The providers and consumers alike should be alerted to its particular status as the consequence of inadequate pricing or negligent misstatements affect the core of the contract. **The Agency welcomes the comprehensive way in which price information requirements are dealt with.**”* (emphasis added)²²

- 4.32 ComReg considers, therefore, that the pricing requirements set out in Section 4.10 of the *new Code* are reasonable and proportionate to ensure that end-users of PRS are provided with the material information in a clear, intelligible, unambiguous and timely manner. Such principles are required by the *UCPD* and were supported generally by the NCA in the original consultation.

Section 4.14

- 4.33 Section 4.14, as set out in the *revised draft Code*, required that in all invitations to purchase, certain information requirements (which are specified in Section 4.11) must appear at a minimum text size of 9 point. The potential exception to this minimum font size requirement is price information which must be at least 33% of the “call to action” or 9 point, whichever is larger.
- 4.34 ComReg's position is that the information requirements set out in Section 4.11 consist of the detail necessary for an end-user to make an informed transactional decision. However, ComReg is also cognisant that the time when such information should be provided is important, as highlighted by the

²² It should be noted that the submission from the NCA refers to pricing requirements in the original draft Code (ComReg Document 10/92b), which included that pricing information should be:

“Promotional Material that is written, and textual pricing information, must be prominent, legible, and horizontal and presented in a way that does not require close scrutiny. As such, pricing information must be:

(a) displayed prominently in the body of the promotion, and

(b) in close proximity, by being placed immediately beside or underneath the call to action, of a size that is at least 75% of the call to action.”

NCA in its response to the previous consultation on the Code (ComReg Document 10/92a) , “*if a consumer is exposed to an information deluge then the exact opposite effect of what was sought may result*”.

- 4.35 As previously set out in Paragraph 4.24 above, ComReg has amended Sections 4.11 to 4.14 inclusive, by replacing the term “invitation to purchase” with “promotion”, which has the effect of reducing the obligation on PRS providers, while ensuring the information requirements set out in Section 4.11, are still provided to end-users but not necessarily all at the same time. PRS providers, therefore, have greater latitude to decide how to promote their PRS and the requirement to adhere to a minimum font size for all material information is more easily achieved.
- 4.36 ComReg considers that prescribing a minimum font size for material information, likely to influence the end-user’s decision to purchase the PRS, is proportionate.

Section 4.15

- 4.37 Section 4.15 of the *revised draft Code* required the following information to be spoken as part of any invitation to purchase on radio or TV:
- (a) the name and description of the PRS,
 - (b) where it is not a Subscription Service, the cost of the service if it is more than €2,
 - (c) where it is a Subscription Service, the fact that it is a Subscription Service and the charge per period and that charge period, and
 - (d) where applicable, information regarding the use of the end-user’s personal data for marketing purposes.
- 4.38 Regarding the requirement to speak the name and description of the PRS, it is important to understand that a single PRS may have several calls to action e.g. an end-user may access the PRS by responding to:
- (a) an invitation to purchase sent directly to their handset,
 - (b) an invitation to purchase in the print media,
 - (c) an online invitation to purchase, or
 - (d) an invitation to purchase that is broadcast on radio or TV.

In all but the broadcast medium, the end-user has the opportunity to re-examine and consider what it is they are being invited to purchase. ComReg, however, considers that because of the transient nature of broadcast promotions, where the end-user is required to primarily concentrate on collecting and comprehending the call to action to the service (e.g. “*to enter/buy text A, B or C to 57310*”), it is important that a PRS is clearly identified to potential end-users. The most appropriate means of doing this is to speak the required information in the voice-over of the promotion.

- 4.39 Clearly the cost of the PRS is material to the average end-user making an informed transactional decision. The IPPSA/Modeva suggested that a more proportionate measure, than that set out in Section 4.15 (and perhaps Section 4.22, which is addressed below), in relation to spoken requirements would be:

“Where the price of a service is such that consumer harm may become an issue (e.g. within the UK a threshold of generally £3.83 excl VAT exists) Phonepaid suggests that the pricing information should be spoken as part of any audio/visual advertisement.”

ComReg makes the following observations on this proposal:

- (a) the *current Code* has a similar provision to that proposed by IPPSA/Modeva, save for a difference in the price threshold, which triggers the spoken requirements. Section 7.1.4(iii) of the *current Code* requires that for audio visual promotions, if the total cost of the services is €2 or more, then the pricing information must also be spoken as well as visually displayed. ComReg previously consulted on this matter and published the following response in its response to consultation (ComReg Document 11/51²³):
- “however, ComReg proposes that it is reasonable and proportionate to maintain the provisions of the RegTel Code published in October, 2008 which do not require that the price of “one-off” PRS transactions costing less than €2 should be spoken”, and*
- (b) it would appear, therefore, that the IPPSA/Modeva concur with the principle that pricing information above a certain threshold should be spoken and the matter to be determined is where that threshold lies. These respondents advocate the higher amount equivalent to GBP£4.50 as opposed to the existing €2 price point. ComReg has previously considered that €2 was an appropriate price point to trigger spoken requirements and no substantive reasons have been provided to warrant changing this amount at this time.
- 4.40 ComReg considers it only fair, necessary, reasonable and proportionate *that end-users are* informed clearly in the voice over for any invitation to purchase on TV or radio that the PRS is a Subscription Service and what the cost and frequency of charging is. As set out in the examination of the provisions of Section 4.8 of the *revised draft Code* above, it is clear that the price of a PRS may have several constituent elements, which comprise the total cost to the end-user e.g. VAT, sign-up costs, network data charges, free or discounted periods, subscription charges, etc.
- 4.41 ComReg has not received any persuasive submissions as to why it would be necessary and proportionate to change the price threshold at this time. It is conceivable that in the future, with the full operation of the other price transparency requirements, consumer protection can be assured at a higher

²³ <http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

price threshold and ComReg will keep this matter under review. For now, however, the price threshold as at Section 4.15 will remain in the *new Code* at €2 for a single transaction and at any price for a Subscription Service.

- 4.42 Section 4.15(d) of the *revised draft Code* required that information regarding the use of an end-user's personal data for marketing purposes is spoken as part of any invitation to purchase on radio or TV. Paragraph 4.25 above refers to the legal requirement, under data protection legislation, to collect and process personal data, which entails making end-users fully aware, at the time of providing personal information, of the identity of the persons who are collecting it (though this may often be implied), to what use the information will be put and enabling end-users to opt-out of receiving promotional material. In considering this Section, ComReg is cognisant of the submission from the ODPC to the previous consultation on the *draft Code of Practice* (ComReg Document 10/92a), in which it expressed concern that the requirement to inform end-users that the PRS provider may link an end-user's purchase of a PRS to their consent to the use of their personal data for marketing purposes, and how to opt-out of receiving future promotional material was not included in the Visual Display Requirements or the Spoken Requirements.
- 4.43 While ComReg has acknowledged in Sections 4.7 and 4.11 of the *new Code* the requirement for PRS providers to comply with their obligations under data protection legislation, it is also cognisant that these requirements may vary from PRS provider to PRS provider, depending on the intended purpose of personal data that they collect. In addition, ComReg is aware that data protection requirements may change from time to time, to reflect legislation changes/amendments. Based on the responses received, including the comments from the ODPC, ComReg considers that it may be overly burdensome on PRS providers to require them to include information required under data protection legislation in the spoken requirements of an invitation to purchase. It should be noted that ComReg has however, retained the provisions of Section 4.7 and 4.11 (i) in the *new Code*, which highlights the need for PRS providers to ensure that they have complied with all legal requirements relating to the use of personal data for marketing and other similar purposes.

Section 4.22

- 4.44 Section 4.22 relates to Subscription Services and requires PRS providers to include the term "*Subscription Service*" and the name of the PRS prominently in a font at least 33% of the size of the call to action for online, TV or print promotions and be spoken in the case of any voice-over promotion.
- 4.45 The IPPSA/Modeva submitted:

"a requirement to speak detailed service terms and conditions in all audio/visual promotions does not represent best practice across all retail

services and indeed invites ComReg to provide documentary evidence in support of this claim”.

However, ComReg is unsure as to which particular Section of the *revised draft Code* this submission refers to and therefore can only assume that the provisions of Section 4.15 and/or Section 4.22, both of which require certain information to be spoken, may have contributed to its inclusion.

- 4.46 ComReg has made amendments to Sections 4.6 and 4.11 to 4.15, inclusive, thereby reducing the amount of information that must be provided to the end-user at any one time. As a consequence, the requirement to speak detailed terms and conditions has been reduced and the requirements are limited to material information only. The material information is information which ComReg considers that end-users need to be aware of in order to make an informed transactional decision.
- 4.47 ComReg considers that if a PRS has a recurring charge (i.e. is a subscription) this is clearly material information and warrants being spoken as part of the invitation to purchase, in order to provide the information to the end-user in a clear and comprehensive manner. ComReg does not consider that the provisions of Section 4.22 of the *new Code* are particularly burdensome and, along with other material information, can be reasonably accommodated within the voice-over of TV promotions. For instance, the following phrase “[Name of Service] is a competition/news alert/digital entertainment subscription service that costs €x per week” would meet the requirements of Sections 4.15 and Section 4.22 of the *new Code* and are not burdensome. This matter is discussed in further detail in the RIA.

Other Matters Raised in Responses

- 4.48 Some of the responses received to Section 4 of the *revised draft Code* included some broad statements that were unsupported. ComReg considers it necessary to address a number of such statements, as they apply to Section 4 of the *revised draft Code*.
- 4.49 The IPPSA/Modeva alleged that ComReg failed to present any statistics relating to the period in which it has regulated the market which would support the proposed measures. ComReg publishes quarterly statistics²⁴

²⁴ (a) During the period July to September 2010, end-users raised 2,962 PRS-related issues with ComReg http://www.askcomreg.ie/about_us/july_to_september_2010.370.LE.asp

(b) During the period October to December 2010, end-users raised 2,874 PRS-related issues with ComReg http://www.askcomreg.ie/about_us/october_to_december_2010.372.LE.asp

(c) During the period January to March 2011, end-users raised 2,959 PRS-related issues with ComReg http://www.askcomreg.ie/tell_us/statistics_for_january_2011_to_march_2011.385.LE.asp

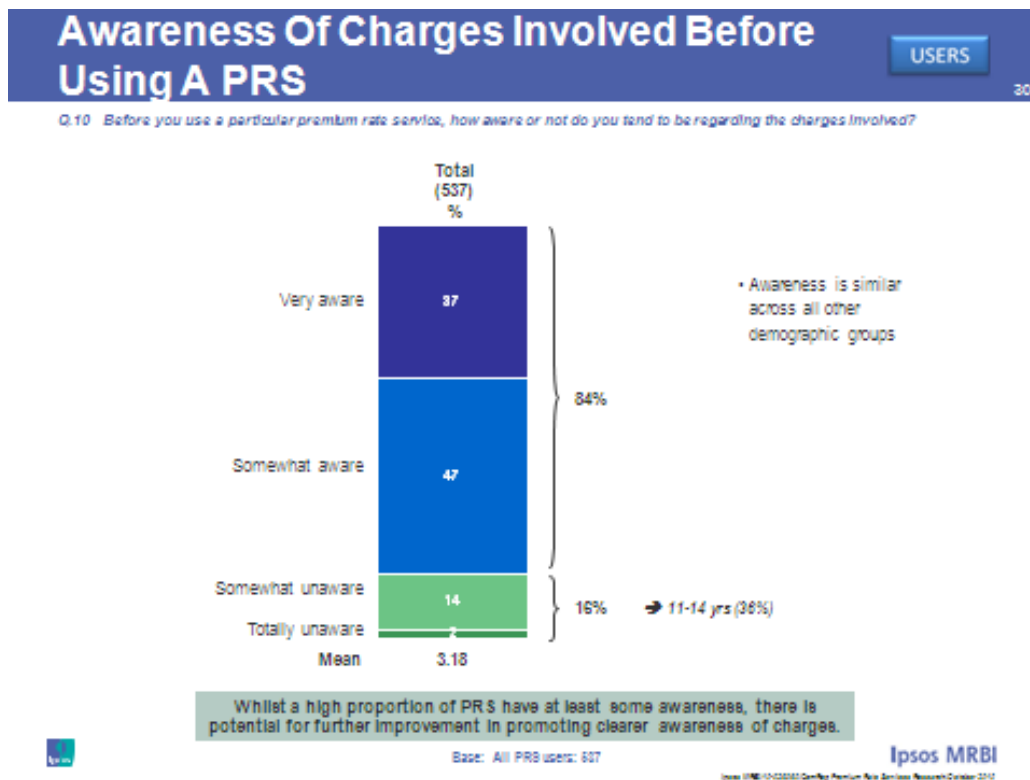
(d) During the period April to June 2011, end-users raised 2,524 PRS-related issues with ComReg http://www.askcomreg.ie/tell_us/statistics_for_april_2011_to_june_2011.386.LE.asp

based on issues raised with its Consumer Management Team by end-users of PRS. These quarterly statistics are available on ComReg's consumer website, www.askcomreg.ie

- 4.50 It is clear from these statistics that Subscription Services are the predominant reason why end-users are contacting ComReg in relation to PRS. Within the total figures, the single most predominant reason given by end-users as a reason for contacting ComReg is denying that they subscribed to a subscription PRS. It is clearly untrue, therefore, that ComReg has failed to produce any statistics relating to the period in which it has regulated the market which would support the proposed measures.
- 4.51 The IPPSA/Modeva both submitted that ComReg had presented the results of its two 'limited surveys' in an un-objective manner and appeared to interpret the results with a bias that had been apparent in the previous consultations and prior to these surveys being conducted.
- 4.52 The IPPSA/Modeva also stated that:
- (a) ComReg's own research shows that 84% of respondents were aware of the charges for a PRS prior to using the service,
 - (b) only 2% of respondents were completely unaware and, as such, ComReg is proposing to introduce draconian measures to satisfy a small minority of consumers who are not representative of the "average consumer", and
 - (c) based on ComReg's research, only 16% of PRS end-users were not aware of the cost of a PRS and the increased price transparency requirements would therefore have limited benefit.
- 4.53 Initially, it should be noted that the allegations relating to bias were not substantiated in the submissions. Further, ComReg considers it necessary to analyse the presentation of these statistics and the conclusions that the IPPSA/Modeva have drawn. The figures originate from a survey conducted by Ipsos MRBI²⁵ for ComReg and, in the interests of clarity and accuracy, the slides and graphs, which illustrate the survey results, and the conclusions drawn by Ipsos MRBI, are reproduced without amendment below.
- 4.54 The IPPSA/Modeva's claim that 84% of respondents were aware of the charges for a PRS prior to using that service, is derived from the following slide:

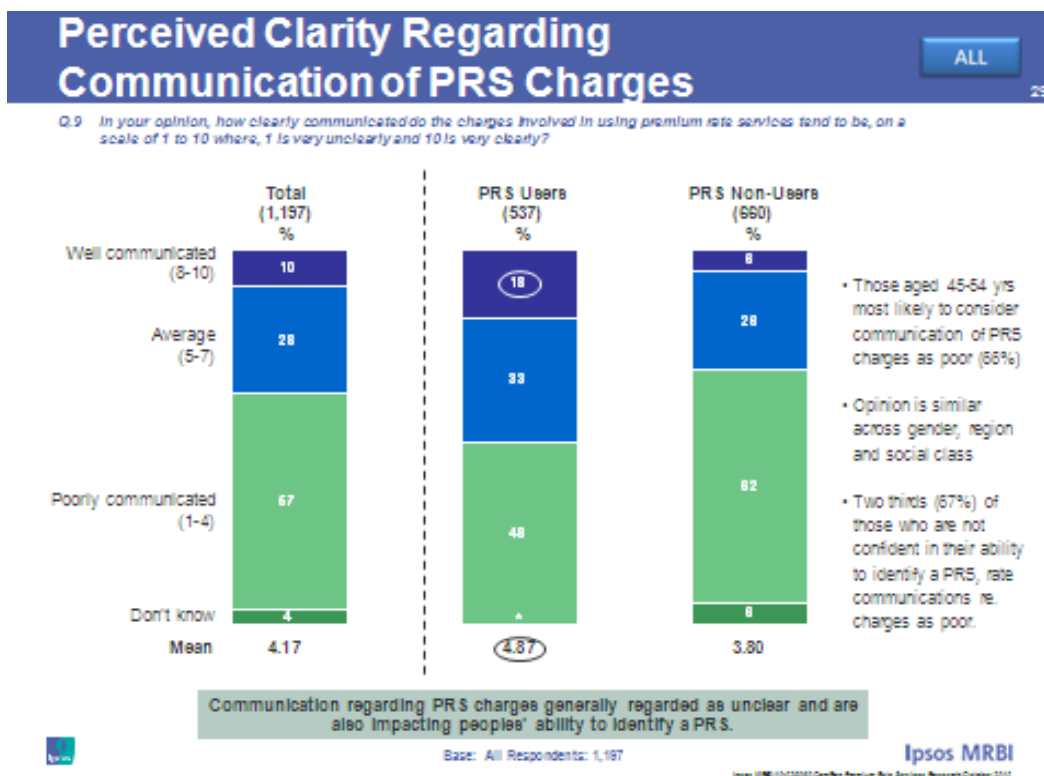
²⁴(e) *During the period July to September 2011, end-users raised 2,935 PRS-related issues with ComReg*
http://www.askcomreg.ie/tell_us/consumer_queries_and_complaints_statistics.180.LE.asp

²⁵ *Ipsos MRBI PRS Research – Presentation of Findings of Quantitative Phase Oct 2010, published as Annex A to ComReg's response to Consultation 11/51*
<http://www.comreg.ie/fileupload/publications/ComReg1151a.pdf>



It should be noted, however, that the figure of 84% cited by the IPPSA/Modeva as being the percentage of respondents that were aware of the charges for a PRS prior to using that service, is not a homogenous group as 47% of all respondents only claim to be somewhat aware of the charges. Similarly, ComReg considers that it is overstating matters to conclude, as the IPPSA/Modeva did, that as only 16% of respondents claimed they were not aware of the costs of a PRS, increased price transparency requirements would have limited effect. Conversely, the conclusion reached by Ipsos MRBI and included at the bottom of the page states “*Whilst a high proportion of PRS end-users have at least some awareness, there is potential for further improvement in promoting clearer awareness of charges*”.

- 4.55 It is also worth highlighting some other findings from the survey, which indicate that there is a substantial case for improving the price clarity of PRS since 57% of respondents considered premium rate charges to be poorly communicated.



- 4.56 A finding not highlighted in the submissions from the IPPSA/Modeva, is that over one third of those surveyed were not confident in their ability to identify a PRS i.e. they could inadvertently use a PRS without being aware that there is a cost involved. With a substantial cohort not confident in their ability to identify a PRS, and 39% of those surveyed being unaware that they can be charged for receiving an SMS (as opposed to sending one), it is not surprising that, typically, about 40% of PRS-related issues raised with ComReg are end-users denying that they subscribed to a PRS.
- 4.57 The conclusions drawn by Ipsos MRBI from the quantitative survey included:
- Over one third (37%) of the population does not feel confident in their ability to identify a PRS (this tends to be higher amongst females and those aged 25-34years), and
 - “Communication regarding PRS charges is generally considered unclear and is also impacting peoples’ ability to identify a PRS”. In addition, only 37% of end-users are fully aware of the charges involved before using a PRS.
- 4.58 ComReg believes that having carefully considered the responses to the latest Consultation and the relevant legislative requirements, the amendments it has made to Section 4 of the *new Code* are reasonable, proportionate and justified. ComReg considers that the provisions of Section 4, also allows the PRS provider to promote its services in a manner it sees fit, while ensuring that the end-user’s interests are protected.

5. Chapter 5 of the Revised Draft Code of Practice - Provisions Relating to the Operation of Subscription Services

The Consultation Issues:

Positive Confirmation to Enter a Subscription Service

- 5.1 In its initial consultation on the *draft Code of Practice* (ComReg Document 10/92a²⁶) and as noted in Section 4 of this document, ComReg highlighted that Subscription Services, which impose a recurring charge on end-users, were the primary PRS-related reason for consumers to contact ComReg. In addition, ComReg expressed its concern with the alarmingly high number of consumers denying that they had consented to subscribe. This pattern has continued since and, consequently, in its second consultation on the *revised draft Code* published on 22 July, 2011 (ComReg Document 11/51), ComReg set out its rationale for proposing to introduce a requirement for consumers to positively confirm their intention to agree to accept recurring charges.
- 5.2 The rationale for including the requirement for consumers to provide positive confirmation of their willingness to accept recurring charges, referred to as a “double opt-in”, was articulated under the following category headings:
- (a) Statistical Evidence,
 - (b) Protections Offered to Consumers under the Distance Selling Regulations,
 - (c) Alleged Confusion for End-users,
 - (d) Proof of End-users Acceptance of Charges,
 - (e) End-user Apathy,
 - (f) “Double Opt-In” above a Particular Price Point, and
 - (g) International Experience.
- 5.3 The purpose of comprehensively setting out the proposal of introducing a “double opt-in” in ComReg Document 11/51 was to illustrate that:
- (a) there is sufficient and verifiable evidence of consumer harm to warrant enhancing consumer protections,

²⁶ ComReg Consultation of a Code of Practice for Premium Rate Services
http://www.comreg.ie/fileupload/publications/ComReg_1092a.pdf

- (b) similar protections are available to consumers who subscribe using different payment methods e.g. credit card and debit card, PayPal and app purchases,
- (c) it is possible that there is more than one interpretation of the results of the IPPSA-commissioned report²⁷ which formed part of the IPPSA's submission to ComReg Consultation 10/92a. As such, ComReg does not consider that there is conclusive evidence to support the allegation that a "double opt-in" mechanism will confuse or irritate end-users or will result in end-user apathy and lead to a spectacular fall off in subscription confirmations,
- (d) there is currently a distinct lack of verifiable and auditable evidence available to ComReg to unequivocally determine, in all cases and investigations, that the consumer has provided informed consent to be charged for the PRS,
- (e) requiring the "double opt-in" requirement to apply above a particular price point (e.g. £3.83 ex VAT as in the UK) was not considered an appropriate measure for the Irish market, at this time, and
- (f) the introduction of a "double opt-in" requirement is not some draconian measure being pioneered in Ireland but is, in fact, a widely-operated policy across most European jurisdictions and considered a fundamental consumer protection measure.

Standardised Regulatory Information Messages

- 5.4 PRS providers are currently required to provide free information messages to end-users after an end-user has:
- (a) subscribed to a subscription PRS (the "Welcome Message"),
 - (b) spent €20 on the PRS (the "Spend Reminder Message"), and
 - (c) unsubscribed from the PRS (the "Unsubscribe Message").

With the proposal to introduce a requirement for end-users to positively confirm their intention to subscribe (the double opt-in) there would be resulting requirement to provide end-users with an additional regulatory message, prior to them subscribing to the PRS. This additional regulatory message would set out all material information that is necessary for the end-user to make an informed transactional decision.

- 5.5 In light of the experience gained from regulating the industry to date, ComReg considered it necessary to prescribe the precise text for regulatory information messages. Some current industry practices make it difficult for end-users and ComReg to differentiate between the various regulatory messages. The impact of the ambiguity in the content of regulatory

²⁷ *Ippsa Submission to ComReg Consultation 10/92a, Appendix 2*
<http://www.comreg.ie/fileupload/publications/ComReg1151s2.pdf>

messages make it extremely difficult for end-users of PRS to determine whether:

- (a) they have just received a promotional message inviting them to subscribe to the PRS,
- (b) they have already subscribed to a PRS and have received the “Welcome Message”, or
- (c) they have received a “spend reminder message” after incurring €20 charges on the PRS.

5.6 The following are examples of direct marketing promotions for a subscription PRS, “welcome messages” and “spend reminder messages”, which were sent to end-users of the PRS after they had spent €20 in the PRS. It is obviously a challenge to determine the precise purpose of each message and ComReg considers that providing end-users with standardised regulatory information messages will greatly enhance transparency and ultimately enhance consumer confidence in PRS. The identification of each message type is included as a footnote and since these messages are representative of current industry practices, ComReg has “anonymised” the PRS provider’s identity and the name of the PRS:

- *[Name of Service] - Play for Great Prizes Anytime! This is a subscription and costs 4 euro a week. 18s+SP [PRS provider’s name and helpline number] .Unsubscribe? Send stop to 57XXX. Data charges may apply²⁸*
- *Want credit every month? OK, but only when you're subscribed(40€/month) to [Name of Service]:- see other texts for info and/or just text us stop to 5XXXX to unsubscribe²⁹*
- *[Name of Service] - Play for Great Prizes Anytime! This is a subscription and costs 4 euro a week. 18s+SP [PRS provider’s name and helpline number].Unsubscribe? Send stop to 57XXX. Data charges may apply³⁰*
- *FreeMsg: [Name of Service] is a subscription service and costs 4 euro a week. Helpline [PRS provider’s name and helpline number]. Unsubscribe? send stop to 5XXXX³¹*
- *FreeMsg: [Name of Service]- Play for Great Prizes anytime! This subscription costs €4 a week. 18s+ SP [PRS provider’s name and*

²⁸ This is the “Welcome Message” that is intended to set out the material information immediately after the end-user has subscribed to a PRS. It does not inform the end-user that they have in fact subscribed, which may result in an unsuspecting end-user, who may have inadvertently subscribed, unknowingly remaining subscribed to the service.

²⁹ This “Spend Reminder Message” was sent to a subscriber to the PRS after the end-user, who was subscribed to the PRS had spent €20 on the service.

³⁰ This is a “Promotional Message” that was sent to an end-user that was not subscribed to the PRS at the time. Note the identical text to the message sent to the end-user after they had subscribed to the PRS.

³¹ This “Spend Reminder Message” was sent to a subscriber to the PRS after the end-user had spent €20 on the service.

helpline number]. Unsubscribe? Send stop to 57XXX. Data charges may apply.³²

- 5.7 ComReg was understandably concerned that instead of clearly and unambiguously providing end-users with material information, regulatory information messages could serve to confuse end-users. For this reason, it was considered necessary and proportionate to propose the precise text for the various regulatory messages. ComReg also considers that clear and standardised regulatory messages will benefit the PRS industry as a whole as these messages should enhance end-user understanding and trust in PRS.
- 5.8 ComReg also proposed that all regulatory messages be provided by SMS. At present, some PRS providers send regulatory information messages via “WAP-push messages” which may, as a result of technological developments, not display on all handsets, particularly smartphones. This may result in the end-user being unable to view important material information or be in a position to retrieve the information from their handset to refer back to it at a later time. ComReg considered it entirely appropriate that regulatory messages are provided in a durable format irrespective of handset model and the only current means of guaranteeing this is via SMS.

Other Provisions Relating to the Operation of Subscription Services

- 5.9 ComReg set out provisions in relation to how PRS messages which were not successfully delivered should be treated in Sections 5.23 and 5.24 of the *revised draft Code*. ComReg stipulated that the end-user should not be charged if the message fails to deliver, and, if the message is part of a Subscription Service, then the PRS provider should not attempt to redeliver the message outside the original charge period. Finally, ComReg proposed that if no PRS messages are delivered for forty consecutive days, the end-user should be unsubscribed from a Subscription Service.
- 5.10 In Sections 5.25 to 5.29 inclusive, ComReg proposed provisions which relate to how end-users should be allowed to unsubscribe from a PRS. In summary, ComReg proposed that end-users of subscription PRS should be able to unsubscribe at any time from a PRS by sending the word “STOP” in an SMS to the shortcode used to charge the end-user. End-users should not incur a premium rate charge to unsubscribe from a PRS. ComReg also proposed that PRS providers should treat any SMS containing the word “STOP” sent to a shortcode as the end-user’s indication as a wish to be unsubscribed.

³² This “Spend Reminder Message” was sent to a subscriber to the PRS after the end-user had spent €20 on the service. Note that the end-user is not informed that they are, in fact, subscribed to the PRS, which may result in unsuspecting end-users, who may have inadvertently subscribed to the PRS, unknowingly remaining subscribed to the PRS.

- 5.11 In Sections 5.30 to 5.32 inclusive, ComReg proposed provisions relating to how PRS providers should treat a “STOP” request from an end-user, who is subscribed to multiple PRS that operate on the same shortcode.
- 5.12 Accordingly, ComReg posed the following question with respect to Section 5 of the *revised draft Code*, pertaining to “Provisions Relating to the Operation of Subscription Services.”

Q. 3. Do you agree with the draft provisions relating to the operation of Subscription Services as set out in Section 5 of the revised draft Code? Please provide reasons to support your position.

- 5.13 In order to address the issues raised in the responses received in a logical manner, ComReg will firstly address the issues of introducing the requirement for a “positive confirmation” (double opt-in) and then address the issues raised in respect of how Subscription Services should operate.

Positive Confirmation to Enter a Subscription Service

Views of Respondents

- 5.14 There was broad disagreement from most respondents from the PRS industry to the proposal to introduce the requirement for end-users of PRS to provide “positive confirmation” of their intention to subscribe to a PRS with a recurring charge. There was however, support for the proposal throughout the consultation process from some PRS providers, consumer groups, the NCA and the ODPC.
- 5.15 O2 submitted that subscription PRS have traditionally been based on SMS technology but, with the penetration of *mobile smartphones*, SMS will no longer be the chosen method of subscription. As such, the *revised draft Code* appeared to be drafted solely for SMS-based PRS and O2 expressed concerns that as PRS move towards “app-based” services, the need for SMS diminishes and the provisions of the revised Code would be obsolete and place an unnecessary burden on industry to comply. O2 cited the example of consumers that sign up to Sky’s mobile TV service “*do not cancel their subscription by sending an SMS with “a “STOP” command to a shortcode (nor should they).”* O2 added that it believed that services that require the consumer to subscribe, that do not use SMS, should not be forced to use the Subscription Request Message, as set out in Section 5.15, which is sent by SMS and to which the end-user must respond by SMS.
- 5.16 Vodafone submitted that “there is only a need to have strict regulation in the promotion of competition Subscription Services” and that “*“Double opt-in” cannot produce any more evidence of opt-in than the current model.*” Additionally Vodafone states the introduction of a ““positive confirmation” step will compromise the “user experience” and “this additional wait time will impact demand, usage and take up of services” and could have a detrimental effect on the PRS industry. Finally, Vodafone highlighted that it

has made changes to its 'Payaware' system that can provide "any information required to prove use of the service".

5.17 The IPPSA/Modeva submitted that they strongly disagreed with ComReg's proposed introduction of a positive confirmation requirement for Subscription Services on the basis that:

- (a) ComReg has based its proposals on "questionable data",
- (b) the proposed measure exceeds what is required to ensure that the "average consumer" is adequately informed and, as a result, is disproportionate,
- (c) the proposed measure will cause devastating harm to both consumers and PRS providers,
- (d) ComReg has not considered alternative options to the proposed measures, and
- (e) ComReg has provided misleading information about the application of the requirement for a "positive confirmation" in other countries.

5.18 Zamano/IPPSA submitted that the positive confirmation methodology is obsolete as it takes no account of the user flows and information provided by the most common forms of sign-up, namely the fixed and mobile web. Most PRS providers using web advertising use a PIN sign-up mechanism which involves:

- (a) an end-user submitting their mobile phone number online,
- (b) the PRS provider sending a PIN via SMS to the end-user's phone, and
- (c) the end-user entering the PIN online to commence the subscription.

Zamano/IPPSA contended that the need for an affirmation SMS is contrary to good end-user experience and is completely at odds with the experience most people are now used to when purchasing applications within app stores.

5.19 Ericsson IPX disagreed with the proposal to require positive confirmation from the end-user, stating that a single SMS from the end-user followed by another from the PRS provider is "*more than sufficient where a user sees a service that is clearly advertised in Print or in other media*". Ericsson IPX added that:

- (a) requiring end-users to exit "the mobile web/web to check and send SMS is likely to ruin the end-user mobile web experience and flow and destroy innovation in the sector",
- (b) a single MO (i.e. an SMS sent from the end-user's handset) is sufficient in the UK when a service is clearly promoted and costs less than £4.50 per week, and
- (c) requiring a positive confirmation step in all cases is unnecessary and disproportionate and places an unnecessary burden on the majority of well-meaning companies.

- 5.20 AIME/Dialogue/FDX/Magnum also disagreed with the measures proposed in respect of the requirement for a positive confirmation on the grounds that the positive confirmation step does not address the objective of protecting the interests of end-users, which are best served by encouraging competition and service innovation amongst PRS providers. These companies suggest that ComReg should undertake further research to better understand the nature of the subscription market and the implications of the provisions in the proposed *revised draft Code* in a more scientific manner.
- 5.21 Modeva submitted that it considered it inappropriate and discriminatory that Subscription Services delivered via WAP would be required to include the shortcode for the services, a description of what the link contains, the name of the Subscription Services and details of the PRS provider's helpline.
- 5.22 The submission from the Sligo Community Alliance represented a consumer perspective and suggested that the requirement to provide positive confirmation should be expanded *"to include the placing of an obligation on the Operator [read PRS provider] to provide something of like value for money taken. In all cases of exploitation the Operators are taking money in return for nothing and it is totally unacceptable that that situation should be allowed to continue. Operators at present can legally charge for "membership" alone and this must be outlawed."*
- 5.23 The Sligo Community Alliance, while strongly agreeing with the requirement to provide a positive confirmation, also reflected a level of anger and frustration that exists among some sections of the population. The submission further suggested that the text of the Purchase Confirmation Message, to which end-users must respond to provide their positive confirmation, should be amended to read as follows:

"You have replied to our ad for This is what is known as a "subscription service" It means that should you agree to join the service a charge 0/ €x will be automatically taken from your call credit every x days until you text stop to xxxxx There is no obligation on the Operator to provide anything in return for the money taken. Text "agree" to xxxxx if you wish to proceed"

- 5.24 The submission received from the ODPC importantly highlighted a recent change in data protection legislation which impacts on the PRS industry. Considering the legal importance of this submission, it is considered appropriate to include the full text as submitted:

"In our previous submission, we indicated our full support for the proposal from ComReg that it should consider the introduction of a "double opt-in" requirement for entry into Subscription Services. In that regard, we now welcome the provisions contained in Sections 5.9 to 5.19 inclusive.

In our previous submission we also stated that "it would appear essential that a service provider abide by the principle of positive end-user consent in order to be able to defend themselves in any proceedings which may arise for an offence under Regulation 13 of S.I. 535 of 2003 (as

amended). In that regard, it should be noted that Regulation 13(9C) of S.I. 535 of 2003 (as amended) places the onus on the defendant of establishing that a subscriber consented to the receipt of an unsolicited communication or call. The double opt-in requirements for Subscription Services would be of considerable value to a service provider who found themselves in the position of having to defend themselves in such proceedings.” In the meantime, the Statutory Instrument referred to above has been revoked by the Minister for Communications, Energy and Natural Resources and it has been replaced by S.I. 336 of 2011. Regulation 13(14) of S.I. 336 of 2011 is as follows:

*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.*

The insertion of the word ‘unambiguously’ in the text above in relation to consent has significant consequences. The intention of its inclusion is to ensure that informed consent has been given by the subscriber or user concerned, that a record of that informed consent and how it was obtained has been kept, and that a copy of that informed consent is available if required during prosecution proceedings before a court. In the matter of a prosecution in relation to PRS and the specific issue of whether the subscriber or user had given consent to the service provider concerned, it now appears essential under this Regulation that the service provider produce evidence of a double opt-in in order to demonstrate that the “subscriber or user concerned unambiguously consented to receipt of the communication.” The implementation of the provisions contained in Section 5 will assist service providers in that regard. At the same time, they will greatly enhance the user’s experience in relation to premium rate services.”

ComReg’s Position

- 5.25 In relation to O2’s submission that the *revised draft Code* was drafted solely for the SMS-based PRS and the advent of “app-based” services would render the *revised draft Code* obsolete, ComReg would like to highlight the following issues:
- (a) that the revised draft Code was drafted to meet the requirements of the current PRS market and it creates a basis that can evolve to meet future market developments,
 - (b) it is not valid to cite Sky’s mobile TV service, which does not require consumers to send a SMS with the STOP command, as a valid comparison for PRS since this is classified as an “On Demand Audiovisual Media Service³³”, which has specifically been exempted from

³³ On Demand Audiovisual Media Services has the meaning assigned to it by Regulation 2 of the European Communities (Audiovisual Media Services) Regulations, 2010 (No 258 of 2010)

PRS regulation. Nonetheless, ComReg recognises the purpose of O2's argument but reiterates that the revised draft Code was drafted to address the issues facing the current PRS market and ComReg is committed to advancing the Code to address future developments,

- (c) in respect of unsubscribing from a PRS, the provisions of Section 5.25 of the *revised draft Code*³⁴ provided that an end-user must be permitted to unsubscribe from a Subscription Service at any time without incurring further premium rate charges. It is widely established practice that PRS providers, as reflected by the provisions of Section 5.25 of the revised draft Code, routinely unsubscribe end-users from their PRS on the basis of a phone call from either the end-user or ComReg, acting on behalf of the end-user. In such circumstances, there is no requirement for the end-user to send a "STOP" instruction via SMS. In addition, the text of Section 5.26 of the new Code has been amended to state:
- (d) "Where a shortcode is used to charge the end-user of a PRS, the PRS Provider must provide the end-user with the opportunity and information on how to unsubscribe from the service by sending the word "STOP" in an SMS to the shortcode used to charge the end-user of the Subscription Service. The shortcode to be used to unsubscribe from the service must be consistent through promotions, subscription requests, regulatory reminders, etc.shortcode"

It is clear therefore, that if a shortcode is not used to charge the end-user of the PRS, then this clause cannot apply but the obligation on the PRS provider, as set out in Section 5.25, to permit the end-user to unsubscribe at any time without incurring further premium rate charges, still applies and can be met by alternative means to the end-user sending an SMS.

5.26 In relation to Vodafone's submission that the "*double opt-in cannot produce any more evidence of opt-in than the current model*", ComReg would like to make the following observations:

- (a) There are currently several methods of subscribing to a PRS, including:
 - (i) the end-user sending an SMS in response to a PRS promotion (in the print media, or in TV or radio),
 - (ii) the end-user clicking on a link (url) or "button" in response to a direct promotion sent to their mobile handset,
 - (iii) the end-user clicking on a link (url) or "button" in response to a PRS promotion during a mobile web-browsing session, or
 - (iv) the end-user entering their mobile phone number online in response to an online promotion. The end-user subsequently receives a PIN to their mobile handset, which they then enter online to complete the subscription.

³⁴ Previously Sections 11.13.3 and 11.13.4 of the Regtel Code of Practice

- (b) At present, it is not possible for ComReg to categorically determine in all cases that an end-user did in fact subscribe to a PRS. In cases where an end-user denies that they subscribed to a PRS, ComReg obtains details of the date, time and method of subscription (i.e. by sending an SMS, clicking on a link or entering their mobile number online) from the relevant PRS provider. The records from the PRS provider may however, be difficult, if not impossible to substantiate, for example:
- (i) Where the PRS provider claims that the end-user subscribed by clicking on a button during a web-browsing session using their mobile handset, this assertion is often supported by citing an IP address, presumably in an effort to support the veracity of a positive subscription. Recent investigations by ComReg have clearly demonstrated that it is not possible for MNOs to determine if one of their customers was browsing a particular website on their mobile handset at the time alleged by the PRS provider. In fact, MNOs have confirmed that they cannot provide reliable assurance that a particular IP address is associated with a particular mobile number. This is because there are not enough IP addresses available to give each user a public (fixed) IP address and IP addresses are dynamically assigned and shared among mobile users as required,
 - (ii) If the PRS provider alleges that the end-user subscribed by entering their mobile phone number online and confirmed their intention to subscribe by entering the PIN that they received to their mobile handset, ComReg has discovered that, more often than not, it is impossible to categorically establish the veracity of the PRS provider's records in the face of steadfast denial of subscription by an end-user. The purpose of the PIN is to ensure that only the end-user, whose mobile phone number has been entered online, will be subscribed to the PRS. In the course of investigating end-user complaints, ComReg has gone to considerable lengths to find evidence that would either corroborate or refute the records that the PRS provider submits to ComReg during the course of an investigation. ComReg's experience is that, in the majority of cases, where the PRS provider alleges that the end-user subscribed through the online/PIN method, the IP address(es) submitted to support this claim are dynamic IP addresses assigned by the end-users Internet Service Provider (ISP). Additionally, it is entirely possible for an end-user to access a website through a Wi-Fi hotspot or through their work PC thereby ensuring that the IP address is in no way related to the individual that the PRS provider may allege has subscribed via the web (or mobile web),
 - (iii) it is also possible that an end-user may submit their mobile phone number online but decide not to proceed to enter the PIN that they subsequently receive to their mobile handset from the PRS provider. ComReg is unable to definitively determine whether, in fact, the end-user had proceeded to enter the PIN to confirm their

intention to subscribe. Conversely, where the end-user does enter the PIN that they receive, ComReg is equally unable to make a definitive determination that the end-user did subscribe which could be to the detriment of either the end-user or the PRS provider.

- (iv) It is clear, therefore, that in the case of PRS subscriptions initiated through the internet, even with the use of the PIN mechanism, the PRS provider alone holds the information on how an end-user subscribed. This information cannot be audited by ComReg, or another party, involved in the provision of the PRS, and in the absence of an reliable audit trail, is, therefore, not sufficiently robust to demonstrate whether an end-user subscribed to a PRS.
- (c) ComReg notes that there are recent technological developments in the area of PIN opt-in, which involves the inclusion of a third-party (outside of the PRS provider and the end-user) to verify that the end-user did, firstly submit their mobile phone number online and, secondly submit the PIN that they received. ComReg will be pleased to engage with industry to discuss such developments and, as previously stated, will consult in the future on amending discrete sections of the *new Code* to address technological advancements, provided that there is no lowering of end-user protections provided in the *new Code*.

5.27 In light of the above, ComReg contends that requiring end-users confirm their intention to subscribe by sending an SMS to a shortcode will ensure that a record is created with their MNO. While the MNO will not be able to determine the content of the SMS, it will nevertheless be in a position to categorically determine if the end-user responded to a PRS promotion and the date/time of this response. Based on the information received from the MNO, ComReg will then be able to assess and analyse the PRS provider's records to establish the content of the SMS thus establishing a significantly more robust audit framework for investigating consumer complaints than that which currently exists.

5.28 With regard to the IPPSA/Modeva's submission that ComReg has based its proposals on "*questionable data*", the following points are relevant:

- (a) the statistics from ComReg's Consumer Care Centre clearly demonstrate that subscription PRS continue to raise a disproportionate number of consumer issues, relative to both the PRS sector and the wider telecoms sector. As previously set out in both consultation documents³⁵ on the Code, the Minister for Communications, Energy and Natural Resources clearly set out the reason for placing the regulation of PRS on a statutory footing, stating "There is right and real anger from the public in relation to premium rate text and phone services. This is a significant issue of consumer concern as children especially are inadvertently running up large bills on their mobile phones. Essentially, they are subject to a scam. Tighter regulation of

³⁵ ComReg's consultation documents 10/50 and 11/51

this sector is required in order to ensure the Irish consumer is not exploited". Prior to the transfer of regulatory responsibility to ComReg, the previous regulatory body, RegTel, similarly reported that subscription PRS were the overwhelming cause for consumer complaints. As such, it would seem that one of the significant reasons behind the Government's decision to place regulation of the PRS sector on a statutory footing is the current practices relating to subscription PRS.

- (b) this public concern has not dissipated and it is clear that the on-going practices regarding subscription PRS are continuing to raise alarm and discontent in the public as evidenced by the recent Parliamentary Question³⁶ from Mr Patrick O'Donovan T.D., who asked to the Minister for Communications, Energy and Natural Resources;

"if his attention has been drawn to practices (details supplied) within the mobile telephone industry; if he is satisfied that the area is adequately regulated; and if he will make a statement on the matter.

"Companies operating sending SMS text messages to unsuspecting people, who when they open the text find that their mobile phone credit is substantially reduced."

- (c) in addition to considering the on-going consumer harm, which ComReg contends is irrefutable, in framing the provisions of the *new Code*, ComReg must also take account of:
- (i) the potential for harm that may be inherent in existing practices, and
 - (ii) the protections that constitute established practices in other retail sectors.

ComReg, therefore, considers that requiring end-users to positively confirm their acknowledgement of the charges for a subscription PRS and willingness to accept them, is proportionate, logical and necessary in the current PRS market.

5.29 The IPPSA/Modeva's contention that the requirements of the *revised draft Code* exceeded what is required to adequately inform the "average consumer" is addressed comprehensively in Section 4 above and it is ComReg's view that the amendments to how subscription PRS operate, which would require end-users to unambiguously confirm their intention to subscribe, is consistent with the *UCPD* and Data Protection legislation. It is, therefore, not accepted that the provisions exceed the requirement to inform the "average consumer".

5.30 The IPPSA/Modeva repeatedly stated throughout their submissions that the proposed measure to require end-users to unambiguously confirm their

³⁶ <http://debates.oireachtas.ie/dail/2011/11/15/00264.asp>

intention to subscribe would cause devastating harm to both consumers and PRS providers. ComReg does not accept this position on the basis that:

- (a) no compelling evidence has been provided to suggest that consumers are opposed to the requirements,
- (b) ComReg notes that it is not prohibiting the public from engaging with and subscribing to these services as might be inferred from the IPPSA/Modeva submissions but are merely ensuring that end-users are happy to proceed to purchase on the basis of informed consent, and
- (c) the basis for the allegation that the proposed measures will devastate the industry, is based on a limited experiment on a single PRS, operated by Modeva, trading as InkRed. The service that was chosen to trial the impact of the requirement for a positive confirmation is called Prizeclub and is widely promoted on TV (during advertisement breaks for the “X-Factor” and “I’m a Celebrity”) and online³⁷. The results of the experiment carried out under the draft proposals using this PRS demonstrated that almost 98% of consumers chose not to proceed to subscribe when presented with the clear terms and conditions in an SMS to their handset. Far from demonstrating conclusively that the proposed measures will devastate the industry, ComReg believes there are alternative conclusions that could also be drawn from the results. For instance the result could indicate that the proposed measures may impact this particular PRS, but interrupted “user flow” cannot definitively be cited as a reason for end-users not to subscribe to this PRS and the results cannot be extrapolated to provide insight into consumer attitudes to all subscription PRS. This is further discussed in Section 9 below.

5.31 In respect of considering alternatives to the proposed measures for end-users to provide positive confirmation of their intention to subscribe, ComReg would like to highlight the following:

- (a) it is an offence, as per Section 13(b) of the PRS Act, for a PRS provider to impose a charge in respect of a PRS, for supplying a PRS to an end-user that was not requested by the end-user. As mentioned above, ComReg’s experience to date regarding complainants of subscription PRS is that many end-users do not accept that they subscribed to the PRS. The requirement of the positive confirmation will assist PRS providers in demonstrating that the PRS was in fact requested by the end-user. If the end-user has, in fact, provided positive confirmation, while this alone will not determine the matter, it will provide a more robust form of evidence that does not currently exist.
- (b) ComReg has also given careful consideration to the proposal from the IPPSA/Modeva that requiring end-users to provide positive confirmation to subscribe to a PRS should only apply to PRS that charge above a

³⁷ <http://www.prizeclub.ie/>

certain price threshold, as is currently required in the UK (where only subscription PRS costing over £4.50 per week are required to have end-users confirm their intention to subscribe). ComReg does not consider that a similar provision is appropriate for the Irish PRS market at this time for the following reasons:

- (i) Based on ComReg experience over the preceding months, 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.
- (ii) 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.
- (iii) As set out in Section 5.32 below, 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.
- (iv) 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 indicating difficulty in identifying a PRS mitigates the suitability of a price threshold for double opt at this time.
- (v) The issue of a price threshold will be kept under review and ComReg will monitor developments in the market once the new Code is in place and may revisit the appropriateness of a price threshold above which positive confirmation is required.

5.32 In Consultation 11/51, ComReg used the analogy that the absence of the requirement for the end-user to provide unambiguous, positive confirmation to subscribe to a PRS was akin to not having a "cooling off" period, as provided for in the Distance Selling Regulations³⁸, for subscription PRS contracts. ComReg has given close and careful consideration to the IPPSA/Modeva's submission that proposes that end-users would be permitted to subscribe to a PRS but not incur any charges during an initial "cooling-off" period. Current market practices indicate that of the 136

³⁸ *European Communities (Protection of Consumers in Respect of Contracts made by means of Distance Communication) Regulations, 2001*

subscription PRS³⁹ currently available in Ireland, 41% operate with an initial joining fee, whereby the end-user incurs a charge immediately on subscribing. Therefore, having cognisance for current market practices, ComReg considers that the introduction of a “cooling off” period is not sufficient grounds to remove the requirement for an end-user to provide positive confirmation of their intention to subscribe and it is appropriate to have a single set of requirements for all PRS, at this time. This, of course, does not prohibit any PRS provider from introducing a “cooling-off” period, where no charges are imposed on the end-user, at the commencement of a subscription.

- 5.33 ComReg has further consulted with Regulatory Authorities in other jurisdictions and it is clear that far from introducing some draconian and untried concept in the PRS industry, Ireland is actually behind other countries with the introduction of the requirement for end-users to provide positive confirmation to subscribe to a PRS. The table below augments the information previously set out in Consultation 11/51:

COUNTRY	2nd SMS - MO required?	COUNTRY	2nd SMS - MO required?
Australia	Y	Hungary	Y
Austria	Y	Italy	N
Belgium	Y	Netherlands	Y
Cyprus	N	Poland	Y
Czech Republic	Y	Portugal	Y
Denmark	Y	South Africa	Y
Finland	Y	Spain	Y
Germany	Y	Sweden	Y
Greece	Y	United Kingdom	Y

ComReg did not provide misleading information in relation to the requirement to provide positive confirmation to subscribe in other jurisdictions as two respondents submitted. ComReg clearly stated in paragraph 3.137 of Consultation Document 11/51 that the requirement to provide positive confirmation only applied for Subscription Services costing over £4.50 in the UK⁴⁰. The principle of informed consent is an obvious requirement in most jurisdictions. While in some jurisdictions (e.g. Germany, Sweden and the UK), technological developments have removed the requirement for the end-user to send an MO-SMS but, as set out above in this document, ComReg considers that the MO is currently the only verifiable method available to ComReg to confirm the end-user's unambiguous consent to be charged. In addition, the introduction of the requirement for end-users to provide positive confirmation to subscribe only over a certain

³⁹ 136 is the number of subscription PRS notified to ComReg in accordance with the PRS Regulations

⁴⁰ Page 42 - <http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

price threshold is also addressed above and is not considered appropriate for the Irish PRS market, at this time.

- 5.34 Several respondents highlighted 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. Several respondents cited the experience of purchasing “apps” as an appropriate comparison and such purchases are held up as a seamless user experience that subscribing to a PRS should emulate. It should be recognised that what is not stated in the submissions of the respondents objecting to the proposed requirements is that paying for “apps” involves several steps, requiring the consumers positive confirmation e.g. in the Android market when a consumer clicks on an app that has a cost attached to it (as opposed to a free app), then the consumer must:
- (a) first login to their registered account (usually an email account which requires the consumer to input their password), and
 - (b) after the password has been confirmed the consumer is brought to a second page where they are required to click on a button confirming that they wish to proceed with the purchase transaction.
- 5.35 Consumers must also proceed through similar multi-step validation processes to confirm their consent to accept charges in the Apple iStore, when making payments through PayPal (e.g. to make a purchase on eBay) or to make a payment with a debit/credit card. Therefore, introducing a requirement for an end-user to provide confirmation of their acceptance of charges for a subscription PRS is not out of step with practices required using other payment methods and would only bring the experience of subscribing to a PRS into line with established multi-step practices for other payment methods. Additionally, ComReg is not mandating positive confirmation for all purchases, which would include one-off purchases, only for Subscription PRS for the obvious reason that the potential costs justifiably warrant a level of precaution on behalf of the consumer.
- 5.36 ComReg has considered the submissions in relation to the end-user experience for subscribing to a PRS and still considers that the requirement to provide unambiguous, positive confirmation by sending an SMS is still required for the current PRS market. ComReg has, however, included an amendment to the Subscription Confirmation Message at Section 5.17 of the *new Code*, which retains the specific text to be included but now also allows for the inclusion of a link (url) to return the end-user to their browsing session, if required. In this manner, end-users may be returned to their browsing session as they would after purchasing an “app”. ComReg acknowledges that the “app” purchase process is more seamless than for PRS subscription purchases, nonetheless, ComReg does not consider that this alone makes the requirement for a positive confirmation overly burdensome.

- 5.37 As stated in ComReg Consultation 11/51 (Paragraph 3.133), ComReg considers that any network charges that an end-user will incur, by sending an SMS to confirm their consent to accept charges, are justified to provide verifiable evidence of the consumer's true intent. Such charges are not considered to be sufficient to adversely influence the end-user's decision to purchase.
- 5.38 ComReg welcomes the advent of Vodafone's "PayAware" system which ComReg understands will enhance transparency around the end-user's consumption of PRS by providing individuals with a personalised "portal" on their handset that will enable them to see what PRS they have purchased. Irrespective of the benefits that PayAware will provide to Vodafone customers, the matter of unintended subscription still remains. ComReg will be pleased to engage with Vodafone and industry to discuss such developments and, as previously stated, will consult on amending discrete sections of the *new Code* to address technological advancements, provided that there is no lowering of consumer protections provided in the *new Code*.
- 5.39 ComReg considers that Section 5.19 of the *new Code*, which requires that messages delivered via WAP as part of a Subscription Service must include certain details such as the shortcode for the service and the name of the Subscription Service, is justified on the basis that:
- (a) end-users are unable to reply to WAP messages. As such, end-users are not able to unsubscribe from a Subscription Service by replying directly to a WAP subscription message with the word "STOP" and for this reason the shortcode should be provided in the content of the message so that the end-user can create and send an SMS with the "STOP" command to the PRS provider, and
 - (b) depending on the end-user's handset, WAP messages may not be able to be stored in the messaging "Inbox" in the manner that SMS are and, therefore, the WAP message may not always be retrievable by the end-user to review the content at a later point.

For these reasons, ComReg considers that WAP messages sent as part of a subscription PRS should contain, at a minimum, the shortcode for the PRS and the name of the PRS, and have amended the obligations at Section 5.19, accordingly.

Prohibition on Subscribing to the Same Service More than Once

Views of Respondents

- 5.40 Eircom/Meteor suggested an amendment to Section 5.11 of the *revised draft Code* which prohibits PRS providers from subscribing a person to the same PRS more than once at the same time. Eircom/Meteor highlighted that a PRS provider would be unable to determine if the same person subscribed to a PRS using two different mobile numbers. The proposed amendment put

forward by Eircom/Meteor suggested prohibiting the subscription of a single mobile number to the same PRS more than once at the same time.

ComReg's Position

- 5.41 ComReg agrees with the logic of the proposed amendment from Eircom/Meteor. As such, ComReg has amended the text of Section 5.11 to prohibit the subscription of a single mobile number to the same PRS more than once at the same time, rather than prohibiting the subscription of the same person at the same time, taking into account that a person may subscribe using two different handsets with two different mobile numbers.

Regulatory Updates after €20 Spend

Views of Respondents

- 5.42 AIME/Dialogue/FDX/Magnum/IPPSA submitted that mandating SMS as the mechanism for providing regulatory updates is inappropriate and proposed that end-users should be informed using a technology that is most appropriate for the service which the consumer is using.
- 5.43 Eircom/Meteor submitted that "once-a-month" regulatory reminders unduly impacts on lower-value subscriptions, which may not incur a €20 spend within a calendar month and have not been shown to be the source of consumer harm. In addition, the requirement to provide monthly regulatory updates introduces technical complications to the established practices. AIME/Dialogue/FDX/Magnum/IPPSA also submitted that the monthly regulatory reminder is superfluous.
- 5.44 O2 submitted that the regulatory updates for Subscription Services, as set out in Sections 5.20 to 5.22 inclusive, are appropriate for traditional SMS-based PRS but, with the evolution of apps, PRS providers that do not typically have SMS capabilities are forced to implement these provisions adding complexity and cost to their service and placing them at a competitive disadvantage to those companies not bound by the Code e.g. Sky, Apple.
- 5.45 AIME/Dialogue/FDX/Magnum/IPPSA also proposed that the text of the Subscription Update Message, as provided in Section 5.22, should be reworded as it may confuse end-users by implying that the end-user has just subscribed to a PRS rather than being an update to an existing subscription.

ComReg's Position

- 5.46 ComReg does not accept the suggestion from AIME/Dialogue/FDX/Magnum/IPPSA that regulatory updates, as required, should not be provided through SMS but instead using a technology that is most appropriate for the service, which the end-user is using. ComReg has increasingly found, through its own monitoring of a range of services and through consumer complaints that some subscription PRS using WAP fail to display on all smartphone handsets. As such, end-users who may inadvertently subscribe to a PRS may also remain unaware that they have, in fact, have done so as they will,

in effect, receive nothing for the costs they incur. Such end-users will remain subscribed to a WAP-based PRS until such time as they examine a bill or realise that their call credit is reducing at a faster rate than expected.

- 5.47 ComReg does not consider that a notification in the terms and conditions in the footer of a promotion which states “*WAP required*” or “*Phone must be WAP enabled to use service*” is sufficiently well understood by an average end-user to permit the delivery of important regulatory information via WAP messaging, which may not display on the end-user’s handset. ComReg, therefore, considers that the provision of important regulatory information through a technology that is guaranteed to inform the end-user is both necessary and justified at this time.
- 5.48 ComReg accepts the merits of the submission from Eircom/Meteor that the provision of a regulatory reminder once per month would be particularly burdensome on low value subscription PRS. ComReg has, therefore, amended the text of Section 5.20 to remove the requirement to provide monthly regulatory reminders but has retained the requirement to provide reminders after each €20 spend, as currently exists.
- 5.49 As set out by ComReg above, when stating its position in relation to the requirement for end-users to provide a positive response to accept the charges for a subscription PRS, the requirements of the *new Code* are drafted in a way that addresses the PRS market as it currently exists in Ireland. ComReg will be willing, and would welcome circumstances where it would be considered appropriate to amend the *new Code* as new services emerge on the market and phone payment develops as a real and viable alternative payment method. However, the direct comparison of subscription PRS with subscriptions in Apps stores is not a valid comparison (as opposed to a one-off purchase) for the following reasons:
- (a) single purchases in App stores have at least a two-stage or three-stage purchase confirmation process, whereby
 - (i) the consumer must first click on the “buy” button (stage 1), then
 - (ii) they are required to log in to their account (stage 2), and
 - (iii) once logged in they are presented with an “invitation to purchase” which clearly sets out the price of the transaction and other material information, and requires the end-user to “click” to confirm their consent to be charged.
 - (b) where there is a subscription associated with an app, these tend to have a fixed cost attached, i.e. the consumer bears the cost “up front” at the outset of the subscription period in order to avail of the service. This is similar to an MO-based subscription, where the cost is borne at the outset by the subscriber and after a period has elapsed, the end-user can choose to resubscribe.
 - (c) the end-user has the option of controlling their spend on subscription apps, by ensuring that automatic subscription function is disabled on their phone. This protection does not exist for MT-billed subscription

PRS, where the control of charging the end-user rests with the PRS provider.

As such, ComReg appreciates O2's submission that the evolution of apps may prove a challenge to PRS providers but until this becomes viable ComReg considers that the provisions of the *new Code*, in respect to requiring a "*positive confirmation*" through the sending of an SMS, is required and is proportionate and reasonable for the current PRS market.

- 5.50 ComReg concurs with the submission from AIME/Dialogue/FDX/Magnum/IPPSA in relation to the text of the Subscription Update Message and a minor amendment has been made to clarify these issues in Section 5.22.

Unsubscribing from a PRS

Views of Respondents

- 5.51 Eircom/Meteor suggested an amendment to Section 5.26 which relates to how end-users can unsubscribe from a PRS by texting the word "STOP" to a shortcode. Eircom/Meteor suggested improving the clarity of Section 5.26 by amending the text to state that the "STOP" instruction should be sent to the shortcode used to charge the end-user of the subscription PRS.
- 5.52 AIME/Dialogue/FDX/Magnum/IPPSA stated in their submission that they considered the provisions of Section 5.26 of the *revised draft Code* to be technically impossible and suggested that ComReg should discuss the provisions at an industry forum prior to addressing it in a further Code review.
- 5.53 O2 stated that the provisions of Section 5.26 did not take the current situation into account and suggested that it would be more efficient to permit the cancelling of app-based services from within the app rather than sending the STOP command via SMS.
- 5.54 AIME/Dialogue/FDX/Magnum/IPPSA disagreed with the provisions of Section 5.28, which proposed that if any message sent to a shortcode contained the word "STOP" then the PRS provider must treat it as a request to unsubscribe.

ComReg's Position

- 5.55 ComReg agrees with the submission from Eircom/Meteor, which suggested amending the text of Section 5.26 that requires PRS providers to provide end-users with instructions on how to unsubscribe from the PRS by texting the word "STOP" to the shortcode used to charge the end-user of the PRS. This amendment is considered necessary as a worryingly high number of end-users who contact ComReg's Customer Care Centre report difficulty in unsubscribing from PRS. If end-users do not have access to billing records, they will be able to find out from their MNO the shortcode that is being used to impose charges on them and simply send the "STOP" command to that.

Currently, confusion can arise when PRS providers change the shortcode to which the “STOP” command must be sent from the shortcode that is used to impose the charges and the amended text of Section 5.26 in the *new Code* will address this issue.

- 5.56 ComReg does not accept the submission from AIME/Dialogue/FDX/Magnum/ IPPSA that the provisions of Section 5.26 of the *revised draft Code* are technically impossible and should be discussed at an industry forum prior to being implemented. Nonetheless, ComReg intends to host an industry forum as soon as possible so as to allow any queries relating to the *new Code* to be raised. ComReg believes that a positive working relationship with industry will benefit both the growth within the industry and end-user protection. ComReg is committed to fostering a strong working relationship with industry.
- 5.57 ComReg also does not accept O2’s suggestion that the provisions of Section 5.26 do not take the current situation into account. The provisions of Section 5.26 have been amended to account for subscription PRS providers using a shortcode and, where no shortcode is utilised, the provisions of Section 5.25 apply.
- 5.58 ComReg has considered the proposal from AIME/Dialogue/FDX/Magnum/IPPSA in relation to the technical investment that would be required to treat any message sent to a shortcode, which includes the word “STOP”, as a request to unsubscribe and accepts that the requirements are too burdensome compared to any benefits that may accrue. Accordingly, Section 5.28 of the *revised draft Code* has been deleted.

Multiple Subscription Services

Views of Respondents

- 5.59 AIME/Dialogue/FDX/Magnum/IPPSA and Ericsson IPX objected to the provisions of Section 5.30 of the *revised draft Code* which relate to the actions PRS providers must take if an end-user is subscribed to more than one PRS which operates on the same shortcode. ComReg proposed that on receipt of a “STOP” command the PRS provider should:
- (a) unsubscribe the end-user from all PRS operating on that shortcode, or
 - (b) unsubscribe the end-user from the PRS from which they received their last charged message and then provide the end-user with the opportunity to clarify their intentions regarding the other PRS which they remained subscribed to.

The submissions stated that the proposal was technically impossible and suggested that ComReg convene an industry forum to address the matter in a later Code review.

- 5.60 Ericsson IPX also objected to the proposals in Section 5.30 and 5.31 of the *revised draft Code*, which set out the mechanics to give effect to the requirements of Section 5.30.
- 5.61 Zamano also objected to the proposals in Section 5.31 relating to the mechanism which would afford end-users the opportunity to clarify their intentions in respect of PRS to which they would remain subscribed, after being unsubscribed from the last PRS from which they received a charged message. Zamano cited the high cost of provisioning shortcodes on the mobile networks in Ireland, which push PRS providers into sharing shortcodes among a number of PRS. Zamano further submitted that the current solution, which assigns a “STOP” command to the last charged message, is working effectively.

ComReg’s Position

- 5.62 ComReg accepts the technical challenges that the provisions of Sections 5.30 and 5.31 would pose to PRS providers. Having considered the submissions received, ComReg believes that the requirement to provide end-users with a mechanism to clarify their intentions with respect to multiple subscriptions on the same shortcode is not a priority at this time and has amended the *new Code* accordingly.
- 5.63 In addition, the provisions of Sections 5.30 to 5.32 of the *revised draft Code*, inclusive, have been amended so as to include the current practice whereby the PRS provider must unsubscribe the end-user from the last PRS from which they received a charged message.

6. Chapter 5 of the Revised Draft Code of Practice - Provisions Applicable to the Operation of Categories of PRS Other than Subscription Services

Purchase Confirmation Receipts

- 6.1 ComReg previously consulted on the matter of providing end-users of PRS with Purchase Confirmation Receipts and having considered the responses received concluded that it was not practical to mandate that receipts be provided in all instances. For example, it would be impractical to provide a receipt for registering a vote via SMS as this would double the traffic on the networks which could impact on the delivery of votes from other end-users.
- 6.2 ComReg did, however, consider that there is merit to providing a Purchase Confirmation Receipt in respect of “off-handset” purchases where no content is delivered to the end-user’s mobile handset. The rationale for ComReg’s approach was to ensure that the end-user is provided with a form of “proof of purchase”, on which they can base any redress that they may seek from the vendor of the good or service that they purchase through a PRS.

Views of Respondents

- 6.3 The MNOs, Eircom/Meteor, Vodafone and O2, took issue with the provisions of Sections 5.7 and 5.8 of the *revised draft Code*, which required that where a PRS includes the use of a facility for making a payment for goods or services that does not involve the delivery of content to the end-user’s mobile handset, then the PRS provider must supply a Purchase Confirmation Receipt to the end-users. All three networks referred to Regulation 5 of the Distance Selling Regulations, which establishes the requirement for receipts to be provided in a durable form and as such there is no requirement to include Sections 5.7 and 5.8 in the Code.
- 6.4 In addition, the MNOs submitted that handset manufacturers (e.g. Apple, Google, Nokia etc.), web payment providers (e.g. PayPal, Google Checkout etc.) and financial institutions (e.g. banks, Visa, Mastercard etc.) are poised to enter the mobile payments market and ComReg should not introduce any distortions into the market by requiring the PRS provider to supply Purchase Confirmation Receipts.

ComReg's Position

- 6.5 ComReg appreciates that there is existing legislation in respect of providing consumers with a purchase receipt in a durable medium. However, ComReg does not consider that including provisions that are consistent with the Distance Selling Regulations creates a distortion in the market. Furthermore, ComReg is cognisant of the submission from the NCA to Consultation 10/92a on the *draft Code of Practice* which welcomed the requirement to provide end-users of PRS with Purchase Confirmation Receipts.
- 6.6 The purpose of including Sections 5.7 and 5.8 in the *new Code* is to ensure end-users of PRS receive similar treatment to those who pay for goods and services by other payment methods such as PayPal or credit/debit cards. In all other cases, consumers are provided with a receipt for their purchase, for instance with PayPal the receipt is sent to the registered email account, and ComReg's only intention is that an end-user of a PRS, which involves paying for a good or service that is not delivered to their handset, are similarly provided with a purchase receipt.
- 6.7 It is likely that the payment mechanism will be to charge the end-user's phone account for the cost of the good or service, which may result in the end-user being sent an MT-billed SMS (i.e. reverse-billed where the end-user is charged for receiving the SMS). ComReg considers that the content of any MT-billed SMS used to charge the end-user for the good or service could contain the necessary information to serve as a Purchase Confirmation Receipt. If there is no MT-billed SMS involved in charging the end-user's phone account, then ComReg considers it necessary to provide the end-user with a receipt in some other form.
- 6.8 It is not ComReg's intention to impose unnecessary requirements or expense on PRS providers but it seems logical and reasonable that if a number of parties collaborate to enable phone payment to be used to purchase goods and services then proof of purchase should be provided. The cost of this should be a factor in the provision of the PRS. In this regard, ComReg has amended the text of Section 5.7 to state that the PRS provider must take steps to ensure that the end-user is provided with a Purchase Confirmation Receipt. This means that the PRS provider does not necessarily have to provide the receipt itself but has to ensure that end-users will be provided with a receipt.
- 6.9 ComReg has further amended the text of Section 5.7 to provide that the receipt is provided in a durable medium which is available and accessible to the end-user. This amendment removes the obligation to provide a receipt that may be stored on the end-users handset, thereby creating greater flexibility for the process.

Operation of Other Categories of PRS

- 6.10 ComReg asked respondents to comment on the provisions of Sections 5.34 to 5.67 inclusive, of the *revised draft Code* relating to:

- (a) Competition Services,
- (b) Voting Services,
- (c) Quiz TV,
- (d) Live Services,
- (e) Children's Services,
- (f) Advice & Information Services,
- (g) Sexual Entertainment Services,
- (h) Chatline Services,
- (i) Contact & Dating Services,
- (j) Virtual Chat (including Text Chat) Services, and
- (k) PRS Accessed via Internet Dialler Software.

Q. 4. Do you agree with the draft provisions applicable to the operation of other categories of PRS, also set out in Section 5 of the draft Code? Please provide reasons to support your position.

- 6.11 ComReg received responses in relation to the operation of the following categories of PRS:

Competition Services

Views of Respondents

- 6.12 There were no submissions received in relation to the provisions for Competition Services, however there were comments made by the Sligo Community Alliance and Vodafone in relation to Competition Subscription Services.
- 6.13 The Sligo Community Alliance submitted that "Competitions are used to facilitate most of the exploitation that is currently on-going and again we draw your attention to our proposal, which RegTel previously accepted, to ban the use of the "subscription service/reverse billing" devices to run them".
- 6.14 Vodafone also submitted that "Vodafone agree that there needs to be strict advertising requirements for subscriptions services that purport as competition services. It is clear that there is no harm in recurring Subscription Services that serve a purpose. In essence, Vodafone believes that there is only a need to have strict regulation in the promotion of competition Subscription Services".

ComReg's Position

- 6.15 It is noteworthy that a PRS provider, who is also a MNO, and a consumer representative body would both highlight, in their respective submissions that they consider Competition Services, which operate on a subscription basis, as being a primary source of harm and the main requirement for strict regulation.
- 6.16 ComReg similarly expressed concern in the previous consultations on the Code that Subscription Services, and particularly Competition Subscription Services which advertise a "free" entry, continue to raise concerns about consumers making fully informed transactional decisions. Nonetheless, ComReg considers the provisions relating to the promotion of PRS and the positive confirmation requirement for Subscription Services provides the necessary end-user protection. For these reasons, ComReg does not consider it necessary to impose any restrictions on the provision of Competition Services through a subscription model, at this time.

Live Services

Views of Respondents

- 6.17 With respect to Section 5.43 of the *revised draft Code*, which required that Live Services must be recorded, AIME/Dialogue/FDX/Magnum/IPPSA submitted that they are keen to ensure that end-users' rights to privacy and data protection are prioritised. In addition they submitted that "*the duration of storage of live services goes beyond what is required for purposes of remedying breaches, where the matter concerned can be remedied with a refund. As such, only such information that would relate to billing ought to be stored*". Finally, AIME/Dialogue/FDX/Magnum/IPPSA requested that ComReg and the ODPC, together with an Industry Working Group, might better reach a consensus and that the prescriptive element contained within the *revised draft code* was inappropriate.
- 6.18 AIME/Dialogue/FDX/Magnum/IPPSA submitted that the provisions of Section 5.44 which set out the regulatory information that must be provided to callers to Live Services were excessive and could add between 10-15% to the cost of voice services annually. The submission added "*This is probably more than all the damage outlined in the RIA being done by the industry every year*".

ComReg's Position

- 6.19 ComReg has amended Section 5.43 of the *revised draft Code* to require that only Entertainment Services be recorded and not Advice and Information Services as previously required. ComReg does not believe that breaches may merely be remedied by issuing a refund and there is no requirement to store any information other than billing information. If ComReg was to accept this argument then it would be possible for a PRS provider to provide live services of a sexual nature to a person who was clearly a minor without a

recording of the call, and ComReg would have no means of investigating any complaint arising. In such circumstances it would be wholly inappropriate to merely settle the matter with a refund⁴¹.

- 6.20 ComReg has also made a minor amendment to the provisions of Section 5.45 the *new Code* to clarify the obligation on PRS providers to take reasonable measures to ensure that children do not use Live Services (other than a Children's Service). The obligation was already included and consulted on and the amendment is to avoid any doubt.
- 6.21 ComReg does not agree that the storage of data, as now required, goes beyond what is required for the purposes of remedying breaches. ComReg has set out what records it considers are required for it to carry out its statutory functions to investigate matters concerning the provision, content and promotion of PRS. PRS providers should be aware that under the Data Protection legislation, ComReg is entitled to access personal data in order for it to carry out its statutory duties.
- 6.22 ComReg considers that the regulatory information to be provided to callers to Live Services may be comfortably delivered within 15 seconds, which is within the maximum 45 seconds permitted, and the assertion put forward by AIME/Dialogue/FDX/Magnum/IPPSA that this will add 10-15% to the costs of voice services annually is inaccurate and made without any supporting statistics or data.

Advice and Information Services

Views of Respondents

- 6.23 AIME/Dialogue/FDX/Magnum/IPPSA suggested that the provisions of Section 5.55, which required that callers to Advice and Information Services should receive a warning not to act upon advice which needs individual interpretation without first consulting a suitably qualified practitioner, did not make sense if the person providing the advice is a registered professional.

ComReg's Position

- 6.24 With respect to the submissions relating to Section 5.55, ComReg agrees with the submission from AIME/Dialogue/FDX/Magnum/IPPSA and has amended the text in the *new Code* to state that advice and information, not being provided by a suitably qualified professional, which needs individual interpretation, should not be acted on without first consulting a suitably qualified practitioner.

⁴¹ Please refer to ComReg's powers at section 9 and 10 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 in this regard - <http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0002.PDF>

Virtual Chat Services

Views of Respondents

- 6.25 Zamano submitted that the provisions of Section 5.64, which required Virtual Chat Services to operate on a “*one message in – one message out basis*”, does not take account of a chat service that would allow the end-user to purchase what it describes as an “*all you can eat*” package, whereby the end-user pays for a “bundle” of messages or an unlimited number of messages within a certain period for a fixed price. Zamano submitted that an “*all you can eat*” bundle would eliminate the worry about the cost of each message.
- 6.26 AIME/Dialogue/FDX/Magnum/IPPSA submitted that the provisions of Section 5.64 were too restrictive and there should be a distinction between operator chat-based services, which may require greater restriction and end-user to end-user chat-based services.
- 6.27 AIME/Dialogue/FDX/Magnum/IPPSA requested that the expenditure levels that apply to text-based Virtual Chat Services (€20) be harmonised with the higher threshold for voice services. (€30).

ComReg’s Position

- 6.28 ComReg accepts the merits of Zamano’s submission and has amended the text of Section 5.64 to apply the “*one message in – one message out*” restriction only on those Virtual Chat Services that are charged on a per-message basis.
- 6.29 ComReg is mindful that text chat services that are charged on a “per message” basis have the potential to impose high end-user costs in a very short time. For that reason, ComReg is not minded to distinguish between operator-based text chat and end-user to end-user chat services at this time, and considers it prudent to leave the power of consumption in the hands of the end-user for the time being.
- 6.30 ComReg previously consulted on the expenditure levels for services and concluded that the current expenditure levels were appropriate. ComReg will revisit the matter of expenditure reminders in its next review of the *new Code* and the matter of harmonising levels between voice and text based services will be addressed.
- 6.31 Having considered the responses received and the protections already afforded to end users of Virtual Chat Services, ComReg has removed the requirement in Section 5.65(b) of the *new Code* for PRS providers to terminate a Virtual Chat Service if the user does not interact further with it following the provision of the €20 spend reminder.

7. Chapter 6 of the Revised Draft Code of Practice - Provisions Applicable to Customer Services

The Consultation Issues

- 7.1 ComReg set out requirements in the *revised draft Code* that it considered necessary to ensure that end-users of PRS receive an adequate level of customer care in their dealing with PRS providers. The main issues codified in Section 6 relating to Customer Services are:
- (a) The overriding principle that PRS providers must ensure that end-users of their services are able to have complaints resolved quickly, easily and fairly,
 - (b) PRS providers must have an adequately resourced live operator helpline during normal office hours,
 - (c) When requested to supply an end-user with a record of his or her engagement with a PRS, the PRS provider must ensure that the information is provided in a comprehensible and legible format and include relevant material to address how the end-users provided consent to accept the charges for the PRS,
 - (d) On foot of an end-user raising an issue with ComReg in respect of a PRS, ComReg may notify the PRS provider that an issue has been raised and request the PRS provider to contact the end-user. The PRS provider must demonstrate that it has taken all reasonable efforts to contact the end-user within three working days of being notified of the requirement to do so by ComReg,
 - (e) Where an end-user is not satisfied with the outcome of a complaint it has raised with a PRS provider, the PRS provider must inform the end-user that he or she may lodge a complaint with ComReg, and
 - (f) Any refunds to be provided must be done so promptly and in a manner that does not impose a cost on the recipient of the refund. Additionally, refunds must be provided in Euro (€) currency.
- 7.2 Accordingly, ComReg asked the following question in respect of the Customer Service provisions set out in Chapter 6 of the *revised draft Code*.

Q. 5. Do you agree with the provisions relating to Customer Service as set out in Section 6 of the revised draft Code? Please provide reasons to support your position.

Views of Respondents

- 7.3 Eircom/Meteor suggested the removal of the requirement to inform end-users *“in writing”* that they may pursue a complaint with ComReg if their complaint has not been satisfactorily resolved by the PRS provider.
- 7.4 Vodafone was in full agreement with the provisions of Section 6.
- 7.5 O2 also welcomed the provisions of Section 6 of the *revised draft Code* but highlighted that some PRS providers have changed their customer service contact details *“on numerous occasions without updating other entities including mobile operators”*. This would obviously result in greater consumer frustration and distrust. O2 recommended that PRS providers should be required to update all PRS providers in the “value-chain”, including MNOs and ComReg if they make any changes to their customer care contact details. This requirement would permit MNOs to provide correct contact details to members of the public should they contact a PRS provider in relation to PRS queries or complaints.
- 7.6 The Sligo Community Alliance proposed that all PRS providers must give full contact details on all advertising, to include a full postal address, rather than the present practice of a PO Box number only. The consumer group added that *“very few letters sent to PO Box numbers receive a reply and it should be open to persons to visit Operators at their place of business.”*
- 7.7 Modeva submits that ComReg has provided no basis or background information in relation to the new requirements in Section 6.3 to *“record all Customer Service calls”*.

ComReg’s Position

- 7.8 ComReg concurs with the suggestion from Eircom/Meteor that there is no compelling requirement to provide end-users, who are dissatisfied with how their complaint has been resolved by the PRS provider, with notification *in writing* that they may pursue their complaint with ComReg. ComReg considers that it would be eminently more beneficial to end-users if they were simply informed that they may pursue their complaint with ComReg and provided with ComReg’s Customer Care details by the PRS provider. Accordingly, ComReg has amended Section 6.5 of the *new Code* to reflect these changes and it is now at the PRS provider’s discretion.
- 7.9 ComReg considers that the issues raised by O2 in relation to changing customer care phone numbers, and by the Sligo Community Alliance in relation to obtaining the full postal address for PRS providers, is a worrying reflection of how some PRS providers may remain anonymous to end-users of their services. ComReg considers that transparency of who the end-user is trading with is an absolute and basic consumer protection, which is underpinned in relevant EU and domestic legislation. ComReg intends to assist in addressing some of these issues by expanding the functionality of its “Number Checker” facility, which is available on ComReg’s consumer-focussed, PRS-related website www.phonesmart.ie. ComReg believes that

providing greater detail, including the PRS provider's full postal address and current customer care number, should be available for all operational shortcodes and premium rate numbers. This project requires considerable IT development, and input from PRS providers to keep their customer care contact details up to date. ComReg is committed to providing greater clarity and transparency in the interests of consumer protection and regards PRS provider contact details as material information for end-users of PRS.

- 7.10 With respect to the submission from Modeva in relation to the provisions of Section 6.3 pertaining to the information that the PRS providers must be able to provide to end-users on request, ComReg would like to highlight that many of these provisions exist in the *current Code*⁴². ComReg also considers that the additional requirement of Section 6.3, which requires PRS providers to supply end-users of Subscription Services with information of the date, time, content of any calls received from the end-user that are connected with standard regulatory messages (i.e. Subscription Request Message, Subscription Confirmation Message, €20 Regulatory Update Message and Unsubscribe Confirmation Message) sent as part of a Subscription Service, is a prerequisite for any PRS provider in order to be able to address a consumer complaint in a meaningful manner. The duration for which these records must be retained are set out in the revised Regulations and, in general records must be retained for a period of six months to facilitate the investigation of complaints but records of how an end-user subscribed to a PRS must be retained for a period of six months after the end-user has unsubscribed from a PRS.

⁴² Section 11.13.8 of the current Code provides that Service Providers must provide to Consumers details of date, time, method of subscription and the date and time on which the confirmation message was sent to the Consumer if the Consumer requests validation of his/her subscription.

8. Respondents Comments on the Provisions of the Revised Draft Code of Practice

- 8.1 ComReg sought the general views of respondents on the provisions of the *revised draft Code*, affording them the opportunity to provide any comments that had not been specifically addressed.

Q. 6. Do you have any comments on the provisions of the revised draft Code?

- 8.2 ComReg received submissions in relation to the following matters;
- (a) The refunds provisions,
 - (b) ComReg's overall goal,
 - (c) The Scope of the Code,
 - (d) The Unfair Commercial Practices Directive,
 - (e) Industry Working Group, and
 - (f) General Comments.

Refunds

Views of Respondents

- 8.3 Eircom/Meteor were the only respondents who made substantial comments relating to the refunds provisions. They reiterated the response to the initial Consultation on the Code (ComReg Document 10/92a), which recommended that in order to minimise the administrative effort involved in the provision of refunds, it was recommended that the PRS provider, which holds primary responsibility for the PRS should directly refund the end-users affected. Eircom/Meteor added that administering refunds through telephone accounts imposes a significant cost and administrative burden on network operators, which cannot be justified in the case of refunds to a small number of subscribers. Eircom/Meteor thereby requested that ComReg exercise its powers to ensure that refunds are provided by the PRS provider which has primary responsibility for the operation of the PRS.

ComReg's Position

- 8.4 ComReg's policy in respect of refunds was articulated in Paragraph 3.257 of the Response to Consultation Document 11/51⁴³ and these provisions have

⁴³ <http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

been included in the revised Regulations. In the interests of completeness, the provisions are restated below:

- (1) *Pursuant to a finding and notification under Section 9(1) of the Act of 2010, the Commission may, at its absolute discretion in accordance with its powers under the Act of 2010, require the premium rate service provider against whom the finding has been made (“the non-compliant premium rate provider”):*
 - (a) *to pay refunds within a specified time period to all end-users who claim a refund, for the full amount spent by them for the premium rate service that is connected with the non-compliance or breach or for a specified lesser amount, save where there is good cause to believe that such claims are not valid; or*
 - (b) *to pay refunds for the full amount spent or a specified lesser amount within a specified time period to all end-users who have used the premium rate service that is connected with the non-compliance or breach, regardless of whether they have claimed a refund.*
- (2) *In the case of refunds to be paid pursuant to Regulation 8(1)(b) above, such refunds may be required to be credited directly to the end-user’s account with his or her network operator. Where there is no such network operator account, end-users must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify end-users of their right to a refund, the Commission may direct the non-compliant premium rate service provider to donate an amount of money equivalent to the refunds to an appropriate registered charity selected by the Commission.*
- (3) *In the case of any refunds or donations to charity which the Commission directs to be paid pursuant to this Regulation 8, evidence must be provided to the Commission by the non-compliant premium rate service provider that refunds or donations have been made within the time period specified by the Commission.”*

8.5 ComReg is aware of the administrative and financial burden that is associated with providing refunds through network operators. ComReg wishes to unequivocally state that its general policy in relation to refunds is that the primary responsibility for providing refunds rests with the party against whom ComReg has made a finding of non-compliance. It is ComReg’s intention that it will first require the non-compliant PRS provider to provide any refunds required. However, in the interests of transparency, ComReg considers it appropriate to place network operators on notice that, in some exceptional circumstances, ComReg may conclude that it is reasonable and proportionate to require refunds to be made through end-user phone accounts. It is difficult for ComReg to cite precise circumstances

when it may choose to adopt such a course of action but ComReg will not make such decisions lightly. Such decisions will be made only in exceptional circumstances.

- 8.6 By way of illustration, ComReg may, for example, conclude that providing refunds through phone accounts is appropriate where there are a very large number of end-users to be refunded and the scale of the problem would overwhelm the operational capabilities of a small PRS provider, such that it would unduly delay end-users from obtaining redress.

ComReg's Overall Goal

Summary of Respondents Views

- 8.7 The IPPSA/ Zamano took issue with the provisions of Section 1.1 of the *revised draft Code* in which ComReg set out how it will approach and interpret its regulatory functions. These parties submit that they can “*find no justification in the grounding acts to justify Comreg purporting its goal to be that of ensuring that PRS users equate its usage with best practice retail services. ComReg’s role is to protect end-users only, not to find ways of improving user experiences. Zamano would also contend that Comreg is not in a position to provide confidence to end-users in relation to their usage of new and innovative services, as its remit is limited to PRS only, and will not cover the majority of application purchase possibilities via iphone and Android appstores.*”
- 8.8 Modeva similarly submitted that “ComReg has invented a phrase of “best practice retail service” without giving any explanation as to what this means. There is no legal definition of this phrase and it does not purport to give a reference point from which to judge any of the measures proposed. This means that ComReg cannot “objectively” justify any of the measures proposed in its draft Code or provide a basis upon which we can input rationally into the consultation”.

ComReg's Position

- 8.9 It is beneficial to set out and consider precisely what ComReg provided in Section 1.1 of the *revised draft Code*:
- 1.1 *Having regard to its statutory functions, powers, and objectives, ComReg’s overall goal is to ensure that end-users of PRS will be as confident and safe in using PRS as in engaging with best practice retail services. ComReg considers that such end-user confidence will also benefit industry as new and innovative services are developed and made available.*

The purpose of this Section is to provide a degree of clarity to the PRS industry as to how ComReg will approach its duty to regulate the PRS industry. ComReg considers that there is nothing incongruous with the aspirational statement that ComReg will endeavour to ensure end-users of

PRS will be confident and safe in using PRS. As Section 12(1)(d) of the Act provides that ComReg's objective is to protect the interests of end-users, it is difficult to comprehend that any PRS provider would object to this proposition. ComReg considers that it is reasonable and proportionate to apply the parameters of confidence and safety as comparable indicators of the PRS industry to best practice retail service. ComReg considers this to be of direct relevance to its objectives as the regulator of the PRS industry.

- 8.10 In relation to IPPSA/Modeva's comment regarding ComReg's remit over "app" store purchases, ComReg agrees that, insofar as the purchase mechanism for "apps" works at the moment, it does not have any remit. Section 5 of this paper discusses the end-user's experience in purchasing "apps" and considers that there are relevant similarities between this process and the positive confirmation for subscription PRS. Subscription PRS are well within ComReg's regulatory scope.
- 8.11 It is unclear as to why Modeva would require a legal definition to explain the concept that ComReg, in carrying out its statutory function to regulate the promotion, content and provision of PRS, should consider "*best practice retail service*" as an appropriate standard against which to hold PRS. ComReg considers that end-users of PRS should be as safe and confident in purchasing PRS as they would any other retail product or service.
- 8.12 ComReg considers that the submission from Modeva, which claims that the inclusion of the term "*best practice retail service*" without providing a legal definition automatically leads Modeva to conclude that "*ComReg cannot objectively justify any of the measures proposed in its draft Code or provide a basis upon which we can input rationally into the consultation*" is without basis. ComReg has now provided two responses to consultation and an initial consultation paper that contain substantial reasoning for all of the provisions in the *new Code*.
- 8.13 ComReg would like to correct Zamano's submission that "ComReg's role is to protect end-users only, not to find ways of improving user experiences." ComReg's objective in respect of PRS, as stated above, is to "protect **the interests** of end-users of premium rate services". ComReg believes that "the interests" of end-users of PRS may be interpreted to mean:
- (a) improving end-users' experience of, and confidence in, PRS, and
 - (b) accessing new and innovative services.
- 8.14 ComReg has, however, based on Zamano's submission and in the interest of clarity, amended the text of Section 1.1 by replacing the more generic term "service" with the more correct term "PRS" and the amended text now reads;

"ComReg considers that such end-user confidence will also benefit industry as new and innovative ~~services~~ PRS are developed and made available."

Scope of the Code

Summary of Respondents Views

- 8.15 A number of respondents questioned the soundness of the regulatory framework on which ComReg's authority to regulate is based. Dialogue/FDX/Magnum/AIME submitted that:

“the legal environment for the regulation of PRS goes beyond the 2010 Act and encompasses EU measures such as the Technical Standards Directive, the E-Commerce directive and the Unfair Commercial Practices Directive, We are concerned that it appears that the legal footing of those measures within the code at sections 1.6 and 1.7 are deliberately vague, and do not provide an adequate basis upon which we can base our interpretation as to how the code will operate. Articles 4 and 5 of the Unfair Commercial Practices Directive are clear in so far as they do not allow ComReg to bring forward further measure than are provided for in the UCPD itself, when a service is targeted at the average consumer. Furthermore, although it appears clear from reading the definition of ISS that all Subscription Services are ISS, the code does not make clear which parts of itself won't apply vis-a-vis section 1.6”

- 8.16 Zamano contended that all the PRS that it provides are Information Society Services (“ISS”) as defined in Directive 98/48/EC and it would be placed at a commercial disadvantage compared to other European companies operating in Ireland as their services would not be subject to the *new Code*. Modeva similarly contended that most of its PRS are ISS and the *revised draft Code* would result in the demise of the PRS industry in Ireland and the associated tax revenue and employment when demand for PRS would be satisfied by PRS providers operating from outside Ireland.

ComReg's Position

- 8.17 It should be noted that, out of an abundance of caution, ComReg notified the *revised draft Code* to the European Commission, in accordance with the relevant provisions of the Technical Services Directive 98/34/EC (as amended by 98/48/EC). The notification was made on 22 July 2010 and this process has now been completed.
- 8.18 In relation to the submissions regarding the UCPD, as stated throughout the paper, in particular in section 4, ComReg is of the view that the provisions of the new Code are consistent with the requirements of the UCPD and do not go beyond what is provided for by the UCPD. ComReg is also of the view that section 1.7 of the new Code is sufficiently clear to inform PRS providers as to how the Code will operate. Any compliance action in respect of a breach of the Code taken will be carried out on a case by case basis having regard to the provisions of the UCPD as applicable.

- 8.19 In relation to the submission regarding Section 1.6, ComReg will monitor the promotion and operation of PRS offered and provided by all PRS providers in the same way and irrespective of their place of establishment, by reference to the requirements of the Code. Any compliance action in respect of any breach of the Code, will be carried out on a case by case basis and in accordance with ComReg's statutory objectives laid out in section 12 of the Act of 2002, and sections 9 and 10 of the Act of 2010 and, in the case of PRS providers established in other EEA member states, whose PRS comprise an 'Information Society Service', in accordance with the provisions of the E-Commerce Directive, 2000/31/EC (and in this latter regard, ComReg will, if necessary, invoke its powers under Article 3(4) and 3(5) of that Directive). By way of clarification, ComReg has amended the provisions of Section 1.6 of the *new Code*.

Unfair Commercial Practices Directive⁴⁴

Summary of Respondents Views

- 8.20 A number of respondents took issue with Section 1.7 of the *revised draft Code* which provided that certain aspects of the Code, regarding promotion of PRS and other commercial practices would be interpreted and understood in light of the provisions of the *UCPD* and the Consumer Protection Act 2007, which transposes the *UCPD* in Ireland.
- 8.21 Zamano contended that there were numerous instances where the *revised draft Code* directly breached the *UCPD* and the Code completely disregarded the definition of the "average consumer". Zamano added that ComReg should publish the definition of the "average consumer" from the *UCPD*, which Zamano contended is a person that is "*reasonably well-informed and observant and circumspect*".
- 8.22 Modeva similarly submitted that the primary provisions of the *revised draft Code* were in breach of the *UCPD* and ComReg was merely paying "*lip service*" to the *UCPD*.
- 8.23 The IPPSA also submitted that the measures proposed in Section 4 of the *revised draft Code* in relation to the promotion of PRS far exceeded those required to ensure that an "average consumer" is sufficiently provided for to make an informed decision to purchase.

ComReg's Position

- 8.24 ComReg has comprehensively addressed the provisions of the *UCPD* and their applicability to promotions for PRS in Section 4 of this document. It is worth reiterating, however, that ComReg considers the measures to be in compliance with the *UCPD*, and well within the spirit of what the *UCPD* aims to achieve.

⁴⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>

- 8.25 The “average consumer” is not specifically defined in the *UCPD*, as Zamano has stated in its submission, but some context to the interpretation of the phrase “average consumer” is provided in Recital 18 in the preamble to the Directive. Those industry respondents who are opposed to the measures of the Code repeat that the interpretation of the “average consumer” provided by the European Court of Justice (“*ECJ*”) considers such a person to be one that is “*reasonably well-informed and observant and circumspect*”. However, what is omitted from these submissions is the final clause of the ECJ’s guidance, which states “*The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.*”
- 8.26 ComReg has given careful consideration to the information requirements of the “average consumer” and has exercised its judgement to include the appropriate provisions in the *new Code*. ComReg’s approach has been broadly endorsed by the NCA, which is the statutory body charged with the implementation of the Consumer Protection Act 2007 in its response to the first consultation on the Code (ComReg 10/92a) and ComReg will have regard to the relevant case law of the Court of Justice, where appropriate.

General Comments

Summary of Respondents Views

- 8.27 Modeva submitted that:
- (a) some of the measures proposed in the revised draft Code would cause the business of most of the participants in the industry to become unviable,
 - (b) considering the amount of transactions and the amount of end-users who actively use PRS on a daily basis, there is no clearly established basis from which to argue that end-user confidence is not in place already,
 - (c) end-users do not need ComReg’s help to make or control their own purchasing decisions,
 - (d) ComReg has failed to balance the protection of the interests of end-users to consume against their interest not to be subjected to unfair commercial practices,
 - (e) many of the changes would be expensive and technically extensive to implement and the new Code should not be implemented for at least 8 months after the commencement of the next budget year.

ComReg’s Position

- 8.28 ComReg has carefully and thoroughly appraised each of the submissions received to both consultations on the *new Code* for the PRS industry and has provided balanced and substantial justification for any of the new measures.

- 8.29 ComReg considers the provisions that the *new Code* introduces are required to protect the interests of end-users in the current PRS market. PRS continue to raise a disproportionate number of consumer issues in relation to the wider telecoms sector and there are regular complaints from individual end-users, consumer groups and public representatives about the current operation of PRS. Furthermore, the majority of these complaints relate to the same issue - reverse-billed subscription services - and it is wholly appropriate for ComReg to introduce measures that will offer a greater level of consumer protection so as to prevent the consumer harm that is currently occurring. It should be noted that these measures are not new and unprecedented measures within the PRS industry but are, in fact, measures that have been operative for a number of years in many other jurisdictions.
- 8.30 While the provisions of the *new Code* requires PRS providers to make technical adjustments to their services, ComReg does not accept the validity of the submission calling for the *new Code* not to be implemented for eight months after the commencement of the next budget year. ComReg has set a reasonable time for PRS providers to make the necessary technical and promotional adjustments that considers both the needs of PRS providers and end-users.

Industry Working Group

Summary of Respondents Views

- 8.31 A number of respondents have requested that ComReg establish an industry working group to focus on specific elements of the Code and possible future Code changes. Realm suggests that the absence of a working group “*is probably one of the main reasons why the process to-date with regards to a new Code of Practice had been so difficult*”.

ComReg’s Position

- 8.32 ComReg commenced the consultation process to develop a new Code of Practice in December 2010 and has afforded industry a comprehensive and unrestricted opportunity to shape the content of the *new Code*. Taking into account the fact that the PRS industry is not a homogenous group and there are sometimes discordant inter-group and intra-group positions, and ComReg’s obligation to consult (as per Section 15 of *the Act*), a public consultation was the only transparent and objective method to frame the first revision of the Code under ComReg’s regulatory remit in order to address the PRS market as it currently exists.
- 8.33 ComReg now considers that the *new Code* provides a foundation that will evolve over time to address emerging and current PRS. It would not be appropriate for ComReg to hold industry forums during the period of an industry consultation. However, as the current consultation has now concluded, ComReg looks forward to establishing an Industry Forum (or fora, if appropriate) to facilitate market development having cognisance for ComReg’s statutory functions.

9. Views of Respondents on the Regulatory Impact Assessment (RIA) on the revised draft Code of Practice

9.1 ComReg sought the general views of respondents on the draft RIA.

Q. 7. Do you have any views of the Regulatory Impact Assessment with regard to the revised draft Code of Practice? Please provide reasons to support your position.

Views of Respondents

- 9.2 RTE welcomed the draft RIA and the quantitative and qualitative research provided by ComReg and believes that similar on-going research would be valuable to understanding consumer issues and needs with a view to growing the PRS industry in Ireland in a positive, fair and transparent manner.
- 9.3 Eircom submitted that paragraph 1.26 of the draft RIA, relating to the benefits of providing end users with Purchase Confirmation Receipts for certain transactions does not assess the impact of partially duplicating the extensive obligations that apply under the Distance Selling Regulations.
- 9.4 AIME, FDX, Dialogue, Magnum and Realm submitted identical responses stating that ComReg's RIA was insufficient to justify that the provisions in the *revised draft Code* were necessary for the protection of the average consumer. The respondents submitted that the draft RIA does not provide adequate scientifically verifiable basis for the imposition of each of the measures proposed in the Code. However, no further particulars or explanation of this position was provided and, as such, it is difficult to respond precisely to such generalised submissions
- 9.5 The submissions from Modeva and the IPPSA raised issues relating to the draft RIA in their respective responses to Sections 4 and 5 of the *revised draft Code*, which relate to the Promotion of PRS and the Operation of Subscription Services, respectively. These respondents also submitted identical commentary on the draft RIA. A lot of the particular comments received from these two respondents have already been addressed in Sections 4 and 5 of this document. Notwithstanding this, their submissions are set out here and considered in detail below.

9.6 These respondents assert that in relation to the proposed intervention on Promotion of PRS and the Operation of Subscription Services,

ComReg has failed to demonstrate any justifiable issue/consumer harm relating to the current promotion of PRS and have similarly failed to adequately quantify the impact of the hugely damaging measures proposed in the *revised draft Code*:

- (a) Apart from references to some high-level consumer complaint statistics dating from 2008/2009, ComReg presented no specific evidence in the draft RIA of consumer harm based on “consumer complaints”,
- (b) No information has been presented in the draft RIA in relation to consumer harm arising as a result of the promotion of PRS,
- (c) The primary source of justification for the measures proposed in the revised draft Code are the limited research surveys conducted by IPSOS MRBI on behalf of ComReg, which ComReg has interpreted with a bias that has been apparent in the previous consultations and prior to these surveys being conducted, and
- (d) ComReg repeatedly sets out in the draft RIA that there is a perceived lack of clarity in the pricing of PRS, but this is not supported by the survey results.

9.7 These respondents also raised more general concerns with the RIA:

- (a) ComReg has failed to carry any analysis of the legislative environment impacting on PRS,
- (b) ComReg did not follow its draft RIA Guidelines and failed to perform any analysis between alternate policy options for the achievement of the two policy objectives (increased transparency and consumer protection) outlined in the RIA,
- (c) ComReg’s “Options” were pre-selected without any analysis within the draft RIA of any real alternatives,
- (d) No tangible estimate of the impact of the measures on industry was provided,
- (e) ComReg should consider the draft impact analysis submitted as part of the responses which estimates the effect of the introduction of:
 - (i) the requirement for an end user to provide positive confirmation of their intention to subscribe to a PRS, and
 - (ii) the requirement that certain material information is spoken.

ComReg’s Position

9.8 ComReg has carefully considered the responses received to its Consultations and its draft RIA. ComReg considers the issues raised by respondents under the following category headings;

- (a) Insufficient Justification – to warrant the measures prescribed in the new Code
- (b) Quantification - of the cost implications for PRS providers in complying with the provisions of the new Code, and
- (c) ComReg's Processes & Procedures - in determining the regulatory impact assessment of the new Code.

Insufficient Justification

- 9.9 ComReg's view is that the RIA is sufficient to justify the provisions in the *new Code* are necessary for the protection of the average consumer. ComReg would highlight that, in addition to the RIA, the justification for the provisions included in the *new Code* are set out in the main body of this document (and the previous consultation documents - ComReg Document 10/92a and 11/51).
- 9.10 The RIA is an overall assessment of the likely effect of proposed new regulation and/or regulatory change. The draft RIA highlighted that there is a high risk of consumer detriment caused by the persistent lack of transparency or informational asymmetry for many consumers. In these circumstances and, consistent with economic and social principles, intervention is likely to be warranted. The draft RIA considered a range of quantitative techniques including, market research survey work, consumer complaints data and a model of consumer welfare, with a view to providing an overall assessment of the likely impact of proposed intervention. ComReg notes that a Code of Practice already exists and PRS providers are obliged to comply with its provisions. On the basis of economic principles and having taken into account the survey evidence and other findings set on in the consultation documents, the draft RIA set out:
- (a) Measures that increase the information available to consumers appear likely to help consumers make better informed decisions in relation to PRS, which in turn should be expected to significantly benefit consumers. For the reasons set out in the draft RIA and the consultation document,⁴⁵ it is considered that the costs of additional information would be relatively limited and, therefore, the overall impact on the PRS market would be positive.
 - (b) Measures that increase information received by consumers after their use of PRS are expected to benefit consumers, for example, by reminding them of their expenditures and, more generally, increasing confidence around their purchase decisions. The standardisation and clarification of regulatory messages was broadly welcomed in the original consultation on the Code⁴⁶ and the costs of these measures would be relatively limited since they are mainly revisions to existing

⁴⁵ Annex C to Response to Consultation 11/51 – draft RIA para 1.22
<http://www.comreg.ie/fileupload/publications/ComReg1151c.pdf>

⁴⁶ ComReg Consultation 11/51 - Response to Consultation 10/92a Page 46 paras 1.155 and 1.157
<http://www.comreg.ie/fileupload/publications/ComReg1151.pdf>

processes (as set out in the RIA under the heading “Information Messages”) and, therefore, the impact overall would be positive.

- (c) It is expected that consumers will benefit from double opt in where those who do not wish to use a PRS subscription services are protected from unintentionally doing so.

- 9.11 Consistent with economic principles, the draft RIA presented⁴⁷ a conservative estimate of potential consumer detriment where there is a level of dissatisfaction experienced by a segment of PRS consumers (over a six month period). These estimates serve to illustrate that there is a significant overall benefit to consumers and the industry to enhancing consumer awareness and perception of PRS, the aim of the measures proposed and assessed in the RIA.
- 9.12 In addition, survey evidence supports that the exiting regulation in the PRS market should be enhanced. Of the total issues raised by end users contacting ComReg’s Consumer Care Helpline, approximately 36% are in relation to PRS,⁴⁸ despite that the PRS market comprises only 1.5% of the total size of the electronic communications market (i.e. mobile, fixed line and PRS)⁴⁹ in terms of revenue. This is a disproportionately high figure considering the relatively small size of the market made up by PRS. However, the PRS market with an approximate value of €53 million is significant in revenue terms. ComReg published figures clearly demonstrate that there has been no discernible change in the nature of the concerns raised by end users of PRS since ComReg assumed regulatory responsibility for the PRS industry in July 2010.
- 9.13 IPPSA/Modeva in particular believe that there is insufficient justification for the introduction of enhanced “spoken requirements” and the double opt-in for subscription PRS. Section 4 of this document sets out in detail the ongoing evidence⁵⁰ of consumer harm attributable, in particular, to Subscription PRS. ComReg does not accept that its research fails to indicate concerns in relation to the functioning of subscription PRS promotions on the part of the consumer. The statistical evidence supports that Subscription PRS can cause a disproportionate level of consumer harm requiring regulatory intervention. Since 2007, over 80% of the complaints received by the regulator (RegTel succeeded by ComReg) in relation to PRS relate to Subscription PRS. This matter has also been addressed in Section 4 of this document but it is worth restating that the research does highlight that

⁴⁷ Annex C to Response to Consultation 11/51, paragraphs 143-149.

⁴⁸ Consumer Care statistics for the period July 2010 to June 2011 as published quarterly on www.askcomreg.ie

⁴⁹ During the period July 2010 to June 2011, the value of the electronic communications market was approximately €3.8 billion as aggregated from ComReg Quarterly Reports, published on www.comreg.ie. For the same period the estimated value of the PRS market is €53 million.

⁵⁰ Paragraphs 4.49 to 4.57, inclusive set out the evidence of ongoing consumer harm as published by ComReg. Sections 5.25 to 5.27, inclusive explain the lack of verifiable evidence to demonstrate unambiguous consent to subscribe.

communications regarding subscription PRS charges are generally regarded as unclear and hence are impacting peoples' ability to identify a PRS.

- 9.14 Concerning the current promotion of PRS and the operation of the subscription service, ComReg has also considered the supporting documentation submitted by IPPSA/Modeva titled "Impact Analysis of Double Opt" and "Impact Analysis of Spoken Promotional Requirements". The initial assumption for both these estimations is that according to Figure C.5 in ComReg's RIA, "84% of people are currently aware of the charges involved before using a PRS". As set out in Section 4 of this document, ComReg highlights that 37% of respondents only claim only to be "Somewhat aware", with 47% being aware of the charges of a PRS before using it. It cannot, therefore be construed that 84% of people are aware of the charges before using a PRS. The conclusion of Ipsos/MRBI of Figure C.5 is articulated as follows; "*Whilst a high proportion of PRS (users) have at least some awareness, there is potential for further improvement in promoting clearer awareness of charges*". ComReg has provided for this further improvement, in a proportionate manner, through enhanced provisions relating to the promotion of PRS in Section 4 of the *new Code*.
- 9.15 Figure C.5 in ComReg's RIA should also be considered in the context of Figures C.3 and C.4 of the RIA which conclude that:
- (a) communications regarding PRS charges are generally regarded as unclear and are also impacting peoples' ability to identify a PRS, and
 - (b) over one third of respondents are not confident in their ability to identify a PRS,

Together, these conclusions provide an explanation as to why a consistently high percentage⁵¹ of end users who contact ComReg's helpline deny they have subscribed to a PRS.

- 9.16 In both the "Impact Analysis of Double Opt In" and "Impact Analysis of Spoken Promotional Requirements" undertaken by IPPSA/Modeva, there is an assumption made that 95% of end users read the text message that they receive on subscribing to a PRS. However, the following factors are relevant and must be considered when appraising the impact analysis submitted by the respondents:
- (a) some PRS send the confirmation message as a WAP message, which as discussed in Section 5 of this document, may not display on all smartphones. This results in end-users being unable to read or store the message which can mean that they are unaware that they have, in fact, subscribed to a PRS,
 - (b) as set out in Section 5 of this document, some subscription confirmation messages resemble promotional messages. It cannot therefore be assumed that just because an end user may read a

⁵¹ 49.5% of consumers who raised PRS-related- issues with ComReg in Q3 2011 denied that they had subscribed to a PRS.

message that they understand that that it is confirming they are, in fact, subscribed to a PRS.

It cannot therefore be deduced, as the respondents do, that the “double opt-in does not improve awareness or transparency” and “additional spoken requirements may improve awareness and transparency to some degree, it will be marginal, given the current high levels of awareness”.

- 9.17 Having taken into account the respondents views, the final RIA (attached at Appendix A) further elaborates and concludes on this overarching framework. The RIA sets out that the enhanced measures are appropriate, proportionate and justified based on economic principles, evidence available to ComReg at this time, and are consistent with ComReg’s statutory objectives to protect end user welfare.

Quantification of Costs

- 9.18 The RIA highlighted that many of the draft provisions included in the initial consultation (ComReg document 10/92a and associated draft Code incorporated in ComReg document 10/92b) are interrelated, such that the implementation of one measure may obviate the requirement for another and the removal of a measure may require the implementation of another within the PRS regulatory framework. Eircom’s submission suggested possible duplication in relation to Purchase Confirmation Receipts. ComReg considers that the amendments made to the provisions of Section 5.7 of the new Code, are consistent with the requirements of the Distance Selling Regulations and do not duplicate these requirements. ComReg has set out that where the end user of a PRS is required to be issued with a Purchase Confirmation Receipt, such receipts do not necessarily have to be issued by the PRS provider, and as such this provision may not have an impact on all of the PRS providers involved in the provision of a particular PRS. This matter is explained in further detail in Section 6 above.
- 9.19 ComReg considers that the requirements of the *new Code*, which relate to the provision of clear pricing information and the requirement to speak certain material information are necessary to adequately inform end-users and can only have a beneficial impact on their interests. ComReg wishes to address the submissions on the possible additional downsides to the requirements included in the *new Code*, in particular;
- (a) The cost incurred by PRS providers in providing the extra services may be passed through to end users, and
 - (b) The fact that excessive information may confuse or burden end users.
- 9.20 The enhanced promotional requirements that simply require amendments to the existing provisions of the current Code (e.g. standardisation of wording, larger font sizes) are likely to have minimal cost impacts given that the systems required to implement the changes already exist. ComReg has also looked at international precedent and experience, such as PhonepayPlus in

the UK that considered the additional costs as a result of rewording promotional statements as negligible⁵².

- 9.21 ComReg was also cognisant of the costs required to amend the voice-over of audio-visual promotions in order to provide pricing, including recurring pricing, information. It should also be noted that ComReg, having considered the responses received, has reduced the “spoken requirements” in Section 4 of the *new Code* from those that were consulted on in Consultation Document 11/51 and has determined that these costs are outweighed by on-going benefits to end users. This topic is further considered in the RIA under the heading “*Positive Confirmation to Subscribe to a PRS (Double Opt-In)*”
- 9.22 With regard to the prospect of excessive information confusing or burdening consumers, the information being provided is primarily basic information about the nature of the product and its price. As such, these requirements cannot be considered overly burdensome on the PRS providers and to obscure or conceal pricing information or other material information. In any event concealment of such material information would be contrary to the provisions of the UCPD. ComReg addresses the general promotional requirements of *the new Code* further in the RIA⁵³.
- 9.23 ComReg has already addressed the issues raised by Modeva/IPPSA in relation to the requirement for end users to provide positive confirmation of their intention to subscribe to a PRS (“double opt-in”) in Section 5 of this document but it is beneficial to restate that:
- (a) the measure to require the end user to send an SMS to indicate their intention to subscribe is both a proportionate and appropriate measure to introduce to the Irish PRS market at this time,
 - (b) while ComReg accepts that requiring an end user to provide positive confirmation of their intention to subscribe to PRS may impact on some PRS providers, initially, it is difficult to comprehend how the impact of this measure “*will cause devastating harm*” to consumers, as submitted by Modeva/IPPSA, as not all PRS operate on a subscription basis and enhanced transparency and protections should provide benefits for consumers.
- 9.24 With the introduction of a double opt-in requirement, end users will have to complete an additional step before they can access subscription PRS. The PRS is, ultimately, still available to them and those who wish to use these PRS can still do so, by incurring a small extra cost. The magnitude of this cost is likely to be limited, particularly when it is considered as a one-off cost compared to the on-going benefit that an end users will receive from being subscribed to a PRS that they value.

⁵² *PhonepayPlus (2008) “Mobile phone-paid services and their Marketing”*

⁵³ Section titled “*Provisions applicable to PRS promotion and price information*” in the RIA attached as Appendix A to this document.

- 9.25 One of the arguments against double opt-in, put forward by IPPSA/Modeva, was that it will complicate the subscription procedure causing disruption to the user flow by requiring potential end users to respond with an MO SMS⁵⁴ to an SMS received from the PRS provider. The purported consequence of this additional step will be to reduce substantially the number of final confirmations, which could negatively impact end users, if these end users would have derived benefit from using the PRS subscription but under double opt-in do not consume the product at all. Evidence from the trial conducted by Modeva⁵⁵ showed that the vast majority of those who initially requested a subscription service did not complete it under the process of “double opt-in”. The reason for their failure to complete the second phase of the opt-in to a PRS is significant to understanding the potential impact of the double opt-in procedure. This is discussed further in the RIA (under the heading “Consumer Protection Measure (Double Opt-In for Subscription PRS)” and is summarised below;
- (a) On the basis of the trial conducted by the IPPSA, the difference in the proportion of people completing their subscription under double opt-in relative to those completing without double opt-in is substantial. If the difference is truly due to the additional “hassle”, disruption or as a result of apathy then this would suggest that a small additional time cost (and any limited cost of sending an additional SMS), incurred when subscribing to a PRS is sufficient to make the majority of end users believe the PRS, is no longer worth subscribing to. This would imply that the end user valuation of the PRS in question is actually relatively low.
 - (b) Indeed, this would theoretically imply that the limit for any individual end user harm caused by a double opt-in would be the time/SMS/hassle cost of the second opt-in phase since, if they would have derived a consumer surplus (benefit) greater than the hassle cost, they would in fact choose to complete the second phase opt-in.
 - (c) Notwithstanding the above, the submission by the IPPSA and Modeva to the previous Consultation (ComReg 10/92a) claimed that the introduction of the "double opt-in" requirement will have a devastating effect on industry, is based on a single trial, on a particular day for a given subscription PRS competition, and therefore may not be representative and appropriate for extrapolation to the PRS market as a whole.
- 9.26 For these reasons, ComReg considers that it has taken due consideration in quantifying the impact on industry arising from the introduction of the *new Code*.

⁵⁴ MO SMS is an acronym for Mobile Originated Short Message Service and, in the context of PRS, means a text message sent from the end users mobile handset.

⁵⁵ Report submitted as Appendix 2 to IPPSA response to ComReg Consultation 10/92a
<http://www.comreg.ie/fileupload/publications/ComReg1151s2.pdf>

Process

- 9.27 ComReg conducted the RIA *ex-ante* (before any changes have been implemented) and consulted in relation to the proposed intervention with interested parties.
- 9.28 In addition to the main consultation documents, the RIA clearly set out the policy objectives and identified options, where the options can be considered as being each of the different measures assessed. ComReg highlighted that, consistent with economic principles and based on survey evidence, despite existing regulation, there is potential for further improving the transparency of information and protection provided to consumers. This would allow them to make better choices with more awareness and confidence.
- 9.29 The RIA set out the policy changes that would be made and, consistent with its statutory objective for PRS, ComReg assessed the overall impact on end users of each of the significant options. Protecting end users interests could be manifested in a number of ways such as keeping prices low, widening the range of services available, or preventing end users from harm.
- 9.30 As set out in Section 5 above, ComReg clearly has considered alternative implementation of options for achieving the twin goals of transparency and consumer protection. In that regard, it has evaluated the information received from regulatory authorities in other jurisdictions, which is also included in Section 5 of this document and indicates that the overwhelming majority of countries consider the provision of a positive confirmation to be a basic consumer requirement and have imposed it within their PRS industries. ComReg considered information and data from a variety of sources such as historical consumer complaints, responses to the initial consultation document as well as research surveys on the PRS market in Ireland. ComReg has also considered the draft impact analyses submitted by Modeva/IPPSA in framing the provisions of the *new Code*. While the analyses submitted by IPPSA/Modeva purport to indicate the introduction of the enhanced promotion and the double opt-in requirements in the *new Code* would have a disproportionate impact, ComReg considers, as set out under the heading “Insufficient Justification” above, that some of the assumptions made by the respondents fundamentally undermines the analysis and its conclusions.
- 9.31 Consistent with economic principles, the RIA estimated a level of potential consumer harm in relation to a level of dissatisfaction experienced by a segment of PRS consumers (over a six month period). Notwithstanding this, ComReg is cognisant of the fact that a burdensome provision within the *new Code* may negatively impact end users of PRS by, for example, reducing the amount of consumer choice available and, that such intervention may lead to potential compliance costs for PRS providers, the RIA clearly assessed whether, overall, the benefits outweigh any costs of regulation.
- 9.32 On the basis of the assessment presented in this document and in the final RIA, ComReg’s view is that conceptually all of the measures implemented in

the *new Code* should be expected to enhance consumer welfare, while the costs that they create will be relatively limited.

- 9.33 For these reasons, *ComReg* has followed its own RIA guidelines in conducting the RIA.

Conclusion

- 9.34 On the basis of the above, *ComReg* has revised and finalised its RIA, which is attached as Appendix A to this document.

APPENDIX A Regulatory Impact Assessment (RIA)

Introduction

- A 1.1 Consultation document 11/51 (Appendix C) set out ComReg's draft Regulatory Impact Assessment ("the draft RIA") on the provisions of the revised draft Code which was prepared in accordance with ComReg's RIA Guidelines ("ComReg's RIA Guidelines")⁵⁶ and having regard to:
- (a) the RIA Guidelines issued by the Department of An Taoiseach in June 2009 ("the Department's RIA Guidelines"), and
 - (b) relevant Policy Directions issued to ComReg by the then Minister for Communications, Marine and Natural Resources under Section 13 of the 2002 Act on 21 February 2003 (the "Policy Directions").
- A 1.2 ComReg invited interested parties to review the draft RIA and to submit any comments or information in relation to it that they believed ComReg should consider in finalising the new Code. ComReg address the respondent's views in relation to the draft RIA and related matters in Section 9 of this document. The latter section should be read in conjunction with ComReg's response and final position on the RIA as set out below.
- A 1.3 As part of the process in selecting an appropriate regulatory approach in this instance, ComReg has set out the key policy issues and objectives below, followed by an assessment of the relevant options and their respective impacts for consumers, PRS providers and competition.

Policy issue and objectives

- A 1.4 This RIA examines the current PRS market situation using information and data from a variety of sources such as historical consumer complaints, responses to the initial consultation document as well as research surveys on the PRS market in Ireland. The evidence presented provides support to ComReg's position that existing regulation in the PRS market should be enhanced because there is a verifiable level of harm to consumers. There are a number of proposed regulatory measures and, in order to assess these measures in as succinct a fashion as possible, it makes sense to focus on the key policy objectives. Therefore the objectives of
- (a) increased transparency, and

⁵⁶ *ComReg Document 07/56a. Guidelines on ComReg's approach to Regulatory Impact Assessment. August 200.*

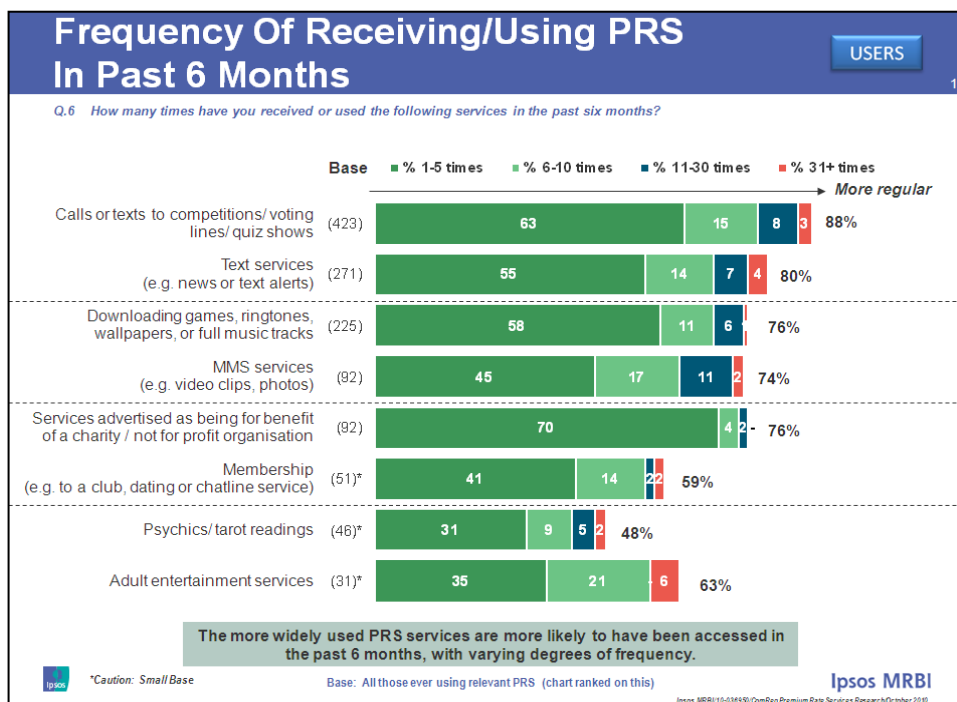
(b) consumer protection

- A 1.5 Within these two overarching policy objectives, the proposed changes to the current Code of Practice are considered. A scenario where there is no change to the existing regulatory situation is implicitly considered as a benchmark against which other available regulatory options are then assessed.
- A 1.6 While ComReg is an organisation which has a responsibility for promoting competition, for protecting consumers and encouraging innovation in the overall telecommunications (electronic communications services and networks) sector, the protection of the interests of end-users (consumers) of PRS is ComReg's singular statutory objective in accordance with its role as regulator of PRS sector. Given ComReg's statutory obligation to protect the interests of end-users of PRS, this RIA primarily considers whether certain individual elements of the Code and the overall Code itself will have a positive impact on end-users of PRS. However, while ComReg is obliged to protect the interests of end-users of PRS, it is ComReg's view that a safe and confident consumer will benefit all industry stakeholders.⁵⁷ Consistent with ComReg's RIA Guidelines, the RIA considers what effect the proposed Code of Practice may have on PRS providers, as well as on competition. Furthermore, ComReg is bound by the principle of proportionality in considering the implementation of regulatory measures.
- A 1.7 ComReg is aware that over-regulation of the PRS industry may run the risk of;
- (a) PRS providers exiting the market, and/or
 - (b) suppressing the range of PRS services from which consumers derive utility. and/or
 - (c) applying inefficient price increases, which could negatively impact consumers.

Although there is a challenge in quantifying levels of customer satisfaction, it is clear from the results of the Ipsos MRBI survey⁵⁸ undertaken on behalf of ComReg that there is a certain cohort of PRS consumers that are regular and repeat users. As evidenced from Figure C.1 some services are more likely to see repeat access than others. It is safe to assume that if consumers did not attach a value to the product on offer, they would not continuously use it over time.

⁵⁷ In 2009 the PRS industry generated €81m in revenues, and this was at the height of a recession when consumers would be especially sensitive, with RegTel reporting approximately 28,000 complaints and queries. One could assume that if consumers feel more confident, both in terms of the economy and the business environment in which PRS providers and end-users interact, there would be a positive effect on revenue for PRS providers.

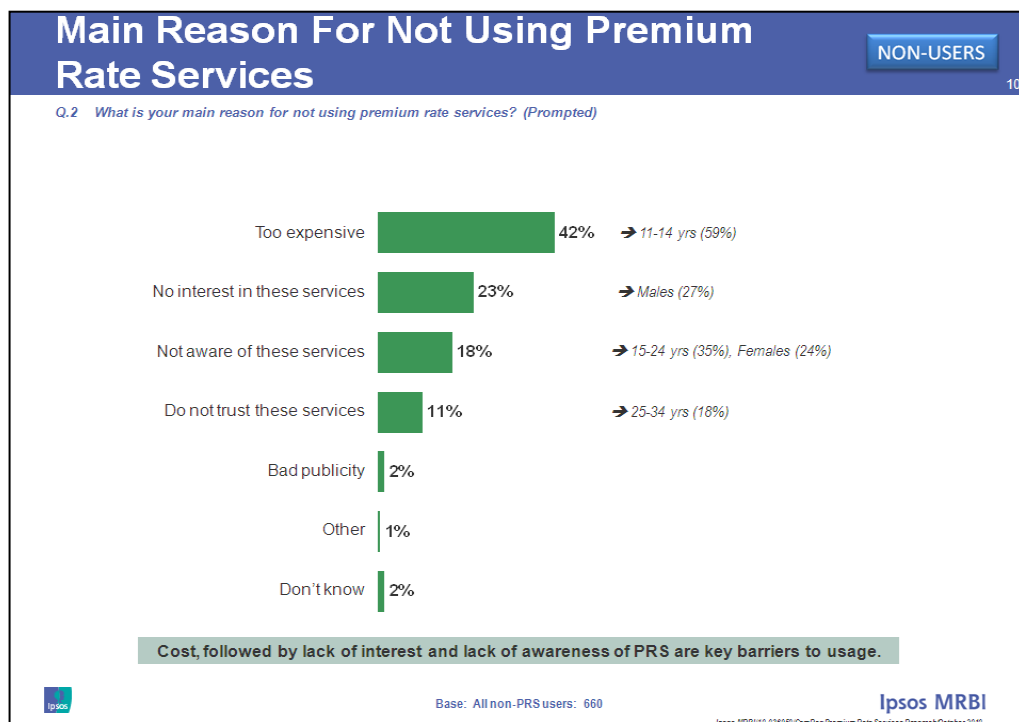
⁵⁸ Ipsos MRBI/ComReg Premium Rate Services Research Quantitative & Qualitative Analysis, October 2010 included as Annex A & B, respectively, to ComReg consultation document 11/51.

Figure C.1 – Frequency of PRS usage

A 1.8 The balanced approach for ComReg is to impose regulatory measures with a focus on consumer protection, while also being cognisant of the need for proportionality. Consumer loss can be measured in a number of ways, but it is clear from;

- (a) historical complaints data collected by RegTel in its 2008/2009 Annual Report, that there were approximately 28,000 queries and complaints (a slight drop on the previous year) made by consumers. Of these, more than 50% were requests from consumers to unsubscribe from a Premium Rate Service and almost 35% were related to the denial of subscription.
- (b) data collected from ComReg's customer care centre also indicates that while the total number of consumers contacting ComReg has declined, the reasons for consumers to contact the Regulator is consistently associated with subscription PRS, with 49.5% of consumers in Q3 2011 denying that they had subscribed to a PRS a further 16% citing difficulty in unsubscribing and another 11% requesting to be unsubscribed,
- (c) survey data, captured by Ipsos MRBI on behalf of ComReg, suggests that 21% of PRS consumers have experienced difficulties using a PRS. Of this percentage, approximately one third are subscription service users. The type of difficulties experienced included not being able to unsubscribe, continuous receipt of texts and the perception of being somewhat misled.

- A 1.9 The Code of Practice introduced by RegTel in 2008 has played an important role in ensuring fairness for PRS end-users. However, given the statistical evidence available, ComReg considers that further corrective measures are required to further improve the overall consumer experience for end-users. Drawing on its extensive research, and experience in regulating the PRS market, ComReg's actions should also serve to adopt a preventative approach as well as responding to harm, if and when it happens. These proposed measures should also help to further build trust and confidence in a market in which, for some, trust has been damaged. It can be seen in Figure C.2 that while the majority of those who do not use PRS explain it is because of expense or lack of interest, there is a considerable cohort who suggest lack of trust is the main reason.
- A 1.10 ComReg also assessed potential impacts for industry players of revising the current Code of Practice. It is considered below that while certain administrative and set-up costs may initially arise, and there may be certain revenue impacts from uncommitted customers because of the requirement for end users to provide positive confirmation of their intention to subscribe to a PRS (the "double-opt in" process), the proposed regulatory changes will also lead to enduring benefits for industry players. These benefits include reduced consumer complaints and greater regulatory certainty in terms of dealing with any consumer complaints and queries which may arise. In addition, it will also promote greater consumer confidence in PRS provisioning which, in view of the regular and repeat PRS-user category identified above in Section 1.9, should reflect positively on the uptake of those services and associated revenues over the longer term. These initial implementation costs need to be viewed against the on-going benefits which consumers will reap over several years from better pricing transparency, as well as the on-going revenue opportunities that a more informed and confident consumer may present.

Figure C.2 – Reasons to not use PRS

Assessing options and impacts for stakeholders and choosing the best option

A 1.11 This section considers whether the existing regulation goes far enough or whether other regulatory options are more appropriate to enhance the existing Code to address the on-going customer difficulties identified in the course of ComReg’s research. Given the number of individual elements to the new Code, it is practical for the purposes of this RIA to consider the potential impacts of the individual components for all stakeholders under ComReg’s two key objectives as follows:

- (a) increased transparency, and
- (b) consumer protection.

Increased transparency

A 1.12 This section assesses the various elements of the new Code that ComReg considers are necessary to help increase transparency in the PRS market, particularly for the consumer but also for other stakeholders in the industry. Specific issues that have been considered in the consultation and relate to the policy objective of increasing transparency are as follows:

- (a) Provisions applicable to PRS promotion and price information,
- (b) Expenditure reminders and purchase receipts,

- (c) “Double opt-in” or positive confirmation,
- (d) Provisions relating to customer service, and
- (e) Appropriate means for end-users to receive refunds.

A 1.13 It is evident from the level of complaints over time, and from the results of research conducted by Ipsos MRBI on behalf of ComReg, and research conducted by Amárach Research on behalf of the Irish Phone Paid Services Association (IPPSA)⁵⁹ that there are transparency issues in the PRS industry. For an industry or market to be transparent, information must be widely held (available to and/or known by consumers) in relation to the types of products or services available, the prices of those products and services and from whom or where the products are available. If and when any of these three elements are missing, an informational asymmetry exists, where one party (the PRS provider) has more or better information than the other (the consumer).

Is information widely held in relation to the types of PRS products or services available?

A 1.14 According to the Ipsos MRBI research, over one third (37%) of the population do not feel confident in their ability to identify a PRS (this tends to be higher amongst females and those aged 25-34years). The research also indicates that further communication amongst the public is needed in terms of highlighting that you can be charged for receiving a PRS SMS text message (39% are unaware of this) and how to stop an unwanted PRS (59% don't know how to). These results indicate an informational asymmetry between PRS providers and end-users. Additionally, there also seems to be an informational asymmetry between end-users of PRS and ComReg since 76% of respondents are unaware of the existence of a PRS Code of Practice and 54% of respondents are unaware that ComReg is the organisation responsible for its implementation.

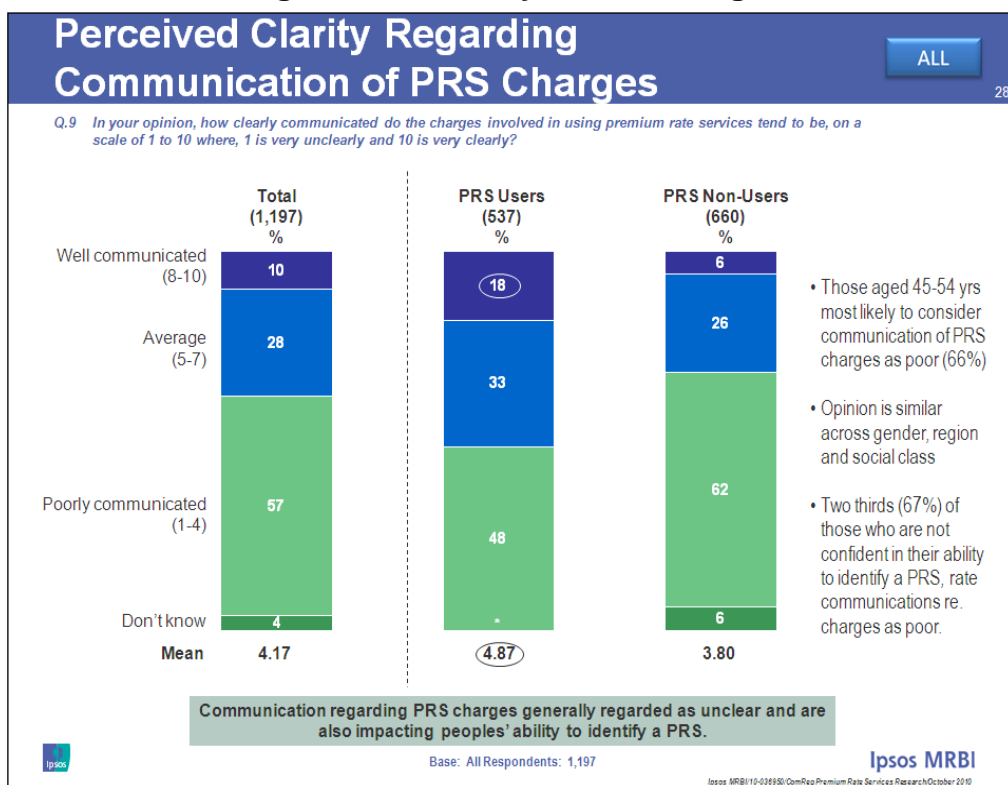
Is information widely held in relation to the prices of PRS products and services available?

A 1.15 In the qualitative element of the survey conducted by Ipsos MRBI on behalf of ComReg (separate to the quantitative research already mentioned), respondents were shown examples of the types of wording for PRS pricing and terms and conditions. Some respondents felt that the wording in some of

⁵⁹ Amárach Research, *Phonepaid Services Omnibus (NOG S10-158), A Presentation Prepared for Phonepaid, April 2010*

the pricing was clear⁶⁰, that no confusion arose and they easily interpreted the meaning of the statement. However, other pricing statements were considered unclear⁶¹ and respondents were confused over pricing terms. For example, some respondents were confused as to whether they were charged €2.50 every 6 days or €2.50 for 6 days. Overall, as highlighted in Figure C.3, there is a perceived lack of clarity in relation to PRS charges and pricing. This may lead to the conclusion that end-users are uncertain about their spend on PRS and indeed the quantitative analysis showed that just over 25% of those who had used a PRS were unsure of their spend.

Figure C.3 – Clarity of PRS charges



Is information widely held in relation to from whom or where the products are available?

A 1.16 While it is clear that users know how to access a PRS using their mobile or fixed line phone, there may be an issue with who they think is providing the service and this is another informational asymmetry, although perhaps not as serious as the asymmetry relating to price information. Indeed in the April

⁶⁰ For example, "You will receive the starting no. for each Comp along with the winner of each Champ. 60c/msg rec." For further detail see Ipsos MRBI/ComReg Premium Rate Services Research Quantitative & Qualitative Analysis, October 2010

⁶¹ For example, "You are subscribed to MyXXYY at 2.50 euro every 6 days. Send 600 SMS/mnth." For further detail see Ipsos MRBI/ComReg Premium Rate Services Research Quantitative & Qualitative Analysis, October 2010

2010 survey conducted by Amárach Research on behalf of IPPSA, of those who had ever used a phone paid service, 71% would first contact the mobile network service provider with a complaint and only 8% would first contact the PRS provider. This highlights a clear lack of awareness on the consumer's behalf about where the product or service is originating from and to whom they are paying for the product or service. ComReg has already made efforts to assist the consumer by introducing the online Number Checker⁶², which provides the name and contact details for the PRS provider to whom the checked number is assigned. However, the result of the result of the Amárach Research also underlines that parties, other than the primary PRS provider are bearing unnecessary customer care costs because consumers are generally unaware of whom they should contact in relation to the PRS.

A 1.17 Consequently, it is evident that there are informational asymmetries and the market is, to some extent, not transparent from the consumer's point of view, even taking existing regulation into account. A number of the policies and measures proposed in ComReg's new Code seek to address and rectify the absences and asymmetries that exist. These are measures that ComReg considers are necessary to help increase transparency in the PRS market, particularly for the consumer but also for other stakeholders in the industry. Specific issues that have been considered in the consultation and relate to the policy objective of increasing transparency are as follows:

- (a) provisions applicable to PRS promotion and increased price information,
- (b) expenditure reminders and purchase receipts
- (c) the requirement for positive confirmation to subscribe to a PRS ("Double opt-in").

Provisions applicable to PRS promotion and price information⁶³

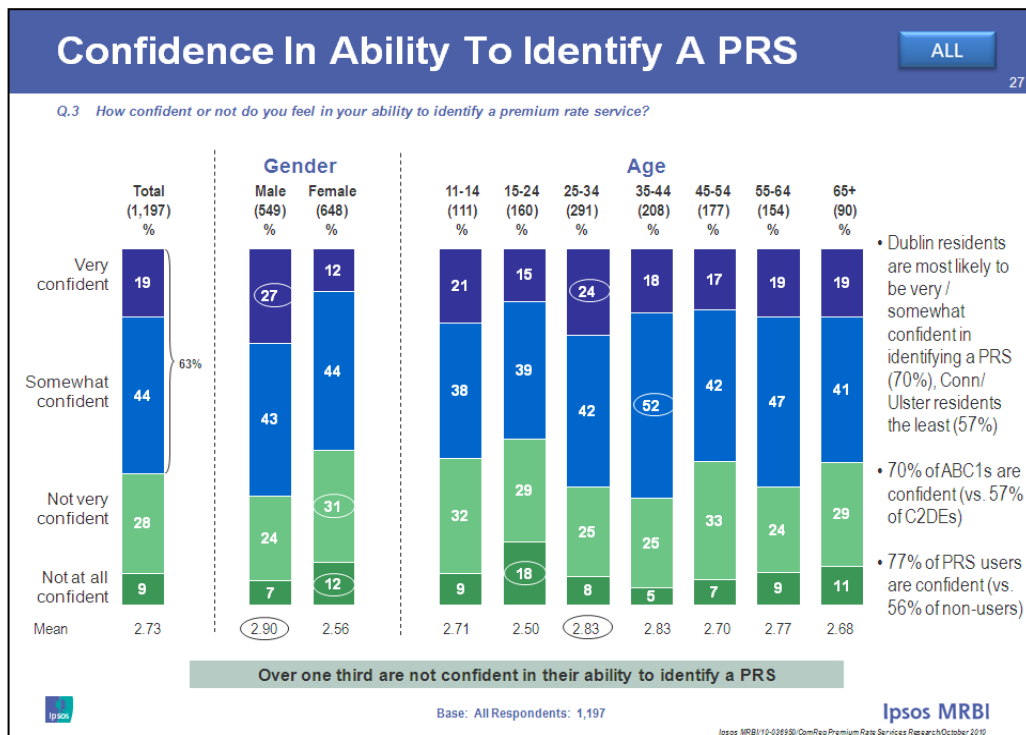
A 1.18 The provisions set out by ComReg with respect to the promotion of PRS and price information were all designed and proposed to ensure that the new Code is more transparent and more user-friendly for industry stakeholders and end-users. ComReg's stated policy, within the scope of the overall objective to protect the interests of end-users of PRS, is to ensure that PRS promotions should essentially neither mislead nor obscure any important conditions. This objective will provide clear benefits to those consumers who seem to lack trust in the PRS industry and/or do not have enough clear knowledge to make rational choices and informed decisions. Based on the quantitative research carried out by Ipsos MRBI, there is clear evidence to

⁶² "Check a number: Look up an unknown number from your bill"; <http://www.phonesmart.ie/>

⁶³ Specifically relating to questions 2 in the consultation document 11/51

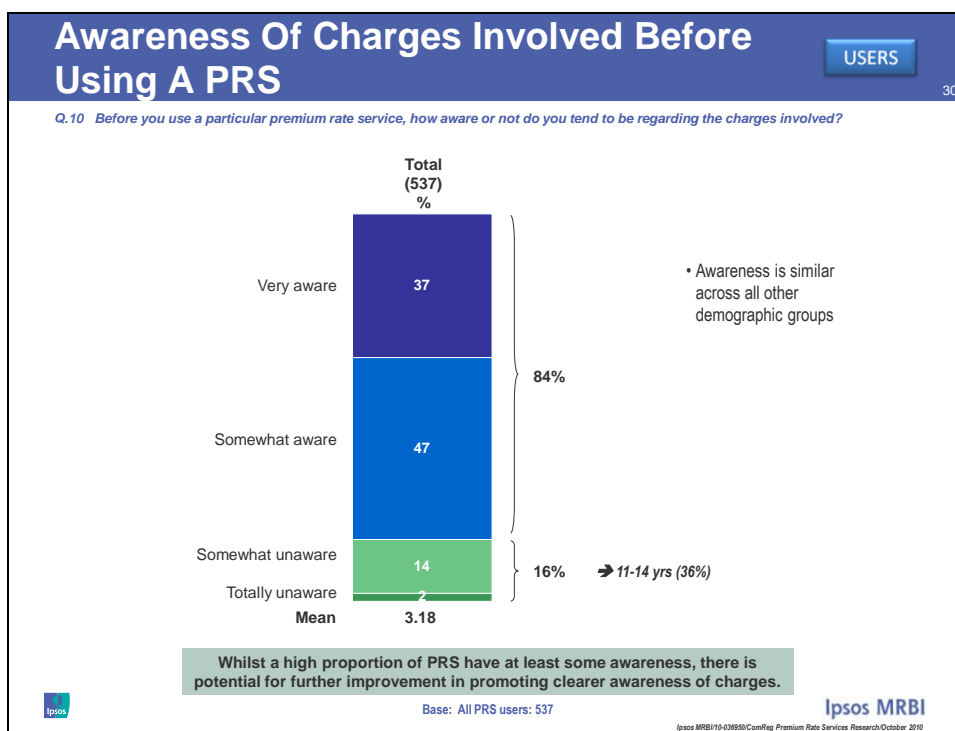
indicate a requirement for these further measures in the new Code in relation to promotions and price information in the interest of protecting consumers.

Figure C.4 – Confidence in identifying a PRS



A 1.19 As evident in Figure C.4 above, according to the survey data, almost 40% of respondents are not confident when asked to identify a PRS, and this figure is higher among the younger, arguably more vulnerable respondents (41% of 11-14 year olds and 47% of 15-24 year olds). A significant proportion of the Ipsos MRBI survey respondents also felt that they were somewhat unaware when asked about charges (cost) of a PRS before actually using it, as apparent in Figure C.5. This empirical data highlights the need for the provisions suggested in relation to promotion and pricing. There are obvious benefits to consumers in having clearer and more transparent information provided to them in advertising and PRS promotional material. Such transparent information obviously allows end-users to rationally decide if and how they want to use a PRS. However, in drafting its proposals ComReg is also cognisant that too much information could lead to “overload” or “clutter”, with the effect that potential end-users do not notice the price or terms and conditions that may be important to them and influence their decision to make a transaction.

Figure C.5 – Awareness of PRS charges



A 1.20 ComReg also recognises that there may be costs incurred by PRS providers in updating relevant advertising/promotional materials. However, these initial implementation costs need to be viewed against the on-going benefits which consumers will reap over several years from better pricing transparency, as well as the on-going revenue opportunities that a more informed and confident consumer may present. Price misperceptions potentially generate a loss in welfare as consumers might be deterred from purchasing services which they might otherwise be willing to pay for at their true price. The Ipsos MRBI survey identified that communication concerning PRS charges was generally regarded as unclear with 57% of respondents considering PRS charges to be poorly communicated. Furthermore, 42% of non-PRS users claimed they did not use PRS because they were too expensive.

A 1.21 The revised provisions set out by ComReg in the new Code with respect to the promotion of PRS, and the improved transparency of price information, should enable consumers to make more efficient pricing decisions. Enhanced transparency should further result in consumers feeling more confident in identifying a PRS and having a better understanding of the type of service they are subscribing to and paying for. It may therefore be expected that this enhanced consumer confidence would further promote increased use of PRS products and services over the medium to longer term.

A 1.22 One alternative to the provisions is to leave the Code of Practice unchanged, which ComReg believes could leave the problem of consumers lacking confidence in PRS unresolved. However, ComReg considers the provisions of the new Code to be reasonable and proportionate taking the identified informational deficiencies into account under the current regulatory scenario.

Expenditure reminders and purchase receipts⁶⁴

A 1.23 Based on the responses to the first consultation (ComReg 10/92a) consultation, ComReg reconsidered its original proposal to introduce additional expenditure reminders and also its proposal to introduce a limit on the amount that an end-user can spend on entering a competition. Both proposals were set out with the consumer's best interest in mind and received support from some respondents. While the draft proposals would be helpful in providing an end-user with more clarity and transparency in terms of their expenditure, there may be situations whereby such additional expenditure reminders would actually impose restrictions on end-users who wish to exercise their discretion and engage with PRS, thereby reducing an end-user's utility and satisfaction. It is ComReg's view that for Live Services the existing €60 limit with an expenditure reminder after €30, which have been in force for a number of years, are sufficient to protect consumers and yet not infringe on customer engagement with the service. For Virtual Chat Services, ComReg has provided that an expenditure reminder message is sent after a consumer has spent €20 on the service. In relation to Subscription Services, ComReg has retained the provisions in the current Code of Practice, which requires that end-users are provided with certain regulatory information after they have spent €20 but has not retained the proposal that requires such regulatory messages to be sent once per month, even where the end-user has not spent €20.

A 1.24 ComReg's proposal for PRS providers to issue end users with purchase confirmation receipts in certain circumstances provides an obvious benefit to the consumer, acting as a tangible confirmation for the PRS purchase that can be retained and referenced in case of potential disputes with the PRS provider. As previously set out, it is clear that issues currently exist in relation to pricing transparency and it is ComReg's opinion, agreed with by a number of respondents to the consultation that a purchase confirmation message would be a positive development for consumers. However, the requirement that purchase receipts be sent for each and every transaction would potentially impose a financial cost on members of the PRS value chain as well as jeopardising the stability of mobile networks given the possibility of exponential traffic volume growth. While the requirement of purchase

⁶⁴ Specifically relating to questions 5,6,10 in the consultation document 10/92a

confirmation receipts for all PRS transactions is unnecessary, particularly given the new promotion and pricing provisions in the new Code, there are some services (SMS payment for toll roads, for example) for which the confirmation receipt proposal can provide benefit to both the PRS consumer and provider. Once a purchase confirmation message has been issued by the PRS provider, it can point to it as evidence that the transaction took place and the end-user was correctly informed. Furthermore, as the National Consumer Agency points out in its response, a purchase confirmation message provides an extra degree of clarity regarding cost and may positively influence the end-user's decision to make further transactions, thereby generating additional revenue for the PRS provider. It is therefore considered appropriate and proportionate that end-users are provided with purchase confirmation receipts in respect of goods and services that are not delivered to end-users via mobile handsets. ComReg has, however revised the provisions of the new Code, which reduces or may eliminate the burden of PRS providers, whereby the requirement that end users of PRS are provided with a Purchase Confirmation receipt when they purchase goods and services that are not delivered to their handset remains, but the receipt need not necessarily be supplied by the PRS provider.

Positive Confirmation to Subscribe to a PRS (Double opt-in⁶⁵)

A 1.25 According to the quantitative research conducted by Ipsos MRBI, 59% of those consumers who had ever used a PRS had used a subscription service. Among this group the claimed average monthly spend was €14.69, approximately 32% higher than what is claimed to be spent by non-subscription service users. While overall, 21% of PRS users surveyed had experienced difficulties over the past six months, 30% of subscription service users had experienced difficulties. Furthermore, the primary reason for PRS consumers to contact the regulator (formerly RegTel and now ComReg) is in relation to subscription services. This data lends to the conclusions that there is a significant premium on expenditure levels of subscription users relative to non-subscription users and there is a greater likelihood that subscription service users will have experienced difficulties compared with non-subscription users. Furthermore, based on this evidence, one could reasonably draw the conclusion that more consumer harm potentially originates within subscription services than non-subscription services.

A 1.26 The data is given additional support by a sample of the responses to the qualitative research carried out by Ipsos MRBI. Respondents were unanimous in agreement that a "double-opt in" is a good idea and that it will not make a difference to those who are currently using and satisfied with

⁶⁵ Specifically relating to question 3 in the consultation document 11/51

PRS⁶⁶. Ipsos MRBI concluded that the double opt-in approach would allow users to carefully consider (think twice) before committing to the service, thereby removing any uncertainty about whether the service is subscription or not and is what the consumers wants.

A 1.27 A report submitted by IPPSA, as part of its response to consultation 10/92a, sought to test customer reactions to a single opt-in process versus a double opt-in process. The analysis suggested that under the double opt-in process, only 3% (out of a sample of just 131 users who sent a subscription request) continued with an 'AGREE' message and only 1.5% who sent the subscription request then proceeded beyond the first hour of making the request, suggesting that certain consumers may regret their initial consumption choice or may have subscribed unintentionally. However, the statistical significance and robustness of such a limited sample is open to question, especially considering that a sample of 236 was initially used to test the single opt-in process, while only 131 (almost half the original sample) was used for the double opt-in process, thereby undermining the comparability of the results. In addition, the consumer reactions to this particular subscription PRS, which indicated a dramatic decline in subscribers when the "double opt-in" was employed, may simply reflect the attractiveness of this PRS to informed consumers. No evidence has been submitted to attribute the decline in subscription numbers being attributable to "user apathy" or other such reason.

A 1.28 While financial impacts from the proposed "double opt-in" process may arise for certain service providers as certain uncommitted customers do not complete their purchase, it should also be recalled that ComReg's primary statutory responsibility is to the interests of the end user and, under the existing regulatory situation, the majority of calls made to ComReg in relation to PRS concern subscription services. A relatively significant project cost for introducing "double opt-in" was estimated by one industry participant. However, it should be noted that consumers will derive ongoing annual benefits from not having to complain, follow-up on complaints, and seek redress in general. The consumer's opportunity cost of time lost in seeking redress is saved. While ComReg would acknowledge the implementation and operational costs for service providers in introducing "double opt-in" and other regulatory changes in the short to medium term, consumers are likely to derive benefits from enhanced consumer protection over several years. Furthermore, the implementation costs for PRS providers cannot be viewed in isolation from the positive revenue impacts, which can also be expected in an environment of increased consumer confidence over the medium to

⁶⁶ "If it's something you're really interested in, it's not going to make a difference if you have to say yes twice, you're going to do it anyway." [Female, 35-44]

longer term. As evidenced by the quantitative research conducted by Ipsos MRBI, as well as the annual revenue that the PRS industry generates, a significant cohort of end-users have used, and thus may be presumed to derive utility⁶⁷ from consuming subscription services. It may be expected that the enhanced consumer protection measures would further reinforce general confidence amongst those consumers, thereby potentially promoting further engagement with subscription services. This would generate industry revenue growth, thus counterbalancing the initial cost impact over time.

A 1.29 In assessing the actual effects of the proposed measure, ComReg has observed that subscription services were, at some point, considered a significant source of potential or actual consumer harm in a number of countries until the regulator was moved to take remedial action. Double opt-in or “positive confirmation” of intention to purchase has been widely implemented, including in the United Kingdom, Belgium, Finland, Australia, South Africa, Sweden, Czech Republic and Finland. Some of these countries introduced double opt-in as far back as 2005 (Czech Republic) and 2006 (Sweden). Several regulators also report that, despite predictions from some quarters that the introduction of “double opt-in” would signal the demise of the PRS industry in their countries, this has not turned out to be the case. Further to this experience it is clear that ComReg’s draft proposal is neither a radical nor novel one, but is in fact setting out similar consumer protections considered necessary by a host of regulators in other jurisdictions.

Provisions relating to Customer Service⁶⁸

A 1.30 In the first three months of 2011, consumers raised approximately 3,000 PRS-related issues with ComReg’s customer service centre - an average of 33 per day. In the previous two years, RegTel reported an average of 24,000 calls per year to its customer care centre, which is an even higher per day average than the figure for 2011. Calls to the customer service centre are classified as either queries, complaints, advice or compliance issues. This is obviously an on-going administrative cost of regulation to ComReg. Current PRS customer service procedures could be considered as ineffective if consumers feel they need to contact the mobile network operator and/or ComReg in order to seek redress for their complaints.

A 1.31 It can be seen from both the Ipsos MRBI survey and the Amárach Research survey that a significant number of end-users are either unsure or there is a lack of awareness about who to contact should they have a problem in relation to Premium Rate Services. Lack of awareness of how to complain

⁶⁷ "It was good, I knew exactly what I was getting into. We had a specific event happening so I wanted to be fully up to date." [Male, 55-64]

⁶⁸ Specifically relating to question 19 in the consultation document 10/92a

was cited by 48% as their main reason for not complaining. Three quarters of those who have complained actually approached their mobile phone company (vs. RegTel at 16% and ComReg at 9%). Problem resolution amongst those who have complained is considered largely unsatisfactory (51% dissatisfied⁶⁹).

A 1.32 Enhanced regulation in relation to customer service should have a positive effect on consumer benefit as they will have to make fewer calls in order to find redress, as well as their usage of PRS in the long run becoming a more enjoyable experience. However, it is possible that stricter regulation in relation to enhanced customer service provision would place an additional cost on PRS providers in terms of staffing. At the same time, positive revenue implications may be generated over the longer term through an enhanced level of consumer confidence in the industry. Over time, as PRS providers deal more effectively with customer complaints this should have a positive effect on the customer's PRS experience, reduce churn and consumer loss and therefore, create a long run positive impact on the PRS industry - customers feel happier to use the services leading to increased revenue generation. This would point to a net benefit, particularly in light of ComReg's specific obligation to the consumer under its role as regulator of PRS in Ireland.

A 1.33 Furthermore, in terms of the overall social cost of this regulatory measure, this is potentially offset by a reduced cost of regulation/administration to ComReg. Without imposing provisions in the Code in relation to PRS customer service, there is the potential risk that consumers continue to look to ComReg for redress, imposing a growing cost and burden of regulation.

Appropriate means for end-users to receive refunds⁷⁰

A 1.34 Although the majority of the provisions relating to refunds are being placed in the Regulations, given that there is a residual clause proposed in the revised draft Code of Practice and in the interests of completeness, ComReg has included a discussion on refunds in the RIA.

A 1.35 As well as a timely refund, the policy objective should be clarity and transparency for the consumer, in that they have options available to receive the refund and will know upfront how the refund is to be made. At its simplest, if money is paid to a PRS provider by method X then the PRS provider should be able to refund to the consumer by method X. However, not all consumers will have the ability to receive refunds through all

⁶⁹ However, it should be noted that this related to a small base comprising all PRS users who have experienced difficulties and complained.

⁷⁰ Specifically relating to questions 22,23 in the consultation document 10/92a

traditional and/or more contemporary/technological methods. Similarly it will not be economically feasible for all PRS providers to offer refunds through all methods. Therefore while regulation is necessary to specify the types of refund methods, logic, rationality and proportionality has to be taken into account. There should be a definite and agreed array of refund methods that are clear to consumers and PRS providers alike for the sake of transparency. Consumer choice and the scale of refunds have to be considered by the consumer, the PRS provider and by ComReg when deciding what refund methods should be applied. Allowing a number of different methods, and then letting the consumer and the PRS provider agree the final method of refund between them, seems to be the optimal approach.

- A 1.36 In this case, the positive effects include a clear and visible choice for consumers if and when they are being refunded. Given a consumer's practical circumstances, the less constrained (s)he is in how (s)he receives the refund, the better. There are few downsides, or negative effects, to this regulatory measure as evidenced by the general consensus in the consultation response. Although making available a number of alternative refund methods will potentially add to the operating costs of a PRS provider, it should foster improved relationships with customers, which in turn can generate increased demand and therefore greater revenue for PRS providers.
- A 1.37 By dictating a small, closed number of refund methods ComReg would restrict consumer choice, and subsequently the PRS providers' choice, on how to make and receive refunds. By allowing and implementing a wider framework, providing the boundaries and then letting consumers and PRS providers agree among themselves the preferred refund method, ComReg is promoting a more choice-driven environment. Payments to consumers' phone accounts at the end of the month, the credit card model as mentioned in the response to consultation, is a reasonable and proportionate option for ComReg to take as the consumer still receives their refund in a timely manner and there is a fairness to the PRS provider which helps it to budget more effectively.

Consumer protection

- A 1.38 This section assesses the elements of the revised draft Code of Practice that ComReg considers will help to reduce consumer harm and increase consumer protection in the PRS market. Specific issues that have been considered in the consultation and relate to the policy objective of reducing consumer harm are as follows (though it should be noted that the "double opt-in" requirement is also considered a consumer protection and could also

be included in this list):

- (a) expenditure limits
- (b) undelivered messages,
- (c) Age Verification Framework, and
- (d) Adult Entertainment Services

A 1.39 It is difficult to quantify the extent to which consumers have been, or are being, harmed by a problematic or difficult interaction or experience with a PRS. The overall welfare cost of negative PRS experiences and/or of price misperceptions under the current framework can only be properly understood by estimating the resulting impact on consumer surplus which, as discussed further below, would require detailed insight into consumer valuations and behaviour in respect of PRS. Given the inherent uncertainty and subjectivity of such an exercise, it is not possible to obtain a precise value for the overall damage to consumer welfare under the existing Code of Practice and thus the corresponding benefits resulting from enhanced consumer protection under the new Code. The RIA must therefore rely on the extensive qualitative evidence available.

A 1.40 The data that is available and estimable from the Ipsos MRBI research, however, includes the approximate number of people who are aware that they have ever used a Premium Rate Service (according to the quantitative Ipsos MRBI research, 33% of the population aged 11+, which if extrapolated to the general population would work out at approximately 1.22 million people), and the number of complaints that have been lodged (the Ipsos MRBI research suggests that 51% of those who experienced difficulties with PRS actually complained to an industry organisation⁷¹).

A 1.41 According to the Ipsos MRBI quantitative research, 21% of PRS end-users have experienced difficulty when using a PRS. While recognising that this research is based on a snapshot, or sample, of respondents over a six-month period, inferring for the general population would work out at approximately 256,000 end-users. The Ipsos MRBI research also suggests that 51% of those who experienced difficulties actually complained to an industry organisation and extrapolating for the general population, this is estimated at just over 130,000. Therefore the 49% of those who did experience difficulty but did not complain can be estimated at just over 125,000. Of the cohort of complainants (estimated at 130,000 for the general population), the Ipsos MRBI research showed that 49% of respondents were

⁷¹ The Ipsos MRBI research noted that a mobile operator, RegTel, the PRS subscription provider, ComReg, the NCA, and the Consumer Association of Ireland were the main points of contact. RegTel/ComReg's average annual figure of calls to its customer care centre is approximately 24,000.

satisfied with the resolution, while 51% were dissatisfied. Extrapolating for the general population, we estimate that approximately 64,000 were satisfied and 66,000 were dissatisfied. The workings are shown in Figure C.6.

Figure C.6 – Sample calculation of minimum consumer detriment over 6-month period based on Ipsos MRBI research

Ipsos MRBI Survey		General Population		Cohorts of dissatisfied and complainants	
All respondents (11+)	1,197	Approx. Population >11	3,700,000	1. Those who did not complain but experienced difficulty	125,641
33% who have ever used PRS	395	33% who have ever used PRS	1,221,000	Assume a basic cost of a generic PRS text message	2.00
21% who experienced difficulty in the past 6 months	83	21% who experienced difficulty in the past 6 months	256,410		251,282
51% of those who experienced difficulties actually complained to a relevant body, ComReg, MNO, PRS provider etc.	42	51% of those who experienced difficulties actually complained to a relevant body, ComReg, MNO, PRS provider etc.	130,769		
Therefore 49% did not complain but still experienced difficulty	41	Therefore 49% did not complain but still experienced difficulty	125,641	2. Those who did complain but were dissatisfied	66,692
49% of complainants were satisfied with resolution	21	49% of complainants were satisfied with resolution	64,077	Assume a basic cost of a generic PRS text message and the cost of time spent seeking redress, based on half the hourly industrial wage	10.50
51% of complainants were dissatisfied with resolution	22	51% of complainants were dissatisfied with resolution	66,692		700,269
				3. Those who did complain and were satisfied/refunded	64,077
				Assume the cost of time spent seeking redress, based on half the hourly industrial wage; initial loss should have been refunded = zero-sum	8.50
					544,653
				Total consumer harm	1,496,204

A 1.42 As is clear from the responses in the qualitative Ipsos MRBI research, there are those end-users who feel complaining is not “worth the hassle”⁷². What kind of value can be put on the frustration and annoyance felt by those who might have had a bad experience but didn’t complain, and those who spent time making calls but to no avail? It is extremely difficult to put an estimate on this level of frustration but in order to include this cohort of people for the sake of completeness, assume, for the purposes of an illustrative example, that these end-users were “chastened” by their experience of PRS and their initial loss is simply the estimated cost of a generic premium rate SMS text, €2.00⁷³. Given some of the anecdotal responses in the Ipsos MRBI

⁷² Two examples of response; “Felt the effort I’d have to put in to get at those people wasn’t worth the €20 I lost.” [Male, 55-64]; “I just moved on from it really. I said what I needed to say to Vodafone and I got them to stop. Reporting them to Vodafone was as far as I went.” [Male, 35-44]

⁷³ This is an internal estimate of a generic price per text for Subscription Services, based on data received from the PRS industry, although the overall subscription charge paid by the end-user could vary significantly depending on the number of messages involved in any one billing period.

qualitative research, this may be a reasonably conservative figure and reflects just one possible way of estimating the initial loss experienced. Furthermore, it would not take into account broader welfare impacts such as the potential dampening effect of a negative experience on future PRS consumption. Nevertheless, for the purposes of this simple and partial estimate, this would imply an estimated initial cost of just over €250,000 for those who have experienced some level of frustration with their PRS experience but did not take the issue any further.

- A 1.43 The next cohort to estimate some minimum level of initial consumer detriment are those who claimed to be dissatisfied in the survey, took the time to make a complaint but did not receive a refund, which we have estimated as approximately 66,000 consumers. In this respect, the time that individuals spend seeking redress is an intangible variable that must also be considered. We therefore use the same initial loss figure as used for the previous cohort, the cost of a generic premium rate SMS text, €2.00, and add to it the time spent seeking redress. We again make a conservative estimate, this time on the time spent and its value, assuming they spent half an hour seeking redress (making calls, being put through to the correct customer service operator, sending and receiving emails and letters, etc.) and based on the average estimated hourly industrial wage of approximately €17⁷⁴, this would give an additional estimated cost for this cohort of approximately €700,000. It is again important to note here that this reflects just one possible method of estimating some initial level of loss experienced by these dissatisfied consumers.
- A 1.44 Finally, those who according to the survey did complain and were satisfied with the resolution (assume this to mean a refund was given) amount to approximately 64,000 consumers. Again we use the cost of time spent seeking redress (half the average hourly industrial wage, €8.50) but, in order to make a conservative estimate of the minimum consumer detriment initially experienced, we assume that the initial loss is made good by the refund. Therefore, the total cost for this cohort amounts to approximately €545,000. Overall, this would amount to an estimate of just under €1.5 million as a minimum level of the loss initially experienced by those who, according to the Ipsos MRBI research, have in some way been aggrieved and/or complained about PRS over a six month period. The calculation methodology used here is just one possible way of estimating some degree of the initial consumer detriment associated with a negative PRS experience and the cost of seeking redress. It should be reiterated that the above represents an indicative and partial estimate only and potentially understates

⁷⁴ Central Statistics Office, 2010 Statistical Yearbook, "In Quarter 4 2009, average weekly earnings across all sectors of the economy were €716.09, a decrease of 0.6% over the year from quarter 4 2008." Dividing this by a 40 hour week comes to approximately €17 per hour.

the actual welfare loss by a significant degree. It is, therefore, more correctly interpreted as a lower bound to the initial level of consumer detriment experienced by PRS consumers identified as being dissatisfied over a six month period.

A 1.45 To fully understand the precise impact on consumer welfare, it would be necessary to identify the consumer surplus foregone under the current framework. In this respect, it would be important to consider the demand elasticity of PRS consumers at an aggregate level as well as the elasticity of supply of PRS. Given the essential nature of the broad scope of telecommunications, individuals' demand for telecommunications may be viewed as relatively inelastic. However, the demand for mobile telephony⁷⁵ specifically would be somewhat more elastic than the demand for fixed telecommunications in general⁷⁶ and, as a significant proportion of PRS users access these services with their mobile phone (according to the Ipsos MRBI research), and we consider PRS to be, to some extent, a luxury good⁷⁷ (which by definition have a high elasticity of demand), it is fair to assume that the demand for PRS is relatively elastic. On the supply side, there is a wide variety of PRS products, and given the type of product on offer in the industry, it may be assumed that supply is not in any way fixed. Therefore, it may be assumed that the supply of PRS is also relatively elastic. This implies that both the demand and supply curves for PRS are potentially quite flat. Notwithstanding this, an area of consumer surplus can be identified, as in the illustrative Figure C.7 below, between the price consumers actually pay (the market price) and the maximum price they would have been willing

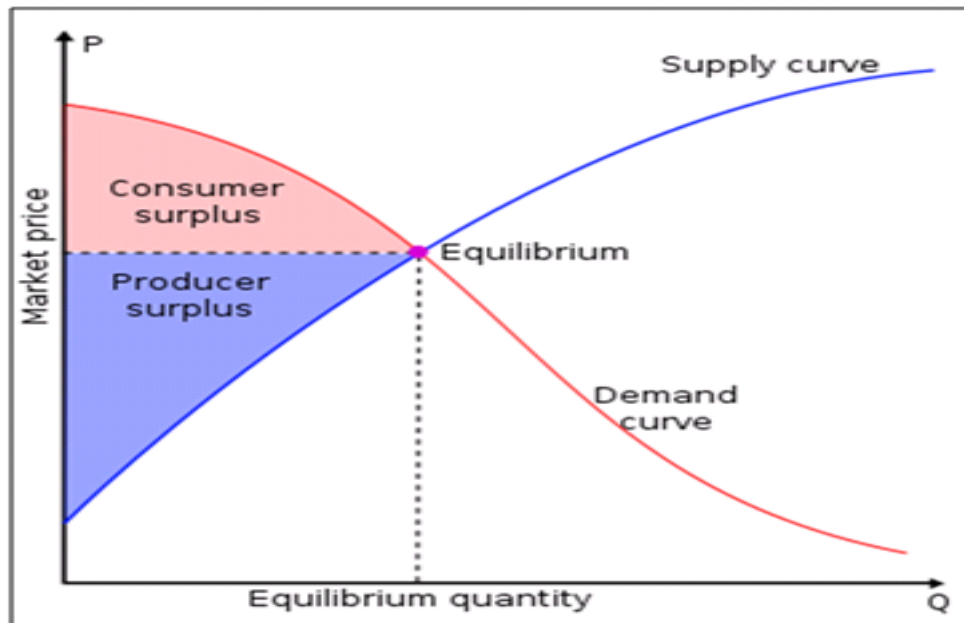
⁷⁵ Regarding the empirical literature on mobile telephony, Parker and Roeller (1997) use US data from 1984 to 1988 to estimate a structural model of the mobile telephony industry. They report an own price elasticity of demand of -2.5. Madden and Dalzell (2004) use annual panel data for 56 countries from 1995-2000. They estimate an own-price elasticity of -0.55. Hausman (1997) reports an own-price elasticity of subscription of -0.51 for cellular subscription in the 30 largest US markets over the period 1988-1993. Hausman (2000) using more recent data reports an own-price elasticity of subscription of -0.71. In a study on the Australian mobile market, Access Economics reports a price elasticity of -0.8. Summarising the results from different studies by DotEcon, Frontier Economics and Holden Pearmain, in its 2003 report on the charges for terminating calls from fixed and mobile networks, the UK Competition Commission reports own-price elasticities for mobile calls ranging between -0.48 and -0.65.

⁷⁶ See European Commission, Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU. Implications for Industry, Competition and Consumers, {C(2009) 3359 final}, May 2009, page 20, http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2009/c_2009_3359_en.pdf

⁷⁷ Luxury goods refer to goods and services that have a high income elasticity of demand for which demand increases more than proportionally as income rises. As an example, demand for Caribbean holidays rises significantly as average income increases. Conversely when the price of a Caribbean holiday rises, the number of Caribbean holidays demanded falls sharply. Contrast this with necessities, such as milk or bread, which people usually demand in quite similar quantities whatever their income and whatever the price. The Economist glossary; <http://www.economist.com/research/economics/>

to pay (the reservation price⁷⁸). Any change in the observed consumer surplus is thus important in terms of ComReg's remit to protect PRS consumers.

Figure C.7 – Illustration of consumer surplus



A 1.46 As already noted, consumers derive some consumer surplus from PRS and if, at an aggregate level, a PRS consumer's reservation price is higher than the equilibrium or market price shown in Figure C.7 above, it is possible to calculate a consumer surplus figure⁷⁹. However, if the satisfaction or utility that the consumer derives from the PRS experience does not equate to the reservation price, then there is a loss in consumer surplus. Furthermore, as discussed earlier, price misperceptions can contribute to lower levels of consumer surplus and consumption as consumers might be deterred from purchasing services which they might otherwise be willing to pay for at their true price.

A 1.47 So, while some attempt has been made to quantify the level of dissatisfaction experienced by a segment of PRS consumers (over a six

⁷⁸ Reservation (or reserve) price is the highest price a buyer is willing to pay for a good or service. It is the maximum value the consumer places on the good or service.

⁷⁹ For example, assume at a market price of €5 for a subscription service, the equilibrium quantity demanded is 5. A hypothetical market demand curve reveals that consumers are willing to pay at least €9 for the first unit of the good, €8 for the second unit, €7 for the third unit, and €6 for the fourth unit. However, they can purchase 5 units of the good for just €5 per unit. Their surplus from the first unit purchased is €9 - €5 = €4. Similarly, their surpluses from the second, third, and fourth units purchased are €3, €2, and €1, respectively. The sum total of these surpluses approximates the consumer surplus: €10. Any downward revision to the reservation price arising from consumer dissatisfaction with PRS would thus result in a decrease in this consumer surplus value which is relevant when formulating consumer policy.

month period), this is likely to significantly understate the actual welfare cost. For example, this figure would not reflect the full extent of the loss in consumer surplus associated with any PRS price confusion (e.g. due to unclear promotional offers) and/or distress experienced (e.g. by difficulties in opting out of certain subscription services), as well as the potential dampening effect of reduced consumer confidence on the general level of PRS consumption. It is, therefore, important to note that there is this economic value of reduced consumer surplus that, while difficult to estimate, nevertheless does exist and is important from a consumer policy perspective. ComReg considers that the regulatory measures discussed in the following sections aimed at substantially reducing this loss in consumer welfare are thus proportionate and justified.

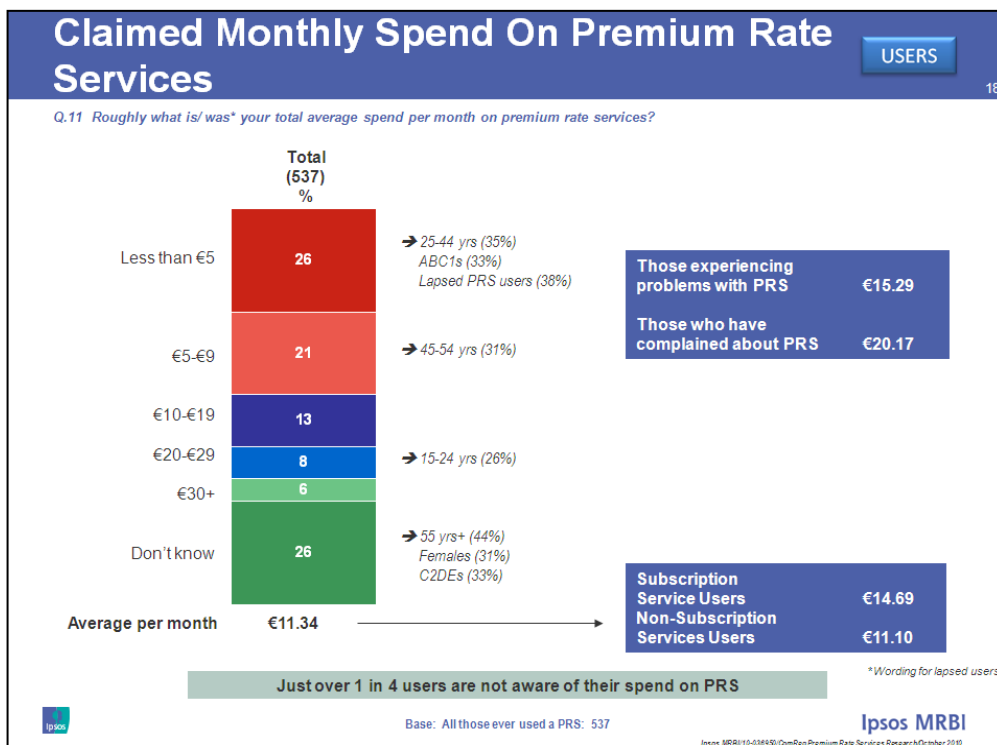
Expenditure Limits⁸⁰

- A 1.48 Expenditure reminders have already been discussed above and ComReg's decision, following the consultations, that it does not consider it warranted to introduce additional expenditure reminders, with the exception of Virtual Chat Services and the monthly reminder in relation to Subscription Services, leads reasonably to a similar decision in relation to expenditure limits. The policy objective in question was to consider whether placing expenditure limits on end-users would be of benefit and if such limits were beneficial, what would be the basis for the expenditure limit. While there is anecdotal evidence of consumers incurring significant charges, it must be said that this seems to be the exception rather than the rule.
- A 1.49 As is evident from Figure C.8 below, PRS end-users claim to typically spend an average of €11.34 per month and while those who have experienced a problem with PRS tend to have spent 34% more than the average (€15.29) or who have complained about PRS tend to have spent 78% more than the average (€20.17), these figures are still short of monthly expenditure on other luxury goods for entertainment - for example a Sky Sports or Movies package, a mobile broadband add-on etc., which is estimated at €30 per month. The intention of an expenditure limit would be to minimise consumer harm by simply blocking or restricting the end-user from continuing with a transaction beyond a certain charge incurrence. In cases where vulnerable users such as children or those with reduced mental capacity overuse a PRS without awareness of cost, there does seem to be a case for introducing an expenditure limit. However, other regulatory measures, such as the age verification framework and "double opt-in" should be sufficient to minimise this type of consumer harm. Therefore, as already mentioned, ComReg has reconsidered its initial proposal to introduce expenditure limits taking

⁸⁰ Specifically relating to questions 7,8,9 in the consultation document 10/92a

proportionality considerations into account.

Figure C.8 – Monthly spend on PRS



Undelivered messages⁸¹

A 1.50 The objective in relation to undelivered messages being stored-up and delivered en masse is to ensure that the consumer is not hit with a significant accrual of messages over a period of time and the consequent costs, creating a bill-shock for post-paid users or credit-shock for prepaid users, which is obviously an example of consumer harm that has to be minimised. ComReg believes that it is reasonable and proportionate to both end-users and PRS providers for no end-user to receive any more messages within a charge period than they originally signed up for. In respect of undelivered messages that are part of a subscription service, ComReg considers that no further attempts should be attempted to send it after the initial charge period has elapsed. This provision is considered appropriate to afford the PRS provider sufficient time to resend the message and prevent the end-user from receiving an inordinate, and perhaps unexpected, number of messages at the same time.

A 1.51 Regulation in this area is necessary because there have been instances⁸²

⁸¹ Specifically relating to question 14 in the consultation document ComReg 10/92a

⁸² <http://debates.oireachtas.ie/dail/2009/10/08/00011.asp>

where stored-up messages have been delivered when eventually the consumer's phone is available to accept text messages (e.g. when the account is back in credit after being topped-up. The National Consumer Agency response to the initial consultation (ComReg 10/92a) highlights a case based on their own research that a backlog of messages built up on a phone represents the potential for significant consumer harm. Both elements of the proposed regulation, no charge for a failed message and no further attempts to deliver message outside the initial charge period, are positive for consumers. Some respondents suggested that a fair balance is struck between protecting consumers and ensuring that PRS providers are not unduly disadvantaged. Cognisant of the impacts for PRS providers, ComReg considers the provisions in the new Code afford the PRS provider sufficient time within which to re-send any failed messages. Thus, in addressing the potential for consumer harm where an end-user suffers bill- or credit-shock from receiving a built up number of messages all at once, it is considered that the revised draft proposals meet the obligation to protect consumers in a fair and proportionate manner.

Age Verification Framework

- A 1.52 Not mentioned above is the extent to which children are vulnerable to PRS. Research conducted by Ipsos MRBI on behalf of ComReg indicates that (of a small sample size) 45% of 11-14 year olds have used PRS, a higher percentage than the population overall (33%). Furthermore, according to 2008 research conducted by Analysys Mason for PhonepayPlus in the UK, "47% of 11-17 year olds use phone-paid services". These figures indicate that children, a vulnerable group, which may be more easily misled and less able, or willing, to complain, are just as likely if not more likely to use PRS more regularly than adults, given the type of services on offer (ringtones, game downloads, music downloads etc.).
- A 1.53 With this in mind, the policy objective in relation to an age verification framework should be to specifically differentiate between consumers that are under eighteen and those adults over the age of eighteen. It is clear that children use PRS for age-appropriate transactions (for example ringtones, football results, downloading games, TV-voting etc.) as often, if not more often, than adults. Without an age verification framework, there is always the chance that a child will be exposed to Adult Entertainment Services (AES). If children are exposed to AES, there is clear consumer harm. There is a social responsibility to ensure that younger mobile users are denied access to inappropriate content while retaining the freedom for adults to access the services they desire. The question is, however, on whom does the social responsibility lie? ComReg proposes that this can be provided by an age verification framework if properly implemented.

A 1.54 An age verification framework should lead to prevent complaints by parents in relation to access to inappropriate content, thus helping to minimise administration costs for ComReg. Undoubtedly some PRS users under the age of eighteen will want to access AES but, by definition, these are adult services and it is neither fitting nor lawful for them to do so. There is a social benefit in forbidding children access to AES. There may be situations where some children will still circumvent the access block, however, for the most part a rigorously implemented age verification framework should work. There is certainly a cost to PRS providers and network operators (both mobile and fixed) of implementing the framework and while quantifying any social benefits of such a framework is difficult, if PRS providers want to offer these services they must ensure that children's access is severely restricted. This framework will also assist in restricting the activities of unscrupulous PRS providers who may look to exploit the easy spending and instant gratification provided by personalised mobile phone access, which is a characteristic of usage by children.

Adult Entertainment Services (“AES”)

A 1.55 The age verification framework places an onus on both the PRS provider (implementation of a system) and on the consumer (proving and verifying age) while the number barring system seems to be overly prescriptive and to some extent may actually restrict the consumer. Once the age verification framework is in place, ComReg, PRS providers and network operators have each taken a significant share of responsibility for the control of access to AES. Consumers must also be trusted with responsibility for their actions, unless they are children, but that is the point of the age verification framework in the first place. Once the age verification framework is in place, adults should be allowed act freely within the law in relation to AES.

A 1.56 A Live Service Providers' Compensation Scheme, which would provide for refunds to end-users whose telephones have been the subject of unauthorised use to call AES, is closely related to the issue of refunds. In the specific case of AES, having such a scheme in place would be beneficial to end-users who have been billed for transactions they did not make. In other words, someone else got hold of their phone and made calls/texts to run up a bill. However, this is extremely liable to abuse by individuals running up high charges and then making claims that someone else made the transaction and while ComReg is obliged to limit consumer harm, it should not foster a situation whereby consumers themselves are the ones defrauding the industry. The implementation of the age verification framework is one step in the process of ensuring such abuse does not occur. Fundamentally, the idea of the compensation scheme is sound but, as already mentioned, the objective could be met with proper regulatory

measures in relation to refunds. Cognisant of the need for any change to the existing regulatory situation to be proportionate and justified, there is undoubtedly an added cost to industry if such a scheme is put in place. Over-regulation by ComReg on this issue could create a further cost to the industry as well as potentially limiting the freedom, perhaps, of consumer choice.

Assessing the impact for competition

- A 1.57 In exploring the various regulatory options, the previous sections have assessed the potential impacts of the proposed regulatory changes on both consumers and service providers. ComReg's RIA guidelines also indicate that the RIA should look to determine what impact the proposed regulatory changes might have on competition in the market.
- A 1.58 As has already been suggested in the previous sections, the amendments to the Code may involve some implementation and operational costs for PRS providers, such as in updating advertising/promotional materials or implementing relevant complaint handling procedures. Furthermore, some revenue implications may arise e.g. from uncommitted customers not completing their purchase during the double opt-in process. Notwithstanding these potential impacts, the enhanced regulatory measures would apply to all service providers providing similar services. While certain providers may have greater reliance on certain types of PRS, the regulatory proposals are intended to be industry-wide and to create greater transparency across the PRS sector, rather than targeting any one specific niche of the industry. Therefore, the potential effect of these proposals is to raise the standard of service transparency across all providers. The proposed changes to the Code may therefore be considered relatively neutral in relation to competition between service providers.
- A 1.59 It may even be argued that the enhanced transparency measures should help to promote competition between service providers as consumers would be better informed on the PRS options available to them and better able to choose according to the PRS price and service offering. The proposed regulatory changes should therefore perform well in terms of better equipping consumers to make competitive choices based on the merits of the service offering. Improved transparency should thus help promote price competition and service innovation among PRS providers, in turn, generating further benefits for consumers over the medium to longer term.
- A 1.60 Furthermore, by reducing the scope for misleading/fraudulent marketing practices by opportunistic and errant PRS providers, the proposals may be viewed as providing a more secure commercial and regulatory environment for legitimate PRS providers to operate and invest within, thereby providing

greater revenue certainty and supporting more efficient and sustainable competition over the longer term.

- A 1.61 As also noted above, in the long term, given increased consumer confidence and a reduction in consumer harm, consumers may also be more minded to use the products and services that the industry has to offer, leading to increased revenues and increased market entry. This will, in effect, grow competition as firms not already in the industry could see it as a favourable and positive place to do business.

Conclusion

- A 1.62 ComReg's statutory objective in relation to PRS is to protect the interests of end users of PRS services. Even taking existing regulation into account, the PRS industry or market continues to lack transparency with significant informational asymmetries persisting in respect of PRS price and service details and evidence of consumer detriment occurring through the substantial complaints received in relation to these services. Survey findings demonstrate that consumer awareness of PRS in Ireland is not particularly extensive, even among PRS users. Almost half (48%) thought that charges were poorly communicated. Additionally, 39% were unaware that they could be charged for receiving a SMS.
- A 1.63 In this context, the policy issue of relevance is how to safeguard consumers. ComReg has assessed, throughout the consultations and in the draft RIA, a number of regulatory interventions in the Code, including, changes to the existing measures and some new measures. Broadly, these measures include:
- (a) Measures that increase the information given before a consumer purchases a PRS;
 - (b) Measures that increase the information given after purchasing a PRS; and
 - (c) Measures that protect consumers from unintentionally using a subscription PRS.
- A 1.64 These enhanced transparency measures recognise that there are end users who clearly derive utility from consuming PRS. However, the revised proposals are also aimed at supporting further end user engagement in PRS through enhancing end user confidence by providing measures which *inter alia* facilitate clear confirmation of an intention to subscribe to recurring charges (i.e. double opt-in for subscription PRS), help avoid bill shocks and strengthen complaint handling procedures.
- A 1.65 ComReg recognises that the provisions in the *new Code* will have direct

effects on both consumers and PRS providers as follows;

- (a) Direct Consumer effects;
 - (i) The provision of information prior to the incurring of any charges through spoken requirements and larger font size;
 - (ii) Consumer protection – additional acceptance level through the “double opt in” for subscription services; and
 - (iii) The provision of clearer information through the standardization of regulatory messages and the issue of receipts where there is no content delivered to the end users handset
- (b) PRS Provider effects
 - (i) Cost of advertising time for spoken requirements
 - (ii) Cost of extra SMS for double opt-in
 - (iii) Cost of system adjustments for double opt-in

A 1.66 The focus of the RIA is to clearly identify and consider the potential positive and/or negative impacts these proposals could have, primarily on end users but also on other industry stakeholders, and to an extent, the impact on competition within the industry.

A 1.67 ComReg has considered the respondents’ views to consultation 11/51 and the draft RIA. ComReg’s response and final position on the RIA as set out below should be read in conjunction with the main document, in particular, section 9 where ComReg set out a detailed response to the specific comments made respondents in respect of the RIA.

Information Requirements

A 1.68 The survey findings clearly indicate that that there is potential for further improving the transparency of information provided to consumers. This would allow them to make better choices with more awareness and confidence.

A 1.69 By providing clear and transparent information through spoken requirements and increased font size for pricing information, prior to any charges being incurred, ComReg seeks to allow consumers who value a PRS to continue to do so. Those that do value the PRS less (or not at all) will now able to make an *informed* choice on whether to purchase it. These measures could reasonably be expected to benefit end users by reducing consumer detriment.

A 1.70 The draft RIA described how consumers can benefit from the consumption of PRS services if they place greater value on the consumption of the service than their perceived price. Consumers may also benefit from the knowledge

that the PRS turned out to be cheaper than they had anticipated. On the other hand, to the extent that the consumer underestimates the price of PRS this could lead to an over consumption of service (i.e. a consumer may unintentionally subscribe to a service that they would not have done had the cost been fully known to them). For these reasons, ComReg believes that any measure that improves a consumers' perception of the price would benefit consumers (i.e. the provision of further information to end users could be expected to allow them to make better decisions).

- A 1.71 Concerning the potential costs of the improved information requirements, ComReg set out in the Section titled "Quantification of Costs" in the main document that it does not consider that the cost impacts of providing pricing information in larger font are significant. As stated, ComReg has reduced the spoken requirements, set out in Section 4.15 of the *new Code*, such that only essential pricing information is required to be spoken and should be readily incorporated within a TV promotion such that it does not impact significantly on a PRS provider's ability to market its product as it sees fit. Similarly, these measures are likely to benefit end users while not disproportionately imposing a cost burden on PRS providers.
- A 1.72 With regard to the prospect of excessive information confusing consumers, ComReg considers that consumers would not be unduly burdened as the information being provided is primarily basic and material information relating to the nature of the product and its price. Absent this information, it is more likely that there would be a time cost involved for consumers in attempting to get refunds, asking for advice or complaining to ComReg.
- A 1.73 The introduction of the new information requirements in the *new Code* should facilitate increased price and service transparency for end users and reduce the potential for consumer harm while also facilitating appropriate redress mechanisms in the event of actual end user harm. ComReg believes that, overall, this measure will create a net benefit for consumers and ComReg will have achieved its key obligation to protect the interests of PRS end-users. In terms of the impacts for PRS providers, ComReg acknowledges potential implementation and set-up costs for service providers as well as possible revenue impacts e.g. from uncommitted end users opting out. On balance, however, ComReg envisages longer term benefits for the PRS industry as the introduction of these proposals should promote confidence and trust in consumers towards the PRS operators which the empirical evidence would suggest consumers seem to lack currently. It is clear from the evidence in this paper that there is a clear consumer value attached to certain PRS services and, thus, greater consumer confidence should promote further customer engagement and uptake of those services. Furthermore, the increased regulatory certainty

that the new measures provide should, in the long term, have positive impacts for both consumers and PRS operators.

Consumer Protection Measure (Double Opt-In for Subscription PRS)

- A 1.74 ComReg has focused on the double opt-in measure in view that some respondents believe this measure to be inappropriate and overly burdensome for PRS providers. However, ComReg has assessed other consumer protection measures in detail throughout the consultation documents, in particular, sections 4 and 5 of the main document and in the draft RIA. ComReg's view is that measures, such as, expenditure limits and age verification, have a wider social value to end-users (e.g., vulnerable users and children) than simply an economic value. It seems apparent to ComReg that certain consumer protection measures do indeed generate their desired consequences of restricting access to PRS for some users groups as appropriate. ComReg received no compelling submissions⁸³ to remove or revise the current expenditure limits and there was broad support from most respondents, to the previous consultation on the Code, to the establishment of a robust age verification standard and a content classification framework, indicating that most respondents agree that these particular measures are desirable in the interests of end users.
- A 1.75 The primary consumer benefit arising from the double opt-in is through limiting access to subscription PRS, where consumers would otherwise have unintentionally subscribed and the price they would have paid exceeds their valuation of the PRS, hence potentially negatively impacting on this set of consumers. The introduction of the double opt in seeks to separate individuals such that those who value the PRS continue to do so. Those that do not value the PRS are now able to make an informed choice on whether to purchase them. Double opt-in is, therefore likely to be welfare enhancing for end users of PRS. Conceptually, the double opt-in requirement can only positively impact consumers since those who benefit from subscription PRS should be able to do so in both a market operating under the new Code and one operating under the existing Code, while any reduction in consumer detriment will overall be beneficial.
- A 1.76 ComReg considers that in the main, it can only be beneficial that an end user has knowingly subscribed. In addition, the double opt in requirement will create an audit trail, not available to ComReg in all cases at present, that may help resolve consumer complaints. For these reasons, the introduction of a double opt in requirement is necessary and justified.

⁸³ Responses received to Questions 5, 6, 7, 8, 9 and 28 of Consultation 10/92a

- A 1.77 On the other hand, ComReg recognizes that there can be a number of potential costs associated with consumer protection measures. For example, additional search costs for consumers, a potential loss to some consumers who, in the absence of the double opt-in, would continue to use the service, potentially increased compliance costs for providers of PRS and the potential pass through of such costs to the consumer.
- A 1.78 Under double opt-in, it is probable that there will be an additional transaction cost to the consumer, for example, sending an SMS to confirm their intention to purchase. ComReg nevertheless considers that these costs are likely to be relatively limited and surpassed by the benefits accruing by stopping consumers from unintentionally using services that they do not value. The additional cost to the consumer of this SMS will not be a premium rate charge and is likely to be free (except for the time cost). On the other hand, if the consumer unintentionally subscribes to a subscription PRS there is a high risk of potential costs such as, a recurring monthly charge (averaging €14.26⁸⁴) or more and any additional joining fees that may apply. Overall, the introduction of a double opt-in as a consumer protection measure will have a beneficial impact on all consumers.
- A 1.79 In relation to potential compliance costs, ComReg's view is that the additional cost incurred by PRS providers implementing the double-opt in measure is likely to be limited. At least one provider (Modeva) was able to implement a trial of double opt-in as part of its response to consultation suggesting that there is limited set up costs for programming/systems required for this additional regulatory intervention. ComReg has recognised the on-off cost to providers in adjusting their promotions and systems for double opt-in and the ongoing cost of sending an additional SMS for each subscription. For the reasons set out in Section 9 in the main document under the title "Quantification of Costs" and relative to the average monthly spend of PRS end users on subscription services of €14.69, it is probable that these incremental costs are relatively insignificant.
- A 1.80 For the above reasons, it is probable that on balance consumer protection measures (and hence the double opt in requirement for all subscription PRS) will have a positive overall impact on the functioning of this industry.⁸⁵ There is evidence that such measures will benefit consumers in the main by stopping consumers from unintentionally using services they do not value, while the evidence in the incremental costs for operators suggests that these costs would be relatively limited.

⁸⁴ Average monthly spend on a subscription PRS – Ipsos MRBI Quantitative Survey for ComReg

⁸⁵ ComReg notes the results of the IPPA survey that a considerable majority of PRS users (71%) would first contact the mobile network service provider with a complaint, only 8% would contact the PRS provider in the first instance.

A 1.81 ComReg considers that a more proportionate approach to safeguarding consumers in the current market conditions is, to provide consumers with enhanced information and enhanced consumer protection measures, including double opt-in. However, if PRS providers unreasonably pass on costs, including compliance costs, to the consumer in the form of higher prices, ComReg may intervene to ensure consumer protection is maintained.

Information Messages

A 1.82 The information requirements in the *new Code* include the provision of Purchase Confirmation Receipts, where a PRS involves the use of a facility to pay for a good or service that does not result in content being delivered to the end users handset and standardized regulatory messages for a subscription PRS.

A 1.83 In relation to subscription PRS, ex post informational reminders are likely to be beneficial to end users in the context of confirming to them that they are subscribed to a service. Where consumers were unaware that they remain subscribed to a PRS, these reminders are likely to aid them to cease using the service in future if they do not value it resulting in an overall positive impact on consumers. Similarly, ComReg considers the provision of Purchase Receipts to be beneficial to end users and should ensure that consumers who PRS to pay for goods and services will be treated in a manner similar to those who use other payment methods. As set out in Section 6 of the main document, ComReg has reduced the requirements that were initially set out in the *draft Code*, such that the PRS provider is not obliged to issue a receipt but to ensure that the end user is provided with a receipt by some party involved in the provision of the sale of goods or service to the end user. This may result in no cost implications at all for the PRS provider and, hence, these provisions are more likely to overall be welfare enhancing having regard for the interests of all stakeholders.

A 1.84 It is difficult to envisage any significant consumer detriment from regulatory reminders. Since these reminders occur after the consumption of a service, they cannot interfere with an initial purchasing decision, and hence the risk of excessive information seems limited.

A 1.85 While there will be costs to PRS providers associated with providing regulatory messages, as highlighted in Section 9 of the main document, the costs are likely to be limited and not significant given that they are primarily amendments to existing services and as such these costs are already factored into PRS providers pricing models.

Competition

- A 1.86 ComReg considered the potential impact of the *new Code* on competition in paragraph 1.59 to 1.63, inclusive, of the draft RIA.
- A 1.87 ComReg considers that there is a prospect for improving and expanding the market beyond current PRS users. Some respondents to the survey (37%) that were not particularly confident in identifying a PRS should now be made more aware with measures such as voice overs in commercials. ComReg is of the view that the increase informational requirements should help consumers better assess the true cost of PRS, which could be lower than their perceived price. It is therefore probable that the enhanced transparency measures would help better equip consumers to make competitive choices.
- A 1.88 ComReg is of the view that the proposals will impact the entire industry in a non-discriminatory manner as they would apply to all service providers providing similar services. In addition, by reducing the threat posed by errant PRS providers, the proposals would support efficient and sustainable competition between legitimate PRS providers over the longer term, generating more enduring benefits for consumers in terms of price and service choice.
- A 1.89 On balance, as enhanced consumer confidence helps generate revenue opportunities, this may in turn help “grow” competition, as firms not already in the industry could see it as a more positive environment in which to conduct business.

Net impact of the *new Code*

- A 1.90 ComReg recognises that any proposed intervention must be a reasoned decision and proportionate to the circumstances in the PRS industry in Ireland. The RIA, together with the analysis in the main document, identify the impact of the proposed measures, and, in so doing, highlight the measures within the new code that best achieve ComReg’s two overarching policy objectives in relation to PRS – increased transparency and consumer protection – in the most proportionate manner.
- A 1.91 ComReg’s view is that having considered the responses received to both consultations on the *new Code*, in conjunction with this RIA, the provisions of the *new Code* should overall positively impact end users and the functioning industry on the basis of compelling conceptual arguments for consumer benefits and the absence of any compelling evidence of substantial compliance costs for PRS providers. ComReg is confident that the measures laid out in this document reflect the current needs of end users and will also have the added benefit of encouraging growth within the industry through

enhanced consumer confidence.

A 1.92 On the basis of the analysis carried out through the consultation, in particular, in sections 4 and 5 of this document and, having taken into account the respondents' views, ComReg believes that the provisions set out in the *new Code* are necessary, justified, proportionate and in line with consumer protections available in other retail sectors in Ireland and elsewhere.