



Commission for
Communications Regulation

Response to Consultation and Decision

General Authorisation

Response to Consultation Document Number 08/27 and Decision setting out new General Authorisation Conditions in relation to Electronic Communications

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Contents

1	Foreword John Doherty, ComReg Chairperson	2
2	Executive Summary	3
3	Introduction	4
4	Conditions Proposed for Attachment to the General Authorisation, Rationale for Amendment and/or Retention of Conditions	6
5	Proposed Conditions as Consumer Protection Rules:	16
6	Are the Proposed Conditions objectively justified, non-discriminatory, proportionate and transparent?	17
7	Are Proposed Conditions Specific Obligations?	20
8	Regulatory Impact Assessment.....	21
	Appendix A –DECISION	24
	Appendix B –Legal Basis.....	26

1 Foreword John Doherty, ComReg Chairperson

ComReg has carried out a number of Consultations in relation to possible amendments to the General Authorisation (General Authorisation, ComReg Document Number 03/81).

ComReg considers that electronic communications services are of critical importance to many consumers in modern society and therefore any disruption, or potential disruption of services, must be treated as a matter of great seriousness. This Response to Consultation and Decision document addresses, where appropriate the changes ComReg has made following valuable submissions from industry, and provides clarity around what should happen when an Authorised Person chooses, or is forced, to cease to provide service.

The revised Conditions to the General Authorisation shall from this date form part of ComReg's General Authorisation, ComReg Document Number 03/81 (now ComReg Document Number 03/81, R1). The amended General Authorisation Document can be found at www.comreg.ie

I wish to thank, on behalf of ComReg, all respondents who submitted comments in relation to the very important issues that surround a cessation of service.

John Doherty
Chairperson, ComReg (Commission for Communications Regulation)
5 November 2008

2 Executive Summary

This document follows the Response to Consultation and Further Consultation on the General Authorisation, ComReg Document Number 08/27 and Consultation on the General Authorisation, ComReg Document Number 07/45, which put forward proposals to amend the General Authorisation to include certain Conditions as legal obligations to apply in the event that an operator ceased to trade or experienced significant non-transitory service disruption.

ComReg General Authorisation Document Number 03/81 contains Conditions which all electronic communications operators in Ireland must adhere to if they wish to do business in this country.

It is ComReg's conclusion, following the latest submissions to Response to Consultation and Further Consultation on the General Authorisation (ComReg Document Number 08/27), that it is appropriate to amend the terms of the General Authorisation (and specifically Condition 18) to provide for situations of service disruption to consumers. ComReg has considered responses to Consultation Document Number 08/27 and has decided to incorporate some amendments submitted by Respondents in response to that document and to amend the General Authorisation accordingly.

ComReg has decided to maintain all of the Conditions consulted on in Consultation Document Number 08/27, but incorporating some further amendments suggested by Respondents. This document addresses the comments of Respondents and provides ComReg's reasoning for proceeding or not, with particular amendments.

3 Introduction

The following discussion summarises the consultation responses and replies to the issues raised. It also demonstrates the manner in which these responses informed ComReg's new proposed Conditions. It should, however, be noted that responses to the consultation were, with certain exceptions, generally supportive of the proposed Conditions.

ComReg received 5 responses to ComReg Consultation Document Number 08/27 from the following Respondents:

- BT
- Vodafone
- Meteor
- Eircom
- The Department of Social and Family Affairs

ComReg thanks all Respondents for their submissions.

In light of the responses received (including confidential responses), ComReg has adopted some amendments to the Conditions now to be attached to the General Authorisation.

The remainder of this document adopts the following layout:

Section 4 of the document responds to question one of ComReg Document Number 08/27 *"Do you agree with the text of the Conditions proposed for attachment to the General Authorisation? If not, please indicate which of the proposed Conditions you do not agree with and why?"* It discusses the views of the Respondents to all Conditions that were proposed. It provides ComReg's conclusions of the submissions and demonstrates ComReg's rationale regarding the Conditions going forward. It also sets out the amended Conditions which are now proposed.

Section 5 of the document responds to question three of ComReg Document Number 08/27, *"Do you agree that the text of Conditions 18.2-18.10 proposed for attachment to the General Authorisation can be classified as Conditions providing for Consumer protection rules specific to the electronic communications sector including Conditions in conformity with the Universal Service Regulations?"* It discusses the views of the Respondents to the Conditions proposed. It provides ComReg's conclusions on the submissions and demonstrates ComReg's rationale regarding the Conditions going forward.

Section 6 of the document responds to question four of ComReg Document Number 08/27, *"Do you agree that the text of the Conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?"* It discusses the views of the Respondents to the Conditions proposed and provides ComReg's conclusions of the submissions and demonstrates ComReg's rationale regarding the Conditions going forward.

Section 7 of the document responds to question five of ComReg Document Number 08/27, *"In your view do the Conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or Conditions which are applicable to undertakings by virtue of other laws?"* It discusses the views of the Respondents to this question posed and provides ComReg's conclusions of the submissions and demonstrates ComReg's rationale regarding the Conditions going forward.

Section 8 of the document responds to question six of ComReg Document 08/27 Number, *"Respondents are requested to provide views on whether the proposed specifications are proportionate and justified and offer views on other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment?"* ComReg responds to the key points of the Respondents to this question, provides ComReg's conclusions on the submissions and demonstrates ComReg's rationale regarding the Conditions going forward.

Appendices:

Appendix A contains the Decision setting out the new Conditions now forming part of the General Authorisation.

Appendix B sets out the relevant legislation and legal basis of the Consultation.

4 Conditions Proposed for Attachment to the General Authorisation, Rationale for Amendment and/or Retention of Conditions

4.1 ComReg Document Number 08/27 asked at Question One:

Do you agree with the text of the Conditions proposed for attachment to the General Authorisation? If not, please indicate which of the proposed Conditions you do not agree with and why.

The text to the Conditions, as consulted on under ComReg Document Number 08/27, had provided as follows:

Definitions and Interpretation

“Cessation of Service” means any Termination, Suspension, or Restriction, howsoever arising, of an Electronic Communications Network or of an Electronic Communications Service, or access thereto, provided by an Authorised Person to Consumers. It does not include the replacement of an Electronic Communications Network or an Electronic Communications Service by a functionally equivalent Electronic Communications Network or Electronic Communications Service.

For the purposes of the definition of Cessation of Service:

“Suspension or Restriction” shall mean where an Electronic Communications Network or an Electronic Communications Service is suspended or restricted for at least 12 hours in any 24 hour period but is likely to be restored;

“Termination” shall mean where an Electronic Communications Network or an Electronic Communications Service is unlikely to be restored by the Authorised Person in the immediate future;

“Consumer” shall mean any natural person who is acting for purposes which are outside his or her trade, business or profession”;

“Substantial number of Consumers” for the purposes of paragraphs 18.2 and 18.3 shall mean 2,000 Consumers in the case of any Termination of an Electronic Communications Network or an Electronic Communications Service, or access thereto and shall mean 20,000 Consumers in the case of any Suspension or Restriction of any Electronic Communications Network or an Electronic Communications Service, or access thereto;

“Working day” means a day which is not a Saturday, Sunday or public holiday in Ireland.

18.2 An Authorised Person shall notify the Commission in writing;

(i) immediately where it believes there is a reasonable probability of a Cessation of Service affecting a Substantial number of Consumers; or

(ii) upon, and at the same time that it takes any action (such as issuing a notice of termination of a contract) against another Authorised Person, if it is of the view, in relation to that Authorised Person, that there is a reasonable probability of any Cessation of Service affecting a Substantial number of Consumers as a consequence of that action; or

(iii) in any event no later than ten working days prior to the actual or anticipated Cessation of Service affecting a Substantial number of Consumers, save where action is urgently required to ensure network integrity or safety of life, such that notification to the Commission is not possible. In this situation the Authorised Person shall notify the Commission as soon as possible.

18.3 Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers as soon as possible, in writing, in the event of a Termination affecting a Substantial number of Consumers. Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers immediately, in writing, where a final decision has been taken to implement a Cessation of Service affecting a Substantial number of Consumers.

18.4 Where the Commission forms the view that there is a reasonable probability of any Cessation of Service, the Authorised Person shall, upon request from the Commission, provide it with any information which the Commission considers necessary.

18.5 An Authorised Person shall at all times use all reasonable endeavours to ensure the effect of any Cessation of Service is minimised. An Authorised Person shall use all reasonable endeavours to ensure the continuous provision of the Electronic Communications Network or the Electronic Communications Service, where practicable, taking proper account of the nature and extent of the Cessation of Service and the likely Consumer requirement for the Electronic Communications Network or the Electronic Communications Service to continue to be provided.

Respondents' Views:

Note: not all Respondents addressed each Condition individually. However, ComReg has endeavoured to respond to all of the Respondents' views as follows, starting with the defined terms.

- 4.1.1 One operator while welcoming the new text for the Conditions felt it was unclear whether the term "Cessation of Service" included disasters outside the control of any Authorised Person. This operator stated that matters outside the control of the Authorised Person should be omitted from the definition of "Cessation of Service".*
- 4.1.2 A second operator while welcoming the clarity provided by the newly defined terms, made a point similar to the above. It stated that "Provision needs to be made for Cessations that were not anticipated by the network or service provider". It felt the term "Cessation of Service" required amendment to exclude unanticipated events. This operator also felt that anticipated events,*

that might not occur for some time, were not contemplated by the definition.

- 4.1.3 A third operator considered the definition of key terms provided the necessary level of clarity around the scope of the proposed Conditions. It stated that ComReg should set out how the numbers of consumers referenced in the defined terms were approached.
- 4.1.4 A fourth operator while welcoming the proposed amendments stated it believed the definition of "*Substantial Number of Consumers*" was "*slightly problematic*". It stated the definition does not define the time period in which the 2000 consumer would be at risk. It asks if the 2000 refers to a number at a point in time or to 2000 with a probability of their being at risk in say one year. It goes on to state that the "*assumption would be that it is 2000 consumers at risk at any given point in time, but the definition is currently silent in relation to this*".

ComReg's View:

- 4.1.5 ComReg has considered the points raised by the Respondents. However, as regards the first and second Respondents' comments, it is ComReg's view that term "*Cessation of Service*" should not be amended to deal specifically for certain anticipated or unanticipated events. It is ComReg's view that it is appropriate that the term "*Cessation of Service*" contemplates matters outside of the control of an operator, such as bad weather, where this might result in a disruption of service to a consumer. ComReg considers that to limit the obligations of an Authorised Person to stoppages within the control of the Authorised Person, would be to unnecessarily dilute the effectiveness of this provision. It remains ComReg's view that it is reasonable for an Authorised Person to notify its consumers where the Authorised Person believes it to be a "*reasonable probability*" (as set out in Condition 18.2) that a "*Cessation of Service*" howsoever arising, might occur.
- 4.1.6 ComReg confirms it considered various factors in its determination of an appropriate threshold as regards what might constitute a "*Substantial Number*" of "*Consumers*" (both defined terms)¹. It considered the total number of fixed access and mobile subscribers, the number of operators in the market and the proportion of consumers per operator. ComReg also considered what might be suitable as regards a termination or a suspension and restriction. ComReg took a certain percentage of the total number of fixed subscribers in particular concerning suspension and restriction, and further reduced this number by 10% to reflect the more serious matter of a termination. ComReg in taking into account various factors endeavoured to achieve fairness in terms of, *inter alia*, the burden of notifications on Authorised Persons as against consumer protection. Ultimately ComReg considers that 20,000 in the case of a suspension or a restriction and 2,000 as regards a termination, best achieve and are reflective of the most appropriate thresholds. It can be noted, more generally, that ComReg has amended the definition "*Substantial Number of Consumers*" to "*Substantial Number*". The defined term, in other respects, is unchanged.
- 4.1.7 In relation to the submission concerning 2000 consumers, ComReg considers that it is sufficiently clear from a reading of the defined term

¹ It can be noted, more generally, that ComReg has amended the definition "*Substantial Number of Consumers*" to "*Substantial Number*". The defined term, in other respects, is unchanged.

“Termination” that it is contemplated that whenever -“howsoever arising” 2000 consumers are affected by a cessation of service that is unlikely to be restored in the immediate future, obligations on the Authorised Person are triggered.

The defined terms now read as follows:

“Cessation of Service” means any Termination, Suspension, or Restriction, howsoever arising, of an Electronic Communications Network or of an Electronic Communications Service, or access thereto, provided by an Authorised Person to Consumers. It does not include the replacement of an Electronic Communications Network or an Electronic Communications Service by a functionally equivalent Electronic Communications Network or Electronic Communications Service. For the purposes of the definition of Cessation of Service:

“Suspension or Restriction” shall mean where an Electronic Communications Network or an Electronic Communications Service is suspended or restricted for at least 12 hours in any 24 hour period but is likely to be restored;

“Termination” shall mean where an Electronic Communications Network or an Electronic Communications Service is unlikely to be restored by the Authorised Person in the immediate future;

“Consumer” shall mean any natural person who is acting for purposes which are outside his or her trade, business or profession;

“Substantial Number” for the purposes of paragraphs 18.2 and 18.3 shall mean 2,000 Consumers in the case of any Termination of an Electronic Communications Network or an Electronic Communications Service, or access thereto and shall mean 20,000 Consumers in the case of any Suspension or Restriction of any Electronic Communications Network or an Electronic Communications Service, or access thereto;

“Working day” means a day which is not a Saturday, Sunday or public holiday in Ireland.

4.2 The Text to Condition 18.2 now reads:

18.2 An Authorised Person shall notify the Commission in writing;

(i) immediately where it believes there is a reasonable probability of a Cessation of Service affecting a Substantial Number of Consumers; or

(ii) without prejudice to the contractual rights and obligations of the Authorised Person, upon, and at the same time that it takes any action (such as issuing a notice of termination of a contract) against another Authorised Person, if it is of the view, in relation to that Authorised Person, that there is a reasonable probability of any Cessation of Service affecting a Substantial Number of Consumers as a consequence of that action; or

(iii) in any event no later than ten working days prior to the actual or anticipated Cessation of Service affecting a Substantial Number of Consumers, save where action is urgently required to ensure network integrity or safety of life, such that notification to the Commission is not possible. In this situation the Authorised Person shall notify the Commission as soon as possible.

Respondents' Views:

4.2.1 One Respondent stated the scope of this Condition is too broad and gives rise to uncertainties as to the circumstances where the obligation to notify arises. It suggested that the wording be amended as follows (emphasis added):

"Immediately where it believes there is a reasonable probability of a Cessation of Service affecting a Substantial Number of its Consumers".

4.2.2 In relation to Condition 18.2 (ii) this Respondent submitted that it does not object to the obligation of notification imposed on a wholesale provider, such as that envisaged in the proposed text for Condition 18 (2) (ii), if this is without prejudice to the notifying Authorised Person's entitlement to exercise its legal and contractual rights such as the ability to serve and execute termination notices, as it may deem appropriate in accordance with its business and commercial interests.

4.2.3 A second Respondent stated that *"Condition 18.2 while catering for urgent action does not provide for an involuntary cessation that is not the result of any action on the part of the Authorised Person. While [this operator] might assume that similar obligations apply should this not be expressly stated in the Condition"*.

4.2.4 This Respondent also suggested that the wording of Condition 18.2 be amended as follows (emphasis added):

"Immediately where it believes there is a reasonable probability of a Cessation of Service affecting a Substantial Number of its Consumers".

4.2.5 A further Respondent asked that *"An Authorised Person shall also notify the Department of Social Affairs (DSFA) immediately where a final decision has been taken to implement a Cessation of Service and or Termination affecting a number of consumers who are recipients of DSFA Allowance"*.

4.2.6 Other Respondents did not specifically address this Condition.

ComReg's View:

4.2.7 ComReg considers the obligations arising under Condition 18.2 are sufficiently clear on the face of the Conditions and it is ComReg's view that they do not require significant amendment.

4.2.8 Furthermore ComReg does not propose to change Condition 18.2 (i), 18.2 (ii) or 18.2 (iii) so as to limit them to relate to the Consumers of the Authorised Person. ComReg considers there may be situations where an

Authorised Person will have visibility or knowledge where a "Cessation of Service" is reasonably probable, even if this is not in relation to its consumers, but relates to another Authorised Person and to its consumers. ComReg considers in these situations, that the notification to ComReg does not represent an overly burdensome obligation of an Authorised Person, is not disproportionate (even if the relevant Authorised Person also notifies ComReg) and could be highly beneficial to notify ComReg particularly in situations where the relevant Authorised Person fails to notify ComReg at all when it ought to.

4.2.9 ComReg is willing to alter Condition 18.2(ii) to take into account the contractual rights and obligations of Authorised Persons and proposes to preface that Condition with the wording "*without prejudice to the contractual rights and obligations of the Authorised Person.*"

4.2.10 In relation to the point concerning any lack of reference to involuntary cessation not the result of any action on the part of the Authorised Person, attention is drawn to the definition of "Cessation of Service" which refers to a "Cessation of Service" as "*any Termination, Suspension or Restriction howsoever arising*", emphasis added. ComReg considers that it is clear that any Cessation of Service must be notified to ComReg irrespective of the underlying reason for the cessation of service. ComReg does not propose to amend this Condition further.

4.2.11 In relation to notifying the Department of Social and Family Affairs as regards a "Cessation of Service" against consumers who are recipients of DSFA Allowance, ComReg does not consider that the General Authorisation or these Conditions are appropriate for the inclusion of such a provision. The General Authorisation falls within the ambit of the Authorisation Regulations², the enforcement is within ComReg's remit. ComReg will, however, endeavour to use its best offices to inform the Department of Social and Family Affairs as regards a Cessation of Service against consumers who are recipients of DSFA Allowance where ComReg knows of such a case.

4.3 The Text to Condition 18.3 now reads:

18.3 Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers as soon as possible in the event of a Termination affecting a Substantial Number of its Consumers. Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers immediately, where a final decision has been taken to implement a Cessation of Service affecting a Substantial Number of its Consumers.

² S.I. No. 306/2003 European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003

- 4.3.1 One Respondent has stated that the requirement to notify consumers in writing is unnecessary and matters such as this should be left to the discretion of the Authorised Person concerned.
- 4.3.2 A second Respondent also stated its belief that *"the requirement to advise customers in writing is not practical in all instances."* It considers that in the case of prepaid unregistered customers the only written communication that can be provided to them would be by way of SMS message, which is limited to 160 characters and accordingly may not accommodate the notification communication.
- 4.3.3 This Respondent also states that consumers should not have to be notified *"immediately"*. It states that the references to both Termination and Cessation of Service (which includes Termination and Suspension or Restriction) which are required to be notified as soon as possible and immediately are ambiguous. It states, further on in its submission, that it does not consider this Condition to be transparent.
- 4.3.4 Other Respondents did not appear to specifically address this Condition.

ComReg's View:

- 4.3.5 This Condition relates to an Authorised Person's obligation to notify its consumers. ComReg has considered the Respondent's submission and has decided to delete the words *"in writing"* from the Condition. In this way, while the obligation to notify its Consumers remains the means by which Authorised Persons discharge this obligation, it will now be left to the discretion of the Authorised Persons. However, in order to properly discharge its obligation under this Condition (and any other Condition) an Authorised Person will have to comply with it in a way that is meaningful. In this regard, ComReg would intend that Authorised Persons employ the most appropriate medium in notifying consumers. This may contemplate placing advertisements or notices in a national newspaper or using national or local radio and television. ComReg has also clarified, by the inclusion of the word *"its"* further on in the Condition, that the responsibility to notify in this case is confined to the Authorised Person's own consumers. In this regard, attention is again drawn to the employment of the phrase *Substantial Number*, in this instance, of *"its" Consumers* instead of *"Substantial Number of Consumers"*.
- 4.3.6 In relation to the obligation to notify consumers as soon as possible or immediately, as appropriate, this does not extend to all *"Cessations of Service"* (to all Terminations and Restrictions/Suspensions) but simply to Terminations. This Condition was designed to reflect the potentially more serious effects of a Termination and for this reason it was distinguished in this Condition (notification to consumers) from Suspensions or Restrictions. This Condition, as stated, is, however, without prejudice to the requirements of Regulation 17 (4) of the Universal Service Regulations. In relation to the requirement to notify consumers *"immediately"*, ComReg considers that there may be situations where Authorised Persons possess more visibility of stoppages than others, such as where the Authorised Person decides to implement a Cessation of Service, which may be either a Termination or a Suspension/Restriction. In these situations, ComReg considers it reasonable that consumers be notified immediately where this final decision has been arrived at. It can be noted that this Condition is confined to situations where a *Substantial Number* of *"its" Consumers* (both defined terms) may

be affected. While noting that a consumer may have been notified immediately under the obligation to notify "*Cessation of Service*" (and therefore to include Terminations and Restrictions/Suspensions), this obligation is limited to situations where Authorised Persons decide to instigate or apply a Cessation of Service. The obligation to notify a Termination is not as qualified.

ComReg does not consider this Condition to be ambiguous or lacking in transparency, in ComReg's view, the obligations pertaining to notification to consumers are sufficiently clear on the face of the Conditions.

4.4 The Text to Condition 18.4 now reads:

18.4 Where the Commission forms the view that there is a reasonable probability of any Cessation of Service, the Authorised Person shall, upon request from the Commission, provide it with any information which the Commission considers necessary.

Respondents' Views:

- 4.4.1 One Respondent stated this Condition should be harmonised with Conditions 18.2 and 18.3 and reference a Substantial Number of Consumers. This Respondent also suggested the Condition be amended in order that ComReg can only request "*information which this is necessary and proportionate for the purposes of ensuring the minimisation of the effect of a cessation of services on consumers*".
- 4.4.2 A second Respondent stated that the Condition was not objectively justified as it was not limited to a Substantial Number of Consumers. This Respondent states that "*This is entirely contrary to assurances that the definitions would render clearer the scope of the proposed provisions and alleviate concerns relating to normal operation activities such as "cut-off for non-payment", as the scope of the Conditions extends beyond major incidents*".
- 4.4.3 A third Respondent also stated that the phrase affecting a "*Substantial Number of Consumers*" should be inserted instead of "*consumers*".

ComReg's view

- 4.4.4 ComReg has considered the Respondents' submissions, however, it does not propose to amend this Condition. ComReg does not consider the requirement to provide information to ComReg in this situation, to be overly burdensome or disproportionate. It can be noted that as a public body, ComReg is required to act reasonably and fairly at all times. It can further be noted that the definition of "*Cessation of Service*", which is referenced in this Condition, is defined as relating "*to any Termination, Suspension or Restriction of an Electronic Communications Network or of an Electronic Communications Service provided to consumers*". It is only in these situations and where ComReg considers a Cessation of Service a reasonable probability, will it seek information from an Authorised Person.
- 4.4.5 Finally, ComReg does not consider that consumers in this instance should read or be limited to a "*Substantial number of Consumers*". ComReg will not

necessarily know how many consumers may be affected before it can request information of an Authorised Person.

4.5 The Text to Condition 18.5 now reads:

18.5 An Authorised Person shall at all times use reasonable endeavours to ensure the effect of any Cessation of Service is minimised. An Authorised Person shall use reasonable endeavours to ensure the continuous provision of the Electronic Communications Network or the Electronic Communications Service, where practicable, taking proper account of the nature and extent of the Cessation of Service and the likely Consumer requirement for the Electronic Communications Network or the Electronic Communications Service to continue to be provided. This is without prejudice to the contractual rights and obligations of the Authorised Person.

Respondents' Views:

- 4.5.1 One Respondent claimed that this Condition does not differentiate the burden of the obligation depending on the relationship of the Authorised Person with the consumers. This Respondent stated that the onus should be placed on the Authorised Person which has the direct relation with the customer that is the retail provider.
- 4.5.2 A second Respondent stated this Condition should be limited in its application to incidents involving a Substantial Number of Consumers. It further believes that a limitation should be placed on the obligations of wholesale providers. It states *"In order to create the appropriate incentives, ComReg should not be seen to be placing an undue burden on wholesale undertakings. To do so would send out signals to less responsible undertakings that their obligations can be carried by their suppliers"*. This Respondent goes on to ask that the Condition be amended to reflect the short term nature of any emergency provision placed on wholesale providers.
- 4.5.3 Other Respondents did not appear to specifically address this Condition.

ComReg's View:

- 4.5.4 ComReg considers that all Authorised Persons should be mindful to ensure that the effect of any Cessation of Service is minimised. This might contemplate for instance making reasonable endeavours to accommodate the consumers of other Authorised Persons on short notice. ComReg considers this Condition is justified and is reflective of the reality that electronic communications is a networks industry. However, ComReg has amended the Condition to delete the word *"all"* before *"reasonable endeavours"*.
- 4.5.5 While ComReg has amended this condition as above, it does not consider that it would be appropriate to limit this Condition to a Substantial Number of Consumers, rather ComReg is of the view that the consequences of a Termination, Suspension or Restriction should be properly contemplated by all Authorised Persons as regards every consumer. However, ComReg

wishes to make it clear that this Condition should not be taken to mean that a consumer's service cannot be terminated for legitimate reasons, for example for reasons of non-payment of debts. For this reason ComReg has added the following phrase to the Condition "*without prejudice to contractual rights and obligations of any Authorised Person*" as had been suggested by a Respondent in relation to another Condition.

5 Proposed Conditions as Consumer Protection Rules:

Question Three of ComReg Document Number 08/27 asked: *Do you agree that the text of Conditions 18.2-18.10 proposed for attachment to the General Authorisation can be classified as Conditions providing for Consumer protection rules specific to the electronic communications sector including Conditions in conformity with the Universal Service Regulations?*

Respondents' Views:

5.1 The Respondents agreed that they could be so classified.

ComReg's Views

5.2 ComReg notes that the Respondents agree that the Conditions could be classified as consumer protection rules specific to the electronic communications sector including Conditions in conformity with the Universal Service Regulations.

ComReg repeats its comments from Consultation Document Number 08/27 that it considers that the proposed Conditions are capable of being classified as consumer protection rules specific to the electronic communications sector. ComReg also considers that the Conditions do conform to the Universal Service Regulations. The objective of the proposed Conditions relates to the safeguarding of consumers against a Cessation of Service for which they have subscribed. It is recognised that electronic communications are important to consumers and are relied upon quite heavily by consumers for communication and information. ComReg considers that the proposed Conditions which are intended to protect consumers in the situation of a "*Cessation of Service*" are in the spirit of consumer protection rules, as contemplated by the Universal Service Regulations.

6 Are the Proposed Conditions objectively justified, non-discriminatory, proportionate and transparent?

Question Four of ComReg Document Number 08/27 asked: *Do you agree that the text of the Conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?*

Respondents' Views:

- 6.1 Not all Respondents agreed that the Conditions were in all instances objectively justified, non-discriminatory, proportionate and transparent. Some operators felt the Conditions could only be so classified if their amendments were incorporated.
- 6.2 One Respondent stated that if the Conditions were amended to more clearly place the onus on the Authorised Person which has the direct relationship with the consumer (that is the retail provider), then the Conditions can be stated to be objectively justified, non-discriminatory and proportionate. In addition it submitted that the scope of the Conditions are limited and cannot be viewed as an extension of ComReg's powers.
- 6.3 Another Respondent submitted that Conditions 18.4 and 18.5 could not be stated to be objectively justified unless they are limited by the term "*Substantial Number of Consumers*" as is the case with Conditions 18.2 and 18.3. In relation to Condition 18.3 it states it believes it does not consider this Condition to be transparent – "*this is due to the ambiguity that has been highlighted*". This Respondent also states that it does not consider the requirement to notify customers immediately in the case of a planned cessation or suspension of service to be proportionate as "*it does not allow for the practicalities of managing mass customer communications and situations where the relationship is more tenuous such as a prepaid customer relationship*".
- 6.4 A third Respondent considers all Conditions to be objectively justifiable and proportionate: "*As ComReg's amended proposals for the addition of Conditions to the General Authorisation to address cessation of service issues would not impose a significant regulatory burden on authorised operators, and would provide benefits to consumers, (this operator) considers that they are both objectively justified and proportionate.*" This operator states it also considers the Conditions to now be non-discriminatory and transparent, it submits it "*agrees that the text of the Conditions proposed for attachment to the General Authorisation is non-discriminatory as it would apply equally to all authorised operators. The text of the proposed Conditions is also transparent as it includes clear definitions of key terms used and also includes specific quantitative thresholds that would trigger notification requirements*".
- 6.5 A fourth Respondent states that it believes the proposed Conditions are proportionate and justified, however it goes on to state that in order to ensure proportionality, "*additional obligations...should be imposed on SMP Operators in relevant fixed markets via specific remedies, as per the Access Regulations*".

ComReg's View:

- 6.6 ComReg has considered all Respondent's submissions. ComReg considers the Conditions as proposed in Consultation Document Number 08/27 to have been objectively justified, non-discriminatory, proportionate and transparent. It has nonetheless in this document also adopted certain, but not all, of the amendments proposed by Respondents, such as by deleting the words "*in writing*", where it appeared in Condition 18.3. ComReg continues to consider that all Conditions whether amended or not, are in all instances objectively justified, non-discriminatory, proportionate and transparent.
- 6.7 In relation to the first Authorised Person's comments, ComReg has reflected on the suggestion to more clearly place the onus on the Authorised Person which has the direct relationship with the consumer, (that is the retail provider), and while ComReg has decided to not to amend this Condition, ComReg does not consider that the Condition, as it continues to read, lacks objective justification, is discriminatory, disproportionate or is not transparent. ComReg considers, as stated, that there may be situations where an Authorised Person believes it a reasonable probability that a Cessation of Service may be possible as regards another Authorised Person. ComReg further believes that all Authorised Persons should, in situations where consumers are affected by a Cessation of Service, be prepared to use their reasonable endeavours to ensure the effect of any Cessation of Service is minimised.

As regards any enhancement of ComReg's powers, it can be noted that Conditions in the General Authorisation are enforced in the same way as obligations under the Authorisation Regulations. ComReg's powers as regards a breach of any Condition of the General Authorisation are the same powers it possesses *vis-à-vis* the Authorisation Regulations. Clearly new obligations have been created by the amendment to the Conditions of the General Authorisation as set out herein, and ComReg will accordingly be entitled to enforce these Conditions also.

- 6.8 In relation to the second Respondent's comments as regards limiting Conditions 18.4 and 18.5 to a "*Substantial Number of Consumers*", ComReg considers, as already stated above, that it cannot so limit Condition 18.4 as ComReg may not have visibility as regards how many consumers an Authorised Person has in order that it seek information of this Authorised Person. In relation to Condition 18.5, ComReg does not consider it appropriate for an Authorised Person to limit its consideration as regards a consumer in terms only of 2,000 or 20,000 consumers.

In relation to the submission that Condition 18.3 is ambiguous or not transparent, ComReg considers, as stated above, that Condition 18.3 is adequately clear for the reasons stated at paragraphs 4.3.5 and 4.3.6 above herein.

Finally, as regards any difficulty in notifying prepaid customers or otherwise managing "*mass customer communications*" of a "*Cessation of Service*" attention is drawn to the amendment now accepted for Condition 18.3, whereby it is no longer an express requirement that notifying consumers has to be "*in writing*". Rather, Authorised Persons can now determine how they will best discharge this obligation providing that the appropriate media is used.

- 6.9 In relation to the fourth Respondent's comments, ComReg does not consider that imposing more onerous obligations on Significant Market Power (SMP) operators than which are imposed on all Authorised Persons would achieve greater proportionality. ComReg considers that it is preferable and more

consistent with the objective of non-discrimination not to distinguish between Authorised Persons in the General authorisation.

6.10 Ultimately ComReg considers the amended Conditions are not discriminatory and impose no heavier duties on SMP operators for instance. The Conditions proposed demand the same of all Authorised Persons and are therefore consistent as between all operators. The Conditions are proportionate and do not go beyond what is currently offered by many Authorised Persons. ComReg continues to consider that the level of regulation being proposed is reasonable. In relation to transparency, ComReg considers the obligations are clear on the face of the Conditions and will assist Authorised Persons in the assessment of their duties.

7 Are Proposed Conditions Specific Obligations?

Question Five of ComReg Document Number 08/27 asked: *In your view do the Conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or Conditions which are applicable to undertakings by virtue of other laws?*

7.1 Respondents' Views:

7.1.1 Two Respondents agreed that the Conditions do not constitute specific obligations or Conditions which are applicable by virtue of other laws.

A second Respondent did not address this question. A fourth Respondent states that *"in our view current law does not adequately address these issues and thus the proposed Conditions are warranted"*. However this Respondent also suggests that additional obligations be placed on SMP Operators.

7.2 ComReg's View:

7.2.1 ComReg notes that most Respondents agree with the question. ComReg also considers that the new Conditions do not constitute Specific Obligations or are Conditions which are applicable by virtue of other laws. ComReg repeats its comments made in 08/27 that, *inter alia*, it does not consider that the new Conditions are already applicable to Authorised Persons by virtue of other consumer laws within the remit of the National Consumer Agency or under Regulation 17 of the Universal Service Regulations. In relation to consumer law generally, ComReg has considered existing provisions of consumer law and found that they do not expressly deal with issues of cessation of service satisfactorily when evaluated against the Conditions now proposed. ComReg also considers the new proposed Conditions and Regulation 17 of the Universal Service Regulations, which requires that Conditions of termination be specified in the consumer contract and that all modifications of a contract be notified one month in advance, are capable of being distinguished from each other. ComReg further considers the term "modification" may not necessarily contemplate, on the face of it, all cessations of service as now contemplated by these proposed Conditions.

7.2.2 Finally in relation to the submissions surrounding SMP operators, ComReg again does not consider it appropriate, and particularly in the context of the General Authorisation, to impose more onerous obligations on certain operators over others. ComReg considers that all operators are authorised under the General Authorisation to enter the market to provide services to consumers. ComReg considers that it is not only appropriate but also necessary and that all Authorised Persons owe corresponding obligations to consumers regarding the withdrawal of these services.

8 Regulatory Impact Assessment.

Question Six of ComReg Document Number 08/27 asked: Respondents are requested to provide views on whether the proposed specification are proportionate and justified and offer views on other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment.

8.1 Respondents' Views:

Two Respondents felt that the Conditions were not objectively justified, non-discriminatory, and proportionate or transparency, it followed that as regards these Respondents, the Regulatory Impact Assessment should reflect their submissions.

A third Respondent stated "*the proposed specifications are proportionate and justified, however...in order to ensure proportionality, additional obligations... should be imposed on SMP Operators in relevant fixed markets*".

A fourth Respondent, noting the withdrawal of the original proposal to include a Disruption Minimisation Plan, "*will substantially reduce the potential costs*". This Respondent stated it also accepts ComReg's position "*that many of the obligations will not be crystallised until such time as there is a reasonable probability of a Cessation of Service that relates to a Substantial Number of Consumers*". Finally, this Respondent also agreed "*that the proposed Conditions would provide benefits to consumer that would significantly exceed the low costs to authorised operators*".

8.2 ComReg's View on submissions and ComReg's Impact Assessment:

8.2.1 ComReg has again considered the impact of the Conditions on stakeholders.

ComReg continues to be of the view that, given the amendments to the Conditions as set out under Consultation Document Number 08/27, the costs are likely to be considerably lower than under the originally proposed Conditions. In addition, given the further amendments to the Conditions as now provided for under this document (for example deleting the reference to "*in writing*" from Condition 18.3), ComReg considers that the costs will be reduced further.

8.2.2 The obligations include (i) obligations to provide notifications to ComReg in the event of prospective service cessation involving a "*Substantial Number*" of "*Consumers*" and notification to ComReg in advance of an actual or anticipated cessation of service affecting a "*Substantial Number*" of "*Consumers*"; (ii) the obligation to inform consumers in the event of prospective service cessation involving a "*Substantial Number*" of its "*Consumers*" (no longer in writing); (iii) the obligation to use reasonable endeavours to minimise disruption to consumers and to continue to provide

services where practicable to consumers; and, (iv) the obligation to provide ComReg with information that it may reasonably require to minimise disruption to all consumers.

- 8.2.3 ComReg does not consider the costs of notification to it are likely to be great and ComReg continues to consider that the costs associated with notification can be justified in terms of consumer benefit.
- 8.2.4 With regard to informing consumers, again the cost of this is limited and as already noted, is further reduced given the express requirement to notify consumers *"in writing"* has been removed. It may now be possible, for instance to notify consumers by way of an effective and meaningful notification in a national newspaper for example. Other methods might also be employed in order to fulfil this obligation. Again it can be noted that the notification provisions *vis-à-vis* consumers relates to a *"Substantial Number"* of its *"Consumers"* only. ComReg continues to consider that the benefits to consumers that may accrue with sufficient notice of a reasonable probability of cessation, outweighs any burden on the Authorised Person.
- 8.2.5 For the avoidance of doubt, notification to ComReg, although stated to be *"in writing"* can be discharged by notifying ComReg by way of e-mail.
- 8.2.6 ComReg repeats its view as regards obligations to provide information to ComReg that these costs *"do not appear to involve significant costs to operators. Information can be sent in to ComReg swiftly and with minimum cost. The benefits should clearly exceed this, as such information may allow ComReg to take actions to help minimise any service disruption for consumers (as per the definition of Cessation of Service)"*.
- 8.2.7 In relation to Condition 18.5, ComReg does not consider the obligation on Authorised Persons to use reasonable endeavours represents a very onerous requirement from Authorised Persons. As highlighted in document 08/27, the term *"best endeavours"* is also an extensively employed term which could have been used here. However ComReg was satisfied to have the standard of *"reasonable endeavours"* employed over *"best endeavours"* on the grounds of proportionality. Moreover it can be noted that the term *"all reasonable endeavours"*, has itself, been amended so that it simply now refers to *"reasonable endeavours"*. ComReg does not consider that substantive long-term costs to operators are likely. It can also be noted that obligations to continue to provide the service shall be *"where practicable"*.
- 8.2.8 ComReg remains of the view that the benefits to consumers of the new conditions would be significantly in excess of the costs placed on the operators. The consumer harm (following an unannounced Cessation of Service if no conditions are in place) was estimated to be at least €1.875 million, in Consultation ComReg Document Number 08/27. As also suggested in Consultation Document Number 08/27, this figure (of €1.875 million) may be a significant underestimate, as it ignores the consumer surplus that the vast majority of consumers would enjoy from having a fixed-line service. Additional benefits would also accrue to consumers attached to other networks as they still should be able to contact friends and family (on the effected network) in the normal manner. ComReg continues to consider that another benefit *"is the confidence that consumers would have that their operator will not leave them without service. This*

should have long-term benefits to competition, which will aid most operators, as well as leading to lower prices and clear consumer benefits”.

8.2.9 ComReg also continues to be of the view that many of the obligations will not crystallise until such time as there is a reasonable probability of a Cessation of Service that relates to a substantial number of consumers. Accordingly ComReg maintains that the *“effort or cost on the part of the operator may therefore only be incurred when there is an extant Cessation of Service that affects consumer welfare issues. As such there is a direct balancing of the operator obligation against the consumer benefit.”*

8.2.10 ComReg thus maintains that the consumer benefit will in any event clearly outweigh the operator impact.

Appendix A –DECISION

STATUTORY FUNCTIONS AND POWERS GIVING RISE TO DECISION

This Decision, made by the Commission for Communications Regulation (“ComReg”), relates to the provision of Electronic Communications Network and Electronic Communications Services and the cessation of service. This Decision is made:

- I. Having regard to sections 10 and 12 of the Communications Regulations Act 2002;
- II. Having taken account of the representations of interested parties submitted in response to Consultation ComReg Document Number 08/27 and Consultation ComReg Document Number 07/45;
- III. Pursuant to the functions and powers conferred upon ComReg under and by virtue of Regulation 8 and Regulation 15 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003³.

All Authorised Persons shall from the effective date comply with the amendments to the General Authorisation and the following additional Conditions are now attached to the General Authorisation, as follows:

DEFINITIONS AND INTERPRETATION

“Cessation of Service” means any Termination, Suspension, or Restriction, howsoever arising, of an Electronic Communications Network or of an Electronic Communications Service, or access thereto, provided by an Authorised Person to Consumers. It does not include the replacement of an Electronic Communications Network or an Electronic Communications Service by a functionally equivalent Electronic Communications Network or Electronic Communications Service. For the purposes of the definition of Cessation of Service:

“Suspension or Restriction” shall mean where an Electronic Communications Network or an Electronic Communications Service is suspended or restricted for at least 12 hours in any 24 hour period but is likely to be restored;

“Termination” shall mean where an Electronic Communications Network or an Electronic Communications Service is unlikely to be restored by the Authorised Person in the immediate future;

“Consumer” shall mean any natural person who is acting for purposes which are outside his or her trade, business or profession;

“Substantial Number” for the purposes of paragraphs 18.2 and 18.3 shall mean 2,000 Consumers in the case of any Termination of an Electronic Communications Network or an Electronic Communications Service, or access thereto and shall mean 20,000 Consumers in the case of any Suspension or Restriction of any Electronic Communications Network or an Electronic Communications Service, or access thereto;

³ S.I. No. 306/2003 European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003, the “Authorisation Regulations”.

“Working day” means a day which is not a Saturday, Sunday or public holiday in Ireland.

18.2 An Authorised Person shall notify the Commission in writing;

(i) immediately where it believes there is a reasonable probability of a Cessation of Service affecting a Substantial Number of Consumers; or

(ii) without prejudice to the contractual rights and obligations of the Authorised Person, upon, and at the same time that it takes any action (such as issuing a notice of termination of a contract) against another Authorised Person, if it is of the view, in relation to that Authorised Person, that there is a reasonable probability of any Cessation of Service affecting a Substantial Number of Consumers as a consequence of that action; or

(iii) in any event no later than ten working days prior to the actual or anticipated Cessation of Service affecting a Substantial Number of Consumers, save where action is urgently required to ensure network integrity or safety of life, such that notification to the Commission is not possible. In this situation the Authorised Person shall notify the Commission as soon as possible.

18.3 Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers as soon as possible in the event of a Termination affecting a Substantial Number of its Consumers. Without prejudice to the provisions of Regulation 17(4) of the Universal Service Regulations, an Authorised Person shall notify its Consumers immediately, where a final decision has been taken to implement a Cessation of Service affecting a Substantial Number of its Consumers.

18.4 Where the Commission forms the view that there is a reasonable probability of any Cessation of Service, the Authorised Person shall, upon request from the Commission, provide it with any information which the Commission considers necessary.

18.5 An Authorised Person shall at all times use reasonable endeavours to ensure the effect of any Cessation of Service is minimised. An Authorised Person shall use reasonable endeavours to ensure the continuous provision of the Electronic Communications Network or the Electronic Communications Service, where practicable, taking proper account of the nature and extent of the Cessation of Service and the likely Consumer requirement for the Electronic Communications Network or the Electronic Communications Service to continue to be provided. This is without prejudice to the contractual rights and obligations of the Authorised Person.

EFFECTIVE DATE AND DURATION

This Decision is effective as from the date hereof and shall remain in full force unless otherwise amended by ComReg.

JOHN DOHERTY

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

DATED THE 5th DAY OF NOVEMBER 2008

Appendix B –Legal Basis

Legal Basis

The procedure for attaching Conditions to the General Authorisation is established by Regulations 8 and 15 of the Authorisation Regulations. In particular note that;

(i) Any Conditions attached to the General Authorisation may only be of the type set out in Part A of the Schedule to the Authorisation Regulations. Of particular relevance in this instance is Paragraph 8 of Part A of the Schedule to the Authorisation Regulations, which provides for Conditions providing for 'Consumer protection rules specific to the electronic communications sector including Conditions in conformity with the Universal Service Regulations'.

(ii) The attachment of Conditions to the General Authorisation must be objectively justified and must be non-discriminatory, proportionate and transparent (Regulation 8 (2) of the Authorisation Regulations).

(iii) ComReg may not attach as a Condition to the General Authorisation any Specific Obligations that it may impose on an undertaking, nor any Conditions which are applicable to undertakings by virtue of other laws (Regulation 8(4) of the Authorisation Regulations).

(iv) In the specification of Conditions in the General Authorisation, ComReg will have regard to the criteria and procedures for imposing Specific Obligations (Regulation 8(5) of the Authorisation Regulations).

(v) The procedure for amending Conditions in the General Authorisation is described in Regulation 15 of the Authorisation Regulations. Regulation 15(1) of the Authorisation Regulations provides that; 'The Regulator may amend the rights, Conditions and procedures concerning the general authorisation, licences and rights of use for numbers provided that any such amendments may only be made in objectively justified cases and in a proportionate manner.' (The Regulator refers to ComReg).

Regulation 8, "Conditions attached to general authorisation", of the Authorisation Regulations provides that:

8. (1) The Regulator shall, as soon as practicable after the commencement of these Regulations, specify conditions to be attached to a general authorisation as are listed in Part A of the Schedule. The Regulator may specify that certain conditions may not apply to undertakings of such class or type as may be specified by the Regulator.

(2) Any attachment of conditions to the general authorisation or non-application of conditions to undertakings of such class or description as may be specified by the Regulator under paragraph (1) shall be objectively justified in relation to the electronic communications network or service concerned and shall be non-discriminatory, proportionate and transparent.

(3) An authorised undertaking shall comply with the conditions attaching to the general authorisation applicable to it.

(4) The Regulator shall not attach as a condition to the general authorisation any specific obligations that it may impose on an undertaking nor any conditions which are applicable to undertakings by virtue of other law.

(5) *The criteria and procedures for imposing any specific obligations referred to in paragraph (4) shall be referred to by the Regulator in the specification of conditions referred to in paragraph (1).*

(6) *The Regulator shall ensure that where a requirement is specified as a condition of a licence such a requirement shall not be specified as a condition of the general authorisation in respect of the services or networks concerned.*

(7) *An undertaking that fails to comply with a condition attached to its general authorisation commits an offence.*

(8) *An offence under this Regulation is triable either summarily or on indictment.*

(9) *In proceedings for an offence under paragraph (7), it is a defence to establish that—*

(a) reasonable steps were taken to comply with the relevant condition, or

(b) it was not possible for that condition to be complied with.

(10) *An undertaking found guilty of an offence under paragraph (7) is liable on conviction—*

(a) if the offence is tried summarily, to a fine not exceeding €5,000, or

(b) if the offence is tried on indictment and the undertaking is a body corporate, to a fine not exceeding—

(i) 15,000,000,

or

(ii) if 10 per cent of the turnover of the undertaking is greater than that amount, an amount equal to that percentage, or

(c) if the offence is tried on indictment and the undertaking is a natural person, to a fine not exceeding €500,000.

(11) *If, after being convicted of an offence under paragraph (7), an undertaking continues to fail to comply with the relevant condition, the undertaking commits a further offence on each day or part of a day during which the failure continues.*

(12) *An undertaking found guilty of an offence under paragraph (11) is liable on conviction for the offence—*

(a) if tried summarily, to a fine not exceeding €500 for each day or part of a day during which the failure continues, subject to a maximum of €5,000, or

(b) if tried on indictment, to a fine not exceeding €5,000 for each day or part of a day during which the failure continues.

Regulation 15, "Amendment of rights and obligation", of the Authorisation Regulations provides that:

15. (1) *The Regulator may amend the rights, conditions and procedures concerning the general authorisation, licences and rights of use for numbers provided that any such amendments may only be made in objectively justified cases and in a proportionate manner.*

(2) *A road authority may amend the conditions of a consent under section 53 of the Act of 2002 provided that such amendments may only be made in objectively justified cases and in a proportionate manner.*

(3) *A planning authority (within the meaning of the Act of 2000) may amend the conditions of a licence under section 254 of the Act of 2000 for the establishment of overground electronic communications infrastructure and any associated physical infrastructure provided that such amendment may only be made in objectively justified cases and in a proportionate manner.*

(4) *Before making any amendment under this Regulation the Regulator, a road authority or a planning authority, as the case may be, shall –*

(a) give notice in such manner as it considers appropriate of its intention, inviting interested parties, including users and consumers, to make representations on the proposed amendments within such period (not, except in

*exceptional circumstances, being less than 28 days from the date of the notice) as may be specified in the notice, and
(b) have regard to any representations made to it pursuant to subparagraph (a).*