



**Response to Consultation and Further Consultation**

**Response to Consultation Document No. 10/92a,  
and further consultation on the Code of Practice for  
Premium Rate Service Providers**

<b>Document No:</b>	<b>11/51</b>
<b>Date:</b>	<b>22 JULY, 2011</b>

All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 11/51” as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before 4.00pm, Friday 2  
September 2011, to:

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

This consultation paper is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation is not bound by it, nor does it necessarily set out the Commission’s final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Commission for Communications Regulation. Inappropriate reliance ought not therefore to be placed on the contents of this document.

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## 1 FOREWORD

- 1.1 In May 2008, the Minister for Communications, Energy and Natural Resources clearly articulated, in an address to the Seanad, the Government's intention to place the regulation of Premium Rate Services ("PRS") on a statutory footing<sup>1</sup>. The Oireachtas subsequently passed the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010 ("the Act") 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").
- 1.2 ComReg has had the responsibility of regulating the Premium Rate Services ("PRS") industry for almost one year and has, during this time, expanded its knowledge and understanding of the industry, industry players and consumer attitudes and behaviours towards PRS. Therefore, ComReg is confident that the proposals laid out in this document reflect the current needs of consumers and will also have the added benefit of encouraging growth within the industry through enhanced consumer confidence.
- 1.3 In general, PRS are goods and services that a consumer can buy by charging the cost to their landline or mobile telephone bill. PRS are typically provided via premium rate telephone numbers (starting with the prefix 15XX) and short-codes (in the form 5XXXX) and typically offer information and entertainment services. They are most commonly accessed through landline telephones and mobile telephones but can also be accessed by fax, interactive digital TV, the Internet or an auto-dialler on a computer. Some examples of PRS include quiz television services, chat-line services, ringtones, sports alerts, weather alerts, television voting and competitions.
- 1.4 Section 15 of the Act requires ComReg to publish a Code of Practice ("the Code") to be adhered to by providers of PRS with respect to the provision, content and promotion of PRS. This Code will replace the current RegTel Code, which is in force since it was published by RegTel in October 2008.
- 1.5 Section 15 of the Act also requires that ComReg consult with Premium Rate Service providers, other interested parties and, as it considers relevant, other regulatory bodies in the State, in advance of preparation and preparation of any proposed Code.
- 1.6 As such, on 1 December 2010, ComReg issued a public consultation ("*Consultation 10/92a*"<sup>2</sup>) on the draft provisions for a new Code and an

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<sup>1</sup> Eamonn Ryan TD address to the Seanad dated 22 May 2008, <http://www.dcenr.gov.ie/Press+Releases/2008/Broadcasting+Bill+to+tackle+premium+rate+scams.htm>

<sup>2</sup> [http://www.comreg.ie/fileupload/publications/ComReg\\_1092a.pdf](http://www.comreg.ie/fileupload/publications/ComReg_1092a.pdf)

associated draft Code<sup>3</sup> (“*the draft Code*”). In preparing Consultation 10/92a and the draft Code, ComReg reviewed the current RegTel Code in light of:

- (i) its experience since assuming regulatory responsibility for the PRS section in July 2010,
  - (ii) RegTel's experience of regulating the PRS sector since 1995 and the transfer of RegTel staff to ComReg, and
  - (iii) international best practice for the regulation of PRS, through liaison with PRS regulators in other jurisdictions.
- 1.7 Following a review of the responses to Consultation 10/92a, ComReg is now issuing this document, which includes a revised draft Code (“*the revised draft Code*”), a draft Regulatory Impact Assessment (“*RIA*”) and the further questions for consultation relating to the provisions of the revised draft Code.
- 1.8 As indicated by way of an Information Notice (ComReg document 11/41<sup>4</sup>), although ComReg does not believe it is required to do so, ComReg intends, as a matter of caution, to notify the revised draft Code following measures to the European Commission pursuant to Article 8 of Directive 98\34\EC (as amended). ComReg also intends to notify draft Regulations which will repeal and replace the Communications Regulation (Licensing of Premium Rates Services) Regulations 2010 (S.I.338 of 2010).

By virtue of the operation of the provisions of Directive 98\34\EC (as amended), no Code will be implemented until at least three months after the notification date. The same applies to the draft Regulations.

- 1.9 ComReg now invites responses to this consultation on the revised draft Code and associated draft RIA from all stakeholders, including consumers, industry, statutory bodies and members of the public. In due course, ComReg will publish a Response to this further Consultation and a Decision to incorporate a final Code of Practice, having had regard to any responses received to this document and any submissions made to the European Commission.

It is requested that responses to this further consultation are received at ComReg not later than 4.00 pm on Friday, 2 September 2011.

Mike Byrne  
Commissioner  
Commission for Communications Regulation

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<sup>3</sup> <http://www.comreg.ie/fileupload/publications/ComReg1092b.pdf>

<sup>4</sup> <http://www.comreg.ie/fileupload/publications/ComReg1141.pdf>

## 2 EXECUTIVE SUMMARY

- 2.1 Section 15 of the Act requires ComReg to publish a Code of Practice (“*the Code*”) to be followed by providers of PRS with respect to the provision content and promotion of PRS. This Code will replace the current RegTel Code, which is in force since it was published by RegTel in October 2008.
- 2.2 Section 15 of the Act also requires that ComReg consult with PRS providers, other interested parties and, as it considers relevant, other regulatory bodies in the State, in advance of preparing and publishing any Code. It is a statutory requirement that all providers of specified PRS observe the provisions of the Code and therefore any changes to existing practices, as required by the Code, will directly impact on how PRS providers promote and provide PRS.
- 2.3 In accordance with 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 (ComReg document 10/92b) was also published in association with the initial consultation document. In light of the submissions received during the consultation process, ComReg has revised some of its initial approaches and this revised position is reflected in the revised draft Code, which is published as ComReg document 11/51d in association with this document.
- 2.4 Many of the draft provisions included in the initial consultation (ComReg document 10/92a and associated draft Code in ComReg document 10/92b) are interrelated, such that the implementation of one measure may obviate the requirement for another. In some instances there were a series of questions asked as opposed to including specific proposals and the responses have informed ComReg going forward. For these reasons, ComReg did not include a Regulatory Impact Assessment (“*RIA*”) in Consultation 10/92a (ComReg document 10/92a) but ComReg considers it appropriate at this stage to undertake an assessment of the likely effects of the proposed changes to the current RegTel Code.
- 2.5 It should be noted that Section 7 of the Act requires ComReg to make Regulations specifying conditions to be attached to the licenses of specified PRS providers. In light of the submissions made during the consultation process and having regard to ComReg’s experience of regulating the PRS industry since this function was assigned to it in July 2010, ComReg has gained insights into the regulation of the industry which have informed its views as to provisions which are necessary for effective regulation of the industry. As a result, ComReg has made significant changes to the revised draft Code and intends to introduce the new set of regulations which will repeal and replace the Communications Regulation (Licensing of Premium Rate Services) Regulations 2010, (SI no. 338 of 2010).
- 2.6 ComReg is also taking this opportunity to make further changes to the Regulations in respect to the manner in which licensing of PRS will operate. These changes will not alter the scope of PRS regulation, nor will they

increase any PRS provider's levy contribution from that which currently exists. They do, however, change the manner in which specified PRS are licensed.

- 2.7 These changes to the Regulations will only come into force subject to the completion of the notification process as prescribed by EU Directive 98/34/EC (as amended by Directive 98/48/EC) relating to the procedure for the provision of information in the field of technical standards and regulations.
- 2.8 In summary, this document sets out a response to the initial consultation (ComReg document 10/92a) and ComReg's rationale for the provisions included in the revised draft Code. The revised draft Code and associated draft RIA are now the subject of further consultation with the relevant questions included in Section 4 below.
- 2.9 For the convenience of readers, ComReg has adopted a standard format in addressing each of the issues raised in the initial Consultation. The Consultation issues are summarised at the beginning of each section and the Consultation question(s) are listed. The views of the respondents are then summarised, after which ComReg's preliminary views and proposed approach are then discussed and set out.

### **Responses Received to Initial ComReg Consultation 10/92a**

- 2.10 ComReg received a significant amount of responses (36) from various individuals and companies to the initial Consultation (ComReg document 10/92a) on the draft Code. The list of respondents is set out below:
  - Hutchison 3G Ireland Ltd. ("H3GI")
  - Adforce.ie
  - Association for Interactive Media and Entertainment ("AIME")
  - Alternative Operators in the Communications Market ("ALTO")
  - Broadcasting Authority of Ireland ("BAI")
  - Bluestream Mobile Ltd.
  - BT Communications Ireland Ltd. ("BT")
  - Community Alliance Sligo
  - Dialogue Communications Ltd.
  - Eircom Group ("Eircom" & "Meteor")
  - Electric Media
  - Ericsson IPX AB
  - Institute of Advertising Practitioners in Ireland ("IAPI")
  - Irish Phone Paid Service Association ("IPPSA")
  - ITS-Tech

- Magnet Networks Ltd. (“Magnet”)
- Masvoz
- mBlox Ltd.
- Mobics
- Modeva
- National Consumer Agency (“NCA”)
- National Disability Authority (“NDA”)
- Telefonica Ireland Ltd. (“O2”)
- Office of the Data Protection Commissioner (“ODPC”)
- Phonovation Ltd.
- Prism Fax Services Ltd.
- Pure Energy Technology Ltd.
- Realm Communications Ltd.
- RTE
- Stagetimes Ltd.
- tacuText 53215
- Telecom Express Ltd.
- Toll Text International Ltd. (“TTI ltd” )
- TV3 Television Network (“TV3”)
- Vodafone Ireland Ltd.
- Xiam Interactive Ltd.

2.11 ComReg has collated the responses in this document in accordance with the format, sequence and structure of the initial consultation (ComReg document 10/92a) and the layout of the revised draft Code broadly mirrors that of the initial draft Code, save for the sections relating to the promotion and pricing of PRS, which have been amalgamated in the revised draft Code.

### **Provisions Applicable to all Premium Rate Services**

2.12 Section 3 of the revised draft Code sets out the general conditions that are applicable to all PRS and are categorised under the following headings:

- (a) General Provisions,
- (b) Data Protection,
- (c) Legality,
- (d) Decency,
- (e) Honesty,



- (f) Avoidance of Harm, and
- (g) Due Diligence.

ComReg has retained these category headings but has revised and, in some instances, removed some provisions. In particular, having carefully considered the responses received, ComReg has:

- (h) removed the initial provisions that related to the use of Guidance Notes to assist with the interpretation of the Code, (which were set out in Section 3.1 of the initial draft Code (ComReg document 10/92b)) since such Guidance Notes could not supersede any of the provisions within the Code. In accordance with Section 9 of the Act, ComReg may however choose to publish, as it sees fit, details of any notification given by it, following the completion of an investigation. One of the reasons ComReg may choose to publish a notification could be for the purpose of clarifying for industry ComReg's interpretation of certain provisions of the Code.
- (i) amended the provision relating to how ComReg will treat confidential information in order to align it with established ComReg policies, and
- (j) amended the provision in the Due Diligence Section, which relates to a PRS provider's obligation not to facilitate another PRS provider, against whom ComReg has imposed a sanction, to operate in breach of that sanction. The broad provision has been retained but the due diligence obligation is coupled with ComReg having published any sanction that limits how a PRS provider is permitted to operate.

### **Promotion of PRS**

2.13 Responses were sought to the provisions in Section 4 of the draft Code relating to the promotion of PRS. ComReg had proposed enhanced provisions that would apply to:

- (k) visual display requirements,
- (l) spoken requirements,
- (m) use of the term "free",
- (n) promotions by SMS, MMS or WAP,
- (o) promotion of subscription services, and
- (p) promotion of specific categories of services.

2.14 Some of the respondents, while agreeing with the aim to provide greater transparency and understanding for consumers, considered that the draft provisions were disproportionate to achieve this objective. ComReg now proposes revising the provisions and amalgamating them with the provisions relating solely to pricing which were included as a separate section (Section 2.6) in the initial Consultation (ComReg document 10/92a). The general layout of this section has also been revised to assist readers.

- 2.15 ComReg proposes retaining the provisions that require pricing information to be prominent, “stand alone” information. In particular, ComReg initially proposed that it should be no longer acceptable for pricing information to only be included in the terms and conditions in the footer of a promotion. Now, ComReg proposes retaining some of the initial draft provisions regarding the requirement for price information to be spoken in respect of subscription services promoted via broadcasts. However, ComReg proposes that it is reasonable and proportionate to maintaining the provisions of the RegTel Code published in October 2008 (“*the current RegTel Code*”), which do not require that the price of “one-off” PRS transactions costing less than €2 should be spoken.
- 2.16 ComReg also proposes reducing the regulatory information that is required to be provided in each and every promotion in accordance with the provisions of Section 6 (Promotions - General Rules) and Section 7 (Pricing Information) of the current RegTel Code, thereby recognising that a PRS transaction may take place over several stages. These proposals are in accordance with the provisions of the Unfair Commercial Practices Directive<sup>5</sup> (“*UCPD*”) which includes the concept of an “*invitation to purchase*” which may not include all promotional communications. ComReg’s intention, in accordance with the objective of the UCPD, is that end-users of PRS receive all relevant information which will enable them to make an informed decision to purchase, at the time of invitation to purchase, but such information need not necessarily be included in all promotions nor provided all at the same time. This approach should serve to ensure important terms and conditions are not concealed in promotional “clutter”.

### **Provision of PRS - Industry Abbreviations, Expenditure Limits and Purchase Confirmation Receipts**

- 2.17 Based on the consultation responses received, ComReg now believes it to be impractical to codify and maintain a list of abbreviations that would be acceptable to use in the promotion of PRS. ComReg also considers it is too burdensome to produce a list of abbreviations that may require regular updating and would outweigh any benefit that may accrue.
- 2.18 Many PRS promotions use abbreviations that are understood by members of the public and any use of abbreviations by PRS providers will be considered in the context of the overall promotion and the overarching requirement set out in Section 4 of the revised draft Code, which requires that promotional material and invitations to purchase must not mislead consumers or cause the average consumer to make a transaction that they otherwise would not make. These provisions are in line with the requirements of the UCPD.
- 2.19 Section 5 of the revised draft Code sets out the requirements to be observed during the operation/provision of PRS to end-users. In the initial consultation, ComReg set out the expenditure reminders and limits that apply to various classes and types of PRS in the current RegTel Code, and sought views on

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<sup>5</sup> Directive 2005/29/EC of 11 May 2005, transposed as the Consumer Protection Act, 2007

whether these should be retained, if they were currently set at the appropriate level and if time-based expenditure limits (i.e. daily, weekly or monthly) should be introduced.

- 2.20 Based on the responses received, ComReg has decided to retain the expenditure limit, set out in the current RegTel Code that applies to PRS accessed through a premium rate number, at €60. In addition, the expenditure limits that apply to Children's Services have also been retained.
- 2.21 ComReg had explored the concept of requiring that each PRS transaction would require a "purchase confirmation receipt" to be provided to the end-user. However, based on the responses received, ComReg agrees that this may not be technically or practically possible in many instances. For example, in the case of large TV-voting events where the volume of traffic would be doubled if each and every vote cast was to generate a receipt.
- 2.22 Instead, ComReg now proposes retaining the requirement for end-users to be provided with a purchase confirmation receipt in respect of "off-handset" purchases, (i.e. for "micro-payments" or "transactional SMS purchases" such as payment for road tolls or parking by PRS, or similar payment for vending machine purchases by PRS.) ComReg believes that any consumer harm that may occur is likely to be related to the goods or services purchased and so fall outside the broad telecommunications area. In such instances, the existence of a "proof-of-payment" receipt will enable end-users to pursue whatever redress they consider appropriate with the supplier of the goods and services.

## **Subscription Services**

- 2.23 In its initial consultation document, ComReg highlighted that Mobile Subscription Services continue to be the predominant reason for end-users of PRS to contact ComReg to register a complaint or raise a query. This pattern has continued for the last number of years, including since the transfer of regulatory responsibility from RegTel to ComReg. In Consultation 10/92a, ComReg proposed a number of remedial measures intended to provide greater consumer protection. These measures are in line with those introduced in other jurisdictions, where Mobile Subscription Services had previously raised similar issues of consumer harm. Foremost in the proposed measures was the "double opt-in" requirements which would require consumers to positively confirm, by sending an SMS, of their intention to subscribe to a service. ComReg received a number of detailed responses, mainly from industry stakeholders, opposed to the introduction of a "double opt-in" (i.e. "positive confirmation") requirement. The National Consumer Agency, the Office of the Data Protection Commissioner and some industry parties support the proposal. ComReg has included a detailed response to this particular topic in Sections 3.107 – 3.142 of this document.
- 2.24 ComReg proposes to retain the requirement for consumers to provide positive confirmation before subscribing to a PRS that will impose a recurring charge. This decision is based on careful consideration of the responses, the evidence provided by research undertaken by ComReg (which is included at Annexes A

and B), evaluation of international best practices and the protection afforded to consumers who sign up to contracts using other payment methods.

- 2.25 ComReg had also considered introducing additional consumer protection mechanisms (which are listed below) but, based on the enhanced promotional requirements and the retention of the requirement for positive confirmation prior to subscribing, ComReg considers that the following additional proposals are not now required:
- (a) the requirement for subscribers to positively confirm their intention to remain subscribed after incurring costs of €20, which is discussed in more detail in Section 3 below (paragraphs 3.153 to 3.161 inclusive), and
  - (b) the requirement for end-users to be informed of the cumulative amount that they have spent on a particular service – this is primarily as a result of the complex technical issues arising and is expanded upon further in Section 3 below (paragraphs 3.66 to 3.70 inclusive).
- 2.26 ComReg proposes retaining the provisions in the current RegTel Code that require that end-users are provided with certain regulatory information after they have spent €20 and proposes a clause that requires such regulatory messages to be sent once per month, even where the end-user has not spent €20.
- 2.27 ComReg has revised the provisions relating to unsubscribing from multiple subscription services that are provided on the same short code. ComReg now proposes that an end-user's indication to unsubscribe is respected and acted upon without equivocation, but the end-user will not automatically be unsubscribed from all services.
- 2.28 ComReg considers that the matter of requiring sign-up fees to be part of charges for an initial subscription period is largely redundant with the retention of the positive confirmation (“double opt-in”) requirement. The full costs, including any initial sign-up costs, are to be presented in a transparent manner to the consumer who can then make an informed decision whether to proceed with the purchase.

## **Competition Services**

- 2.29 ComReg considers that the enhanced promotion, pricing and subscription confirmation requirements are sufficient to address the concerns set out in the initial consultation document relating to competition services provided on a subscription basis.
- 2.30 ComReg proposes amendments to the draft provisions relating to post-competition publicity being taken out of circulation six months after the award of a prize. In addition, ComReg proposes including a provision that any post-competition advertisements would include the date on which the prize was awarded.

## Virtual Chat Services

- 2.31 ComReg has amended the definitions of Chatline and Virtual Chat (including text chat) Services to more accurately reflect how these services operate for the purpose of clarifying for industry the relevant provisions of the Code that apply to these services. ComReg has also included a number of new proposed provisions in respect of Text Chat services in order to provide adequate consumer protection. These requirements provide that end-users of Text-Chat services receive expenditure updates after spending €20 on the service and limit the number of messages that an end-user may receive to the number of messages that he/she may send.

## Customer Service

- 2.32 ComReg has removed the requirement for PRS providers to pass on a consumer contact to another PRS provider that has operational control of a PRS. ComReg appreciates that this may result in duplication of services. ComReg has amended this provision and now proposes requiring a PRS provider to supply end-users with the relevant contact details for the PRS provider that retains operational control of the service.

## Refunds

- 2.33 ComReg consulted on several issues surrounding the implementation of refunds but did not include any draft proposals on the matters raised in the initial consultation. In summary, having considered the responses received, ComReg acknowledges that in the majority of cases any refunds due, in accordance with a Section 9 (of the Act) investigation, will be made to those end-users of a service who register a complaint and the non-compliant PRS provider can provide such refunds through a variety of means, having consideration for the end-user's preference.
- 2.34 ComReg noted on Page 32<sup>6</sup> of Consultation 10/92a that it was conscious that it had not included any provisions on refunds in the draft Code but stated that refund provisions would be included in the regulatory framework following consideration of the responses to consultation. Section 7(1)(b) of the Act provides that ComReg shall make regulations specifying conditions to be attached to licenses "*including the basis and circumstances upon which refunds may be made*". Therefore, following analysis of the responses received to the consultation, which are discussed at Section 3 of this paper (paragraph 3.220 onwards), and having regard to ComReg's powers under the Act, ComReg believes that the key provisions relating to refunds should be dealt with in the Regulations. Certain aspects, such as points of detail and administrative issues, relating to refunds will also be included in the Code and

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<sup>6</sup> ComReg Document 10/92a extract from Page 32 "Note: ComReg has not included any provisions in respect of refunds in the Draft Code of Practice but will, having considered the responses received to this consultation, make decisions and include provisions in respect of refunds in the regulatory framework",  
[http://www.comreg.ie/fileupload/publications/ComReg\\_1092a.pdf](http://www.comreg.ie/fileupload/publications/ComReg_1092a.pdf)

this is discussed further in Section 3 below under the subject heading “Customer Service”.

- 2.35 Although the provisions for refunds are to be included in the Regulations, the issues raised in the Consultation and the responses received assisted ComReg in framing the provisions relating to refunds and are therefore discussed in this paper.
- 2.36 The provisions included in the revised Regulations will address situations where serious non-compliance or fraud has occurred and every end-user of a PRS is to be refunded. In such circumstances, depending on the scale of the issue, it may be appropriate for end-users to be automatically refunded through their phone account. Section 9 of the PRS Act provides that ComReg may publish, in a manner it sees fit, details of a finding of non-compliance and it is possible that it may be appropriate to notify all end-users through a variety of media.

### **Access to Adult (including Sexual) Entertainment Services**

- 2.37 In its consultation, ComReg requested views on a number of aspects relating to control of access to adult-type services. ComReg’s position is that adults (i.e. persons over 18) should be free, within the law, to choose what they wish to view. However, ComReg and the wider PRS industry also have a duty to protect children from harm.
- 2.38 It is clear that further engagement and consultation is required to establish a content classification framework, against which PRS providers can evaluate their content to determine if it is suitable only for adult audiences and to explore with industry the various access control options that are available to offer protections for children. ComReg hopes to be in a position to advance its position and thinking on this by the end of the year.

In the meantime Section 5 contains proposed provisions relating to adult-type services.

### **Numbering - Fundraising for Charitable Donations**

- 2.39 ComReg sought responses to the establishment of a dedicated shortcode range for the purposes of providing a contribution for charitable organisations. There was broad support for the proposal but additional issues were raised in the responses, particularly in relation to providing a similar premium rate number range (15XX) and establishing criteria for such number/shortcode ranges and how they should be restricted. These merit further consideration.

These issues are best addressed through ComReg’s Numbering Advisory Panel (NAP) which will consider the matters at their next meeting in the third quarter of 2011.

## Conclusion

- 2.40 ComReg in making its final decision and issuing the final Code of Practice will consider the views of respondents to this Consultation, Consultation Document 10/92a, and the views of the European Commission and those views as collected by the European Commission<sup>7</sup>.

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<sup>7</sup> Although ComReg does not believe it is necessary to do so, ComReg intends, as a matter of caution to notify the revised draft Code of Practice pursuant to Article 8 of Directive 98/34/EC (as amended).

### **3 DRAFT CODE OF PRACTICE**

#### **Provisions applicable to all PRS**

##### **The Consultation Issues**

- 3.1 Section 3 of the draft Code set out the provisions that would be applicable to all Premium Rate Services (PRS). Included were many of the provisions from Sections 3, 4 and 5 of the current RegTel Code and the provisions were subdivided into seven discrete areas, as follows:
- (a) General Provisions,
  - (b) Data Protection,
  - (c) Legality,
  - (d) Decency,
  - (e) Honesty,
  - (f) Avoidance of Harm, and
  - (g) Due Diligence.

The inclusion of a new “Due-Diligence” sub-section in the draft Code is intended to reflect the regulatory changes introduced by the Act, which recognises all parties in the PRS “value chain”. ComReg considers that, to a certain extent, there is a shared responsibility for the delivery of PRS to end-users and wishes to encourage good commercial practices throughout the value-chain.

**Q. 1. Do you agree with the proposed provisions, applicable to all specified PRS, as set out in Section 3 of the draft Code? If not, please provide reasons to support your view**

##### **Summary of Respondents Views**

- 3.2 In general, Modeva, H3GI, TV3, the National Consumer Agency (NCA), the National Disability Authority (NDA) and Vodafone agreed with the proposed provisions, applicable to all specified PRS, as set out in Section 3 of the draft Code.
- 3.3 Realm, while agreeing with most provisions of Section 3, highlighted that the provisions of Section 3.6 of the draft Code, which allows PRS providers to meet the provisions of the Code by alternative means, cannot supersede the provisions of the Code. Eircom/Meteor similarly raised concerns about the provisions of Section 3.6 of the draft Code. Both Realm and the IPPSA advocated that ComReg should publish any alternative means and to make them available to all PRS providers.



- 3.4 RTE submitted a request for clarifications to the provisions of Section 3.11 relating to the requirement to provide end-users with a means of opting-out of receiving further promotions. (For the avoidance of doubt, these provisions were only intended to apply when a person has been entered into a promotional database and the matter has now been clarified by amending the text in the revised draft Code which relates to promotions provided by SMS, MMS or WAP.) Telecom Express similarly raised questions about the applicability and intention of Section 3.9 relating to the collection of personal information and the requirement to provide end-users with information on how to opt-out of having their personal data used.
- 3.5 Xiam submitted that the provisions of Section 3.8, which relate to the requirements to provide ComReg with information, are too broad and overstate ComReg's right to receive information.
- 3.6 The NCA submitted that the proposals set out in the draft Code achieve the necessary balance between the voluntary nature of the consumer engaging with the PRS and the consumer consent required for the payment of fees.
- 3.7 Eircom/Meteor expressed concerns about the provisions of Sections 3.26, 3.28 and 3.29 which relate to the requirements for all PRS providers to undertake "due diligence" assessments of their contractual partners.
- 3.8 The IPPSA broadly disagreed with the proposed provisions set out in Section 3 of the initial draft Code and made extensive submissions along the following lines:
- (a) Section 3.1 which alludes to producing views as to interpretation but without following the requirements of Section 15 of the Act of 2010. ComReg cannot create an obligation with a similar force to that of a Code without undertaking the process outlined in Section 15 of the Act of 2010,
  - (b) ComReg is subject to the Interpretation Act 2005 which defines and limits ComReg's capacity as to interpretation and, therefore, believes that Section 3.2 is illegal,
  - (c) ComReg's authority to require PRS, which involve the use of premium rate numbers or short codes, to comply with the provisions of the National Numbering Conventions as set out in Section 3.3,
  - (d) Section 3.4 of the draft Code is redundant and irrelevant and lacks legal basis because Section 15 of the PRS Act provides that the Code is binding on PRS providers,
  - (e) Section 3.8 of the draft Code breaches superior legislation including Data Protection Acts, European convention on Human Rights and the Contractual Right of privacy,
  - (f) Sections 3.14 to 3.16 - ComReg has no basis to assume legal responsibility for the actions of a PRS provider. It does not have the power to refuse to licence any PRS, under the 2010 Act, except

on those grounds outlined in Section 6.4 of the Act and on those grounds alone, and

- (g) Sections 3.26 to 3.29 - ComReg is not entitled, except following a clear procedure, to restrict the capacity for Premium Rate Service providers (PRS providers) established in other member states from providing services within the jurisdiction and, as such, they are not obliged to follow the Code. Taken together, these two issues mean that the 'Due Diligence' section is unenforceable and needs to be reconsidered.
- (h) In summary, the IPPSA concluded that ComReg should withdraw the current consultation and engage with industry to develop a Code that is legally compliant under Directives 98/48/EC, 2000/31/EC and 2005/29/EC.

### **ComReg's Position**

- 3.9 Section 3.1 of the draft Code has been removed, however, ComReg reserves its right to issue notices on points of clarification should any issue as to the interpretation of aspects of the Code arise. This would be for the purpose of giving practical guidance to industry as to how ComReg will apply the Code.
- 3.10 Section 3.2 of the draft Code has been removed since ComReg's overriding obligations "to protect the interests of end-users of PRS", as contained in the Act, stands and establishes ComReg's statutory objective.
- 3.11 With respect to Section 3.3 of the draft Code, ComReg considers it appropriate that PRS (as with other areas and services regulated by ComReg) should be provided in accordance with the provisions of the National Numbering Conventions,<sup>8</sup> as the provisions of the National Numbering Conventions also provide for consumer protections, such as price transparency (i.e. the use of appropriate number range according to the price of a PRS). For these reasons, the provisions have been retained in the revised draft Code.
- 3.12 Section 3.4 of the draft Code has been removed as the provisions in Section 3.26 (relating to Due Diligence) sufficiently deal with these issues which reflect the extended reach of regulatory responsibility under the new legislative framework.
- 3.13 Section 3.6 of the draft Code of Practice was included to provide flexibility on how the provisions of the Code may be interpreted and this provision has been retained but it is not intended to be used to circumvent the requirements of the Code. In the interests of proportionality and transparency, ComReg would make public such alternative means of complying with the Code, while keeping in mind the requirements of confidentiality.
- 3.14 With respect to Section 3.8 of the draft Code, ComReg has removed this provision as ComReg believes that its existing information gathering powers

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<sup>8</sup> *National Numbering Conventions Version 7 - ComReg Document 11/17 dated 9 March, 2011*, <http://www.comreg.ie/fileupload/publications/ComReg1117.pdf>

under the Act, the revised Regulations and its powers at Section 13(D)(1) and Section 39 of the Communications Regulation Act, 2002, as amended, are sufficient for it to exercise its statutory functions.

- 3.15 ComReg has removed Section 3.9, as the provisions of Section 4.7 of the revised draft Code should now adequately address the matter of consumers being made aware of the use to which personal data may be put and how to opt-out of such use, as appropriate.
- 3.16 The provisions of Section 3.11 have been amended to clarify that they are applicable only in circumstances where a consumer's personal data has been entered into a promotional database.
- 3.17 With respect to the provisions of Sections 3.14 to 3.16 of the draft Code, it is not the case that ComReg will determine what is or is not lawful. ComReg believes that it is appropriate that it is a requirement for all PRS to comply with the law and, as such, these sections are retained in the latest draft Code.
- 3.18 ComReg has made some amendments to the sections of the revised draft Code relating to the due diligence requirements. The Act provides an expanded definition of a PRS provider and, as compared to the regulatory scope under the RegTel scheme, all parties in the PRS "value-chain" are defined as PRS providers who are all required to be licensed when providing a specified PRS. Therefore, there is an onus on all parties involved in the provision of a PRS to bear a responsibility, within their remit, for their own actions and those of their contractual partners when matters that may constitute a breach of the Code are brought to their attention.
- 3.19 ComReg is aware of the provisions included in the E-Commerce Directive (2000/31/EC) in relation to Information Society Services and appropriate reference is made in Section 1 of the revised draft Code in this regard. The applicability of the e-Commerce Directive does not result in the provisions of Section 3 of the revised draft Code being inapplicable and they will, therefore, be applied as appropriate in accordance with European law, the Act and the revised Regulations.
- 3.20 In relation to the last point made by the IPPSA, ComReg is obliged by Section 15(1) of the Act to consult with PRS Providers, interested persons and other regulatory bodies of the State. As such, to engage with industry alone to develop a Code, as suggested, would be a breach of ComReg's statutory duty.
- 3.21 In summary, ComReg has considered the submissions to Consultation 10/92a and, accordingly, amended the provisions of Section 3 of the draft Code, where it considers it appropriate. The amended provisions are set out in the revised draft Code which is now subject to further consultation.

## **Provisions Relating to the Promotion of PRS**

### **The Consultation Issues**

3.22 Section 4 of the draft Code sets out the draft provisions relating to the promotion of PRS. ComReg stated that its overall policy objective was to ensure that PRS promotions should not mislead, or require close scrutiny, and should be clear, legible and audible, if spoken, and not mask any important conditions.

To this end ComReg proposed enhanced provisions relating to:

- (a) visual display requirements,
- (b) spoken requirements,
- (c) use of the term “free”,
- (d) promotions by SMS, MMS or WAP,
- (e) promotion of subscription services, and
- (f) promotion of specific categories of services.

ComReg also set out additional provisions in Section 5 of the draft Code relating to the way in which the price of PRS should be conveyed to consumers. These provisions augmented the current obligations on PRS providers, particularly specifying a minimum font size for price information and the requirement to have the price spoken on broadcasted advertisements.

Section 4 of the draft Code also consolidated the service specific promotions that were distributed throughout the existing Code for the purpose of collating all provisions relating to promotion, whether general or service specific, in a single section.

**Q. 2. Do you agree with the proposed provisions relating to the promotion of PRS? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

- 3.23 Many respondents disagreed with the prescriptive nature of some of the provisions in the draft Code. In particular, Modeva, Realm, BT, O2, Electric Media, and the IPPSA took issue with the requirement to have price and regulatory information in, what they consider to be, a disproportionately large size.
- 3.24 Several submissions similarly set out objections to the draft provisions on the basis that the regulatory information would occupy too much advertising space, the effects of which would be exacerbated in smaller ads.
- 3.25 Objections were also raised against the draft provisions regarding spoken requirements which, it was alleged, would result in 10 and 20 second radio

advertises being unviable because of the requirement to include too much regulatory information.

- 3.26 Electric Media and the Institute of Advertising Practitioners in Ireland (IAPI) suggested that the Code of Practice, published by the Advertising Standards Authority of Ireland (ASAI), is relevant and should be the standard that is applied to PRS promotions.
- 3.27 H3GI and Ericsson IPX questioned the provisions of Section 4.13(d)(iii) which requires end-users to positively confirm acceptance of impending charges at the end of a free trial period. The point of contention is that this would discriminate against PRS providers using accepted marketing practices such as “buy-one-get-one-free”.
- 3.28 Phonovation and TV3 questioned the requirement for all costs to be spoken on TV promotions and recommended that the current provision, which only requires prices in excess of €2 to be spoken, should be retained. BT suggested that this threshold should be raised to €5.
- 3.29 The NCA submitted that the average consumer faces increased challenges in understanding the nature of the product being promoted and the implications of availing of the service. In addition, the NCA submitted that promotions that do not satisfy the “consumer’s expectation” may result in avoidable and unnecessary disappointment and should therefore be avoided. This would be assisted with the addition of clauses relating to the “*misleading omission or concealment of material information which the average consumer would need in order to make an informed transactional decision*”.
- 3.30 The Office of the Data Protection Commissioner (ODPC) submitted that advertisements on certain media do not afford consumers, who respond to them, an adequate opportunity to either understand or consider the terms and conditions which apply to the further use (if that should be the case) of their personal data i.e. how and in what circumstances their phone number may be used in the future.
- 3.31 The NDA expressed support for the broad principles in the draft Code and particularly welcomed the proposal that would require essential items of information to be both visually displayed and spoken. The NDA also proposed that web, and other forms of electronic communications, are in line with Web Content Accessibility Guidelines (WCAG) 2.0 - a wide range of recommendations for making web content more accessible.
- 3.32 The Broadcasting Authority of Ireland (BAI) highlighted the importance for both agencies to liaise on matters and develop appropriate processes and procedures for PRS.

### **ComReg’s Position**

- 3.33 The promotion, content and provision of PRS span a broad range of matters including:

(a) the use of personal data,

- (b) advertising through many media platforms,
- (c) direct marketing,
- (d) broadcasting standards,
- (e) consumer law relating to unfair commercial practices,
- (f) distance selling regulations,
- (g) technical and operational telecommunications performance,
- (h) financial services regulation and personal finance, and
- (i) consumer redress.

3.34 The approach, internationally, has been to address these issues in a co-ordinated manner through agencies with the specialist skills and powers to act promptly to protect, or obtain redress for consumers. ComReg, similar to PRS regulators in other jurisdictions, is the Government appointed body to deal with the totality of premium rate issues. This does not preclude other agencies or bodies, whether statutory or self-regulatory, or indeed PRS industry groups, from acting on particular matters as well.

3.35 ComReg is mindful of the stated policy of the Minister for Communications, Energy and Natural Resources, which clearly identified a requirement to place the specific regulation of PRS on a statutory footing and the Oireachtas has unequivocally conferred on ComReg the duty to regulate the “*content, promotion and provision of PRS*”<sup>9</sup>. ComReg acknowledges that the advertising Codes, published by the ASAI and the BAI, have some relevance to PRS but do not specifically address the many complex issues that PRS present. These Codes were in place prior to the enactment of the Act which clearly sets out the will of the Oireachtas to appoint a “sectoral” regulator for the purposes of PRS regulation, including regulation of PRS promotions. ComReg is fulfilling its statutory obligations in that regard by including provisions relating to the promotion of PRS in its Code and to do otherwise would be to abdicate its responsibilities.

3.36 ComReg fully acknowledges and concurs with the submission from the BAI that there is a requirement to liaise and consult on matters of mutual concern.

3.37 ComReg’s statutory responsibility is to examine the practices in the industry and evaluate these against the requirement of a Code of Practice. Based on its contacts with consumers, the research reports attached at Annex A and B, and from responses to the initial Consultation (ComReg document 10/92a), ComReg considers that there is sufficient evidence to conclude that, in the interest of protecting consumers, the provisions relating to promotions and pricing in the current RegTel Code require amendment. ComReg notes the views of some respondents that the requirement to provide a large amount of regulatory 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.

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<sup>9</sup> As per section 10 of the Communications Regulation Act, 2002, as amended.

Having carefully considered all submissions, and having cognisance of the provisions of the UCPD, ComReg considers that the requirements set out in the draft Code relating to promotion of PRS can be rationalised and amended to include provisions relating to pricing information, which were previously set out in a discrete section of the draft Code. These proposed amendments, set out in Section 4 of the revised draft Code, take cognisance of the concerns expressed in relation to the overprovision of information and reflects ComReg's recognition that not all promotions may be considered “invitations to purchase<sup>10</sup>” as defined in the UCPD.

- 3.38 In summary, ComReg has considered the submissions to Consultation 10/92a and, accordingly, amended the provisions of Section 5 of the draft Code, where it considers it appropriate. The amended provisions are set out in Section 4 of the revised draft Code, which is now subject to further consultation.

## **Industry Abbreviations**

### **The Consultation Issues**

- 3.39 In the consultation, ComReg set out that some industry-accepted abbreviations are misunderstood and/or overlooked by end-users of PRS. ComReg, consequently, suggested that it may be beneficial to codify what are acceptable and unacceptable abbreviations to enhance transparency.

**Q. 3. Do you agree with the proposed table of accepted abbreviations? If not, please provide reasons to support your view.**

### **Summary of Respondents Views**

- 3.40 Most respondents agreed that the standardisation of abbreviations would benefit PRS providers and consumers alike but some had concerns about the requirement to continuously update the table. Others, while also welcoming the concept, questioned individual abbreviations provided in the Annex to the draft Code.
- 3.41 Other respondents were firmly of the belief that it was not appropriate to include a non-exhaustive list in the Code and that there would be an undue and unnecessary administrative burden on ComReg and PRS providers to update and check the table.

### **ComReg's Position**

- 3.42 ComReg considers that the aim of codifying what are acceptable or unacceptable abbreviations in the interests of providing clarity to end-users has

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<sup>10</sup> “invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

merit. However, having to continuously update a list of abbreviations is likely to become impracticable for both ComReg and industry.

3.43 More significantly, it would undoubtedly be possible to use a number of permitted abbreviations in a promotion and not improve or enhance its clarity. For this reason ComReg has decided to remove Appendix A (Permitted and Unpermitted Abbreviations) to the draft Code.

3.44 Note that, instead of the abbreviated list, ComReg has included the following proposed provision at Section 3.12(c) of the revised draft Code relating to the use of abbreviations;

*“PRS and Promotional Material must not use abbreviations unnecessarily where the communications medium would permit otherwise”*

3.45 Therefore, ComReg does not consider it appropriate to codify a list of abbreviations and has removed Appendix A from the revised draft Code accordingly.

## **Pricing Transparency**

### **The Consultation Issues**

3.46 ComReg set out in Section 5 of the draft Code, specific requirements relating to the price information that must be supplied to end-users, prior to any costs being incurred.

**Q. 4. Do you agree with the provisions relating to the price information that should be made available to end-users of PRS? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

3.47 A number of respondents (Modeva, H3GI, ALTO, Realm, Telecom Express, NDA, O2, Ericsson IPX, Magnet Networks, mBlox and Xiam) expressed broad support for the draft provisions. Some of these respondents expressed reservations and sought clarification that the spoken requirements could only apply to audio visual promotions on websites.

3.48 TV3 and RTE proposed that the price of only those PRS costing over €2 should be required to be spoken in accordance with established practices.

3.49 The IPPSA disagreed with the proposed provisions stating that they are additional and analogous to those provided in Section 4 of the draft Code relating to the promotion of PRS.

### **ComReg's Position**

3.50 ComReg has considered the responses received to Question 4 in the context of responses received to other questions, in particular those relating to promotion



of PRS (Question 2). ComReg considers that it is preferable to amalgamate the provisions of Sections 4 (Promotions) and 5 (Price Information) in order to provide clarity on how pricing information forms a critical and integral element of any promotion.

- 3.51 Provisions requiring certain prices to be spoken in audio-visual promotions are set out in Section 4.15.
- 3.52 Therefore, ComReg has considered the submissions to Consultation 10/92a and, accordingly, amended the provisions of Section 5 of the draft Code, relating to Price Information, where it considers it appropriate. ComReg has amalgamated these revised provisions with the provisions of Section 4 of the revised draft Code, relating to Promotion of PRS, and the combined provisions of Section 4 of the revised draft Code are now subject to further consultation.

## **Expenditure Reminders and Limits**

### **The Consultation Issues**

- 3.53 ComReg set out, in Section 2.7 of the Consultation Document, a number of questions relating to the current expenditure limits as stipulated in the existing Code and invited submissions on whether these limits are appropriate and if expenditure limits should be extended to other services. ComReg also explored the merits of requiring PRS providers to issue expenditure reminders to end-users to assist in controlling the amount they spend on PRS.

The issues are inter-related and will therefore be considered collectively.

- 3.54 Expenditure Reminders

ComReg proposed that end-users should be in control of the amount that they spend on PRS. The nature of some PRS, particularly where the end-user regularly interacts with a service, or where its delivery is spread over a relatively prolonged period of time, can result in the end-user being unaware of the cost that he/she is incurring. To this end, ComReg proposed in Section 6.6 of the draft Code, that PRS providers should send a reminder message to end-users stating that the end-user has spent €20 on a particular service. Section 6.6 also provided that, where applicable, end-users must also provide a form of positive confirmation to indicate their desire to continue with the service.

- 3.55 Appropriate Expenditure Reminder Levels

The current RegTel Code sets out limits on the amounts that can be spent in respect of certain categories of services. ComReg consolidated the various price thresholds, in Section 6 of the draft Code, and invited views as to whether the existing limits are appropriate.

- 3.56 A Limit on the Amount Spent Entering a PRS Competition

Recent experience demonstrates that some end-users, particularly those that purchase PRS through a fixed-line, have used their telephone account as a form

of credit in order to engage with quiz shows on TV that offer prizes. Some end-users, who repeatedly engaged with the shows, incurred unsustainable levels of debt that, subsequently, became an issue for the fixed line Network Operator.

### 3.57 A Limit on the Amount Spent on Payment for Goods or Services

The Act provides that a PRS may include or allow the use of a facility, including a facility for making a payment for goods or services. Network Operators may choose to impose limits on expenditure through the use of a facility in the interests of protecting their consumers from “bill shock” and controlling consumer bad debt. Nevertheless, as the setting of limits is done at the discretion of a Network Operator, ComReg sought views on what expenditure limit, if any, should apply to the payment for goods and services through a PRS.

### 3.58 Daily, Weekly or Monthly Expenditure Limits

The proliferation of reality TV shows or talent shows afford end-users the opportunity to cast votes for their “favourite contestant” for example. ComReg believes that some end-users, particularly those under 18 years of age, can incur relatively high costs in casting such votes. Industry had indicated to ComReg that some end-users may wish to organise “block”, or multiple, votes in support of a particular candidate and that any daily spend limit could, therefore, impinge on this activity. This issue may be less significant if, rather than a daily limit, there was a proportionately higher weekly, or monthly, spend limit.

ComReg, consequently sought views on the following matters:

- Q. 5. Do you agree with the requirement to provide end-users of PRS with expenditure reminders? If not, please provide reasons to support your view.**
- Q. 6. Do you consider that the levels at which the proposed expenditure reminders are set are appropriate? If not, please provide reasons to support your view and, where appropriate, suggest alternative limits.**
- Q. 7. Do you consider that there should be a limit on the amount that an end-user can spend on entering a PRS competition? If so, how much? If not, please provide reasons to support your view.**
- Q. 8. Do you think there should be limit on the expenditure of an individual transaction through the use of a “facility”? If so, how much? Please provide reasons to support your view.**
- Q. 9. Do you consider that there should be a daily, weekly or monthly expenditure limit imposed in respect of individual PRS? If so, what do you think an appropriate level would be? If not, please provide reasons to support your view.**

### **Summary of Respondents’ Views –Expenditure Reminders and Appropriate Thresholds**

- 3.59 Modeva, Electric Media, Tacutext and Realm agreed in general with the principle of providing expenditure updates but objected to ComReg’s proposed requirement for an active response from customers to indicate they wish to continue with their chosen service.
- 3.60 RTE considered that the provisions of Section 6.6 should not be required in the case of Mobile Originated (MO) billed services where the end-user is taking action to engage in a series of individual services. RTE submitted that spend reminders could be considered intrusive and inappropriate, and noted that end-users should bear a responsibility to recognise and decide appropriate spend levels based on their individual circumstances.
- 3.61 TV3 questioned the value of the requirement as it is difficult to send spend reminders to fixed-line handsets and impossible if the end-user’s Calling Line Identification (CLI) is withheld. TV3 also proposed that end-users bear a level of personal responsibility, and once provided with an expenditure reminder, the end-user can decide whether to continue with the service.
- 3.62 Vodafone agreed that expenditure reminders are appropriate for subscription-based services but are not appropriate for transactional SMS services – i.e. services that typically result in the end-user making a payment for goods or

services – where the cost of a single transaction may exceed €20 and therefore render the expenditure reminder redundant. Neither would such services be appropriate for low value MO-billed services where it may take several months to incur total costs of €20. In such cases, the reminder would be of no benefit to the end-user.

- 3.63 Eircom/Meteor suggested that there is no justification to extend the requirement to provide expenditure information in the case of non-Subscription Services, as to require such reminders would be to overlook the other benefits that would accrue from other improvements in the Code.
- 3.64 Realm submitted that the existing expenditure reminders work and the proposed changes would be detrimental to the industry due to “consumer inertia”. Realm also disagreed with the requirement to terminate all voice services after the end-user has incurred €60.
- 3.65 The NCA submitted that it is possible for consumers to unwittingly accrue significant costs and, therefore, the provision of expenditure reminders is meritorious. The NCA also expressed concerns that the specified limits are relatively high in the current economic environment and questioned the basis for the figures cited in the Consultation.

### **ComReg’s Position**

- 3.66 Having considered all the submissions received, ComReg understands that the provision of expenditure reminders, while theoretically appealing, could pose significant technical problems and require a disproportionate financial investment on behalf of PRS providers when considering the benefits that would accrue. For example, in the case of a competition that can be entered by either sending an SMS or making a call, it would be unfair to require that expenditure reminders are provided because those using a fixed line telephone would not be able to receive such reminders and so, the requirement would only be applicable to those who entered via SMS.
- 3.67 ComReg has also been mindful of RTE’s submission that a reminder is not required where the end-user is required to take a separate action to make each and every individual purchase and the expenditure reminders are, therefore, more appropriate to subscription-type Mobile Terminated (MT) billed (i.e. reverse charged) services.
- 3.68 ComReg also considered the merits of Xiam’s submission that proposed requiring a reminder to be sent after the €20 expenditure threshold is hardly required if it has taken the end-user 20 weeks, at €1 per week, to incur the charges.
- 3.69 ComReg also believes that the enhanced provisions, relating to promotions and price transparency, which are set out in the revised draft Code, obviate the need to provide expenditure reminders in respect of each and every PRS.

- 3.70 Nevertheless, cognisant of its obligations in regards to consumer protection, ComReg considers that in some instances, it is appropriate, in the interests of consumer protection, that expenditure reminders are provided. Specifically:
- (a) the current provisions in relation to voice services accessed via a premium rate number, where the end-user could potentially incur substantial charges in a single call, warrants retention. In the absence of any evidence to the contrary, ComReg believes that the existing €60 limit, with an expenditure reminder after €30, which has been in force for a number of years, is sufficient to protect consumers and yet not impinge on customer engagement with the service. In addition, this is a continuation of the current RegTel Code and would not be a new burden on PRS providers.
  - (b) Expenditure reminders are considered necessary for Virtual Chat Services, where end-users are charged for receiving SMS/MMS, and, in a similar manner to those who engage with voice services, as substantial charges can be quickly incurred for these services. ComReg has, therefore, proposed that end-users are provided with an expenditure reminder after €20 and no further charges can be imposed unless the end-user further interacts with the service.
  - (c) The draft provisions that were set out in Section 6.6(a) of the draft Code relating to Subscription Services are addressed under Question 13 below.

### **Summary of Respondents' Views – Amount that may be spent entering a PRS competition**

- 3.71 The majority of respondents opposed imposing a limit on the amount that end-users should be permitted to spend on entering PRS competitions. While all respondents appear to understand that competitions have the potential to cause end-users to incur relatively large costs, they believe that if the consumer is adequately informed, then ComReg should not seek to restrict consumer choice.
- 3.72 In particular, Modeva, H3GI, ALTO, Realm, RTE, TV3, Vodafone, BT, Eircom, Ericsson IPX and the IPPSA all submitted that appropriate promotion of such services, which provide the end-user with the relevant information for them to make an informed decision, would mitigate any harm that may arise.
- 3.73 Xiam suggested that the introduction of any limit should be focused on areas of high consumer risk, such as Subscription Services, and to protect certain groups such as children.

### **ComReg's Position**

- 3.74 ComReg considers that, with the enhanced promotional and pricing provisions included in the revised draft Code, supplemented by some additional service-specific provisions for competitions, this should provide sufficient protections to end-users of such services. If the revised draft provisions are adopted, ComReg considers that the requirement to impose a limit on the amount that

an end-user can spend on entering a PRS competition would not be considered necessary at this time.

- 3.75 ComReg does not consider that these proposed provisions are burdensome on PRS providers and believes that these new proposals strike an appropriate balance between consumer protection and consumer responsibility.
- 3.76 ComReg firmly believes that the current expenditure limits that apply to Children's Services are appropriate and relevant to competitions that are aimed at children and ComReg proposes to retain the existing provisions in this regard.

### **Summary of Respondents' Views – Amount that may be Spent on an Individual Transaction through the Use of a Facility**

- 3.77 In general, most respondents, as with Question 7, did not believe that there should be a limit on the amount spent on an individual transaction through the use of a "facility". These views, however, included the postscript that end-users should be free to spend what they like but they should be provided with clear and accurate information allowing them to make an informed decision.

### **ComReg's Position**

- 3.78 In the context of the enhanced rules on promotions and pricing, ComReg does not believe that it is necessary, at this time, to impose any limits on end-users decisions on how much they wish to spend on individual transactions through the use of a facility. Network operators may, of course, decide to apply expenditure limits as they see fit in order to mitigate bad debt but this is at their discretion.

### **Summary of Respondents' Views – Daily, Weekly or Monthly Expenditure Limits in respect of an Individual PRS**

- 3.79 The majority of the submissions reiterated, or referenced, salient points from submissions to earlier questions. In summary, most respondents did not agree with the imposition of any expenditure limits, with the proviso that promotions are clear and transparent and permit end-users to make an informed decision.
- 3.80 The NDA welcomed the introduction of time-specific spend limits citing the possibility that a person may avail of up to two months credit before receiving a fixed line bill thereby running the risk of unknowingly incurring large costs. The NCA welcomed the concept but needed more information on the practical application before being in a position to definitively comment.

### **ComReg's Position**

- 3.81 ComReg believes that it is important that end-users should, in a similar manner to data roaming charges, be provided with appropriate mechanisms to assist them in avoiding large charges, so as to avoid "bill shock". As indicated in some submissions, Network Operators are best placed to address matters of credit control with their customers.

- 3.82 The majority of mobile phone users have pre-pay accounts and this in itself is a factor to assist individual's expenditure control.
- 3.83 While the introduction of expenditure limits at a regulatory level would provide protections for vulnerable users of PRS, it would also impose restrictions on end-users who wish to exercise their discretion and engage with PRS. Expenditure thresholds can only be applied to individual PRS i.e. each PRS provider can only monitor an end-user's expenditure on the specific PRS it supplies, which would therefore permit an end-user who has reached a threshold, to continue spending with a different but similar service. The only counter to this is to require Network Operators to control a customer's total expenditure on PRS but this would, undoubtedly have the unintended effect of limiting consumer choice.
- 3.84 Having cognisance for all of the submissions, ComReg believes that the introduction of enhanced provisions for promotions and pricing will provide increased protections for end-users, such that the introduction of time-based expenditure limits, is not warranted at this time.
- 3.85 Therefore, the proposals to retain some of the provisions relating to increased price transparency and other provisions set out below relating to Subscription Services, ComReg does not consider it is necessary to introduce, at this time:
- expenditure reminders, save those that are currently provided in respect of services accessed through a premium rate number, Children's Services and a new provision in relation to Text Chat services,
  - a limit on the amount that an end-user can spend on entering a PRS competition,
  - a limit on the expenditure amount of an individual transaction through the use of a "facility", or
  - a daily, weekly or monthly expenditure limit in respect of individual PRS.
- 3.86 ComReg has carefully considered the submissions to Consultation 10/92a with respect to Expenditure Reminders and Limits and, considers that the provisions of the revised draft Code will address the potential for harm that the introduction of limits and reminders would have addressed. The amended provisions set out in the revised draft Code are now subject to further consultation
- 3.87 ComReg will, however, monitor activities in the market and will move to introduce provisions where there is clear evidence of consumer harm.

## **Purchase Confirmation Receipts**

### **The Consultation Issues**

- 3.88 ComReg proposed that end-users of PRS, who make a "once-off" purchase via a mobile handset, should receive a purchase confirmation message comparable

to a receipt provided for a retail purchase. The intention was that the end-user is provided with a tangible confirmation of a PRS purchase that he/she could retain in the event of having to seek redress at a later point.

- 3.89 ComReg recognised that, given the immediacy and interaction required by some PRS, the provision of such receipts on each and every occasion may not be appropriate. Nevertheless, ComReg sought views on the matter.

**Q. 10. Do you agree with ComReg’s preliminary view on the introduction of Purchase Confirmation Receipts in respect of some once-off PRS transactions? If not, please provide reasons to support your view.**

### **Summary of Respondents’ Views**

- 3.90 In general, most respondents submitted a qualified approval for the proposition to introduce a requirement to provide Purchase Confirmation Receipts. The relevant reservations related to:
- (a) end-users receiving responses for every one entry to a competition, for example, and
  - (b) the inability of mobile networks to handle high volumes of inbound and outbound messages for events such as TV voting.
- 3.91 The NCA highlighted that the Sale of Goods and Supply of Services Act 1980, the Distance Selling Regulations (SI 207/2001) and the e-Commerce Regulations (SI 68/2003), all support the idea of the consumer receiving proof of purchase or order acknowledgement of some sort. This provides an extra degree of clarity regarding cost and may influence the decision to make further transactions.

### **ComReg’s Position**

- 3.92 ComReg believes that the provision of Purchase Confirmation Receipts would be a positive development but, given the nature of some PRS, are not always appropriate. After reviewing responses to the initial consultation, ComReg agrees that receiving a Purchase Confirmation Receipt when engaged with a Text Chat Service would be intrusive and unnecessary and would not be required considering the promotion and pricing provisions that are now proposed in the revised draft Code.
- 3.93 Similarly, for large TV voting events, the requirement to provide Purchase Confirmation Receipts in response to each and every vote cast would, undoubtedly, cause unnecessary congestion on mobile networks. The difficulty that therefore arises is that it would seem that there are so many exceptions to the proposed requirement to almost render it unworkable.
- 3.94 Nonetheless, the proposal has merit, particularly when considering a discrete category of services, where end-users use phone payment to pay for “non-digital” goods or services – these are goods and services that are not delivered to the end-users handset and therefore the normal PRS characteristic of



immediacy is not present. Examples of these non-digital, or off-handset, goods and services are where an end-user may choose to use phone payment to pay for a road toll or a purchase from a vending machine.

- 3.95 With the anticipated and imminent development of phone payment as an alternative payment method for many “mainstream” goods and services, there is a reasonable assumption that end-users require confirmation similar to that provided by existing payment methods. If, for example, a consumer chooses to pay a barrier-free road toll online or through a retail outlet, they will receive a receipt confirming that their payment has been received and their liability for the toll fee has been discharged. ComReg’s proposal to provide confirmation receipts to the end-user’s handset for such services is intended to mirror accepted retail practices of providing receipts.
- 3.96 Should a consumer choose to use phone payment to purchase a good or service, and subsequently need to pursue a consumer care matter, it is likely that any redress sought will be from the provider of the good or service purchased rather than the telecoms provider i.e. if a person uses phone payment to pay for the purchase of a DVD, which is found on delivery to be faulty, the consumer should seek redress from the supplier of the DVD rather than their telecoms provider (network operator) or the PRS provider which facilitated the payment (dependent on the particular contract’s terms and conditions involved). In such circumstances, the provision of a receipt at the time of purchase would greatly help the consumer to reference their purchase from the DVD supplier.
- 3.97 ComReg therefore considers it appropriate and proportionate that end-users are provided with Purchase Confirmation Receipts in respect of “non-digital” goods and services. The provisions of Sections 5.7 and 5.8 of the draft Code have been amended to reflect the submissions received.
- 3.98 It is important to note that it is not intended that Purchase Confirmation Receipts must be separate to any MT-billed<sup>11</sup> messages that are delivered to the end-user for the purpose of completing the purchase. For example, if a PRS provider sends an MT-billed SMS to the end-user’s handset in order to apply a charge to pay for the good or service to be purchased, then this SMS may also be used to provide the end-user with a Purchase Confirmation Receipt. However, the Purchase Confirmation Receipt must be separate to any promotional messages.
- 3.99 Therefore, ComReg proposes that PRS providers must provide end-users with Purchase Confirmation Receipts in respect of PRS that use a facility to make a payment for goods and services, where such goods or services are not delivered to the end-user’s mobile handset.
- 3.100 The revised provisions of the Code are considered necessary to provide end-users of PRS with relevant information to seek redress, if required, but are not

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<sup>11</sup> *Mobile Terminated (MT) Billing is a mechanism to bill whereby a consumer is charged for receiving a message at the retail level. The opposite of this is Mobile Originated (MO) Billing where the consumer is charged for sending a message.*

intended to, and do not in any way, relieve PRS providers of any obligations they may have under the Sale of Goods Act (as highlighted by the NCA) and the other legislation listed at paragraph 3.92 above.

- 3.101 ComReg has considered the submissions to Consultation 10/92a with respect to Purchase Confirmation Receipts and, accordingly, amended the provisions of Section 6 of the draft Code, where it considers it appropriate. The amended provisions are set out in the revised draft Code which is now subject to further consultation.

## **Positive Confirmation to Enter a Subscription Service**

### **The Consultation Issues**

- 3.102 ComReg set out in its initial consultation the fact that Mobile Subscription Services continue to be the primary PRS-related reason for consumers to contact ComReg. ComReg's experience mirrors that of RegTel, which also reported that Subscription Services comprise the vast majority of calls to its customer care centre.
- 3.103 ComReg outlined the various methods by which end-users subscribe to Mobile Subscription Services and how PRS providers are typically unable to provide ComReg or the consumer with verifiable evidence as to whether an end-user has subscribed to a PRS.
- 3.104 In order to ensure that end-users of subscription-based PRS are fully equipped to make an informed decision to purchase, and to ensure that there is verifiable evidence to confirm that the end-user was so informed, ComReg proposed the adoption of a "double opt-in" mechanism. The adoption of this proposal would require PRS providers to send a free SMS to the end-user's handset setting out the price and other relevant conditions and the end-user would not be subscribed unless they, in turn, responded positively to this SMS.

**Q. 11. Do you agree with ComReg's proposal to introduce a "double opt-in" requirement for Subscription Services? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

- 3.105 ComReg received a robust response from the PRS industry to the proposal to enhance the existing provisions of the Code and introduce a "double opt-in" mechanism for Subscription Services. A summary of the majority of responses of those that opposed the introduction of the measures proposed cited the following for their opposition:
- (a) Modeva, IPPSA and Realm took issue with the data used by ComReg to support their proposals, in particular, the unreliability of the statistics collated from consumer contacts and ComReg's ability to analyse this data,

- (b) H3GI, Eircom/Meteor and O2 agreed that a “double opt-in” may be appropriate for some SMS-based PRS but not for “on-portal” services,
- (c) H3GI, suggested that if ComReg were to introduce a “double opt-in” it should be applied to services that have evidently caused consumer detriment and/or services that exceed €5 for example. Tacutext also highlighted that “double opt-in” is only mandated for higher priced PRS in the UK,
- (d) Bluestream, Electric Media, IAPI, Telecom Express, O2, TV3 and the IPPSA maintained that double opt-in will confuse consumers and may cause irritation. Some further suggested that, if introduced, the proposed measures will disrupt a consumer’s browsing experience and lengthen the subscription process, thereby requiring the end-user to incur greater costs, and may bring an end to all Subscription Services. Vodafone stated that the introduction of “double opt-in” has had a significant detrimental impact on the premium rate SMS industry in the UK and, similar to other submissions, proposed that clarity of pricing at the point of purchase and clear instructions on how to unsubscribe is sufficient,
- (e) Realm, Tacutext, mBlox and the IPPSA made reference to the UK where it was claimed that “double opt-in” is required only for Subscription Services in excess of £4.50 per week and not to subscriptions that cost less,
- (f) Vodafone and Ericsson IPX submitted that the decline in end-users contacting their customer care lines indicates an improvement in pricing transparency and improved customer care. Modeva similarly cited declining complaints to ODPC, and a similar drop off in consumer complaints over the past two years, to support their position against the introduction of a “double opt-in” for Subscription Services.

3.106 Conversely, ComReg also received robust submissions in favour of the proposed measures which may be summarised as follows:

- (a) Phonovation, Xiam and RTE supported the proposed measures with RTE adding that it supported any measures which will assist in minimising issues around Subscription Services,
- (b) The NCA identified problems with PRS subscriptions as one of the main features of complaints to the Agency about PRS. The NCA welcomed the proposed introduction regarding a “double opt-in” which would have the effect of being an effective “cooling-off” period for consumers which works effectively in other industries,
- (c) The NDA believed that the introduction of the proposed measures, coupled with the increased transparency requirements for promotions and pricing is critical,
- (d) The ODPC fully supported ComReg’s proposal stating that, over the past number of years, the ODPC has been inundated with complaints from the public concerning the entry of their mobile phone numbers into Mobile Subscription Services, apparently without their knowledge or consent. The ODPC was particularly supportive of the proposed measures where

end-users are subscribed on the basis of a subscription initiation made via WAP links, on a website or on the basis of contact details collected by means of cards handed out to individuals at promotional events, festivals, etc. Furthermore, the ODPC highlighted that it would appear essential for a service provider “*to 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.*”

- (e) In addition, the Sligo Community Alliance proposed that “many people do not understand what a Subscription Service is and how reverse billing works”. It contended that “the introduction of a “double opt-in” would not go far enough to remedy consumer harm and barring such practices is the only real option available to protect the public.

### **ComReg’s Position**

Given the range of views received by the respondents to the issue of the draft proposal to introduce a “double opt-in” for Subscription Services, ComReg has collated its position under the following category headings:

- Statistical Evidence,
- Protections Offered to Consumers under the Distance Selling Regulations,
- Alleged Confusion for End-users,
- Proof of End-users Acceptance of Charges,
- End-user Apathy,
- Double Opt-In Above a Particular Price Point, and
- International Experience.

ComReg’s preliminary conclusions and stated positions in relation to this particular policy issue are set out in the final paragraph (“Summary”) of this section.

#### *Statistical Evidence*

- 3.107 On the issue of statistical data to warrant the introduction of a “double opt-in”, as set out in ComReg’s initial Consultation (ComReg document 10/92a), it is relevant and necessary to reiterate and consider the reasons for ComReg to contemplate amending the existing Code of Practice in the manner suggested as outlined in the paragraphs below.
- 3.108 RegTel consistently illustrated in its Annual Reports that Mobile Subscription Services were the overwhelming cause of consumer complaints, with 91% of all calls in 2009 relating to Subscription Services. ComReg has similarly found that 86% of consumers who contact ComReg in relation to PRS have raised

issues relating to Subscription Services. As set out in Section 2.9.4 of the initial consultation (ComReg document 10/92a), Mobile Subscription Services were similarly the predominant reason for consumer complaints in the UK in 2008 (prior to remedial action in 2009).

- 3.109 Since the primary (almost sole) reason for consumers to contact the regulator (formerly RegTel and now ComReg) is in relation to Subscription Services, it is reasonable to infer that the “public anger” and “scam” to which the former Minister referred to in his address to the Seanad in May 2008, as detailed in paragraph 3.118 below, relates in some way to Subscription Services.
- 3.110 ComReg suggests that the decline in consumer complaints over the past two years as referenced by Vodafone, Modeva and Ericsson IPX may in part be attributable to better customer service, though none of the submissions received provide evidence to this effect, but is also likely to be reflective of the overall decline in the PRS market. It is anticipated that by the end of the current financial year (end June 2011), the PRS market is expected to have declined by approximately 38% over the previous three years, and so a similar decline in the number of complaints received is to be expected. The decline in consumer complaints cannot therefore be automatically assumed to indicate that end-users are content with the current practices within the industry.
- 3.111 Modeva maintained that since Subscription “Entertainment Services” represent approximately 80% (79.8%) of the revenues of IPPSA members, “it is not unreasonable to assume that the level of calls to ComReg’s call centre should include a level of queries in relation to Subscription Services proportionate to their activity in the market”. ComReg, however, is of the view that a disproportionate number of consumer contacts arise as a result of the current practices for Mobile Subscription Services relative to the number of transactional events they represent in the PRS market. In other words, the number of individual transactions rather than revenues raised, is a better basis for assessing the proportionality of issues raised by consumers.
- 3.112 As set out in ComReg’s Consultation document 10/92a, since assuming regulatory responsibility for the PRS sector in July 2010, ComReg has received, on average, 250 calls per week relating to PRS with the vast majority relating to Mobile Subscription Services. However, ComReg commissioned a research report <sup>12</sup> which found that:

- (a) Only half (51%) of those experiencing difficulties with PRS have complained, and only 25% of those who did so, complained to the regulator (RegTel 16% or ComReg 9%).

While recognising that the following statements (b) and (c) below are based on extrapolation of (a), it is nevertheless indicative and illuminating to note the following;

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<sup>12</sup> PRS Research – Presentation of Findings of Quantitative Phase by Ipsos MRBI for ComReg (October 2010) and attached as Annex A

- (b) If only 25% of end-users raised an issue with ComReg/RegTel, and this represents on average the 250 calls per week ComReg receives, then potentially there could be up to 1,000 end-users per week who experience issues with PRS, and
  - (c) If these 1,000 end-users represent the 51% of those who complained about PRS, then there is potentially another approximately 1000 end-users who did not complain (through lack of knowledge how to or apathy etc.). Therefore, there are potentially up to 2,000<sup>13</sup> end-users per week who may experience difficulties with PRS.
- 3.113 Modeva cited a reference in RegTel's 2009 Annual Report that, in the majority of cases a valid subscription had been effected and it was unclear to RegTel why so many consumers failed to understand what they were entering. To examine this phenomenon, ComReg commissioned a second report by Ipsos MRBI in late 2010 to explore PRS usage, and the findings of this report may be used to provide clarity on why consumers apparently subscribed to PRS yet felt compelled to contact the regulator as a consequence of engaging with the services. This Qualitative Research Report<sup>14</sup> clearly indicates that the most commonly cited difficulty experienced by end-users of PRS centred around Subscription Services, in particular end-users unwittingly subscribing in the belief that interaction was a once-off (i.e. non-subscription).
- 3.114 While ComReg's Qualitative Research Report indicates that unclear pricing and manipulative promotions are considered the cause of most problems, the report also concludes that a "double opt-in" for PRS subscriptions would easily resolve many of the negative issues experienced by end-users of PRS.
- 3.115 ComReg is also mindful of the submission from the NCA, which states that one of the main features of complaints from consumers relating to PRS relates to Subscription Services.
- 3.116 ComReg, therefore, concludes that there is substantial data and information that Mobile Subscription Services are the primary source of complaints raised by end-users of PRS and, furthermore, the number of complaints that ComReg receives represents a minority of the total issues affecting end-users. These are not suppositions drawn solely from call centre statistics but are supported by two separate reports conducted by a reputable consultancy firm in accordance with established research methods.
- 3.117 Though not all consumer contacts will be classified as complaints, ComReg is, nevertheless, duty-bound to monitor the reasons why end-users of PRS choose to contact its customer care helpline in order to broadly assess if the Code is providing the required protection for consumers. The evidence from the customer care contacts, which indicates that engaging with Subscription

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<sup>13</sup> Similar figures are further expanded upon in the draft RIA attached to this Consultation and while ComReg recognises that there are a number of available methods of calculating the potential numbers of end users who may be harmed through their use of PRS, as demonstrated above and in the RIA, both estimates indicate that the number is in excess of 100,000 annually.

<sup>14</sup> PRS Research – Presentation of Findings of Qualitative Phase by Ipsos MRBI for ComReg (February 2011) and attached as Annex B

Services is the primary reason for users of PRS to contact ComReg, is supported by the evidence from the research conducted on ComReg's behalf by Ipsos MRBI. To deny that there is a pressing problem in the industry is to ignore the anecdotal and material evidence that points to Mobile Subscription Services as being the primary source of consumer harm in the industry.

- 3.118 The Minister for Communications, Energy and Natural Resources, in his speech in the Seanad in May 2008, announcing that regulation of PRS would be placed on a statutory basis, cited the following reasons; *“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 this sector is required in order to ensure the Irish consumer is not exploited.”* As set out above, at the time of the Minister's speech, Mobile Subscription Services were the predominant issue for consumers to contact the regulator. Evidence since the transfer of regulatory functions to ComReg clearly demonstrates that this continues to be the case.

#### *Protections Offered Under the Distance Selling Regulations*

- 3.119 End-users of subscription PRS enter into a contract but are not currently afforded the same protections as other consumers who similarly place orders and contract remotely. Regulation 4 of the Distance Selling Regulations (SI 207 of 2001) provides that retailers (i.e. PRS providers) are required “in good time prior to making the contract” to provide the consumer with enough information to decide whether or not to proceed with the purchase.
- 3.120 In addition to this pre-contractual information, a distance contract will not be enforceable against a consumer unless the consumer has received confirmation of the prior information mentioned above. This confirmation must be in writing (read email or SMS) or in another durable form which is accessible to the consumer.
- 3.121 At present, a promotion for a subscription PRS is assumed to meet the requirement to provide the consumer with the information required in order to make their decision to proceed with the purchase. In addition, the “Subscription Confirmation Message”, provided under Section 11.13.2 of the current RegTel Code, is accepted to meet the requirement to provide the consumer with confirmation of the purchase transaction.
- 3.122 End-users of subscription PRS, however, once they have indicated an intention to purchase by responding to a promotion, are not able to avail of a “cooling-off” period as envisaged by the Distance Selling Regulations. As the inherent obstacle to PRS with the application of the cooling-off period is that a PRS will, typically, be consumed or received immediately, it is difficult, if not impossible, for a consumer to change his or her mind and withdraw or reverse the transaction. For example, it is clearly impractical to reverse a transaction whereby a consumer enters a competition through a PRS – the consumer's entry is almost instantaneously registered once they engage with the Competition Service (by making a telephone call or sending an SMS) and

choosing to exit a competition (withdraw a person's participation) may clearly pose insurmountable obstacles for the PRS provider.

- 3.123 For Subscription Services, there is no practical reason why consumers should not be afforded similar protections provided for in the Distance Selling Regulations and be permitted to avail of a "cooling-off" period, which could afford them time to reconsider their purchase. The introduction of the "double opt-in", as set out in the latest draft of the Code, provides that end-users will receive, to their handsets, the information to enable them to decide whether or not to proceed with the purchase. The end-user will have the opportunity to reflect if he or she wishes to enter into a contract that will effectively establish a direct debit to their phone account. Single, or one-off, transactions are not required to observe this "cooling-off" period but ComReg considers it entirely appropriate and desirable that additional protections are introduced when an end-user is acceding to permit the establishment of a direct debit to their phone account, often by a third party with whom they have no direct contractual relationship. Similar measures have been introduced in other jurisdictions and this is further expanded upon later in this section.
- 3.124 Realm Communications, in its response to Questions 8 and 9 relating to whether it is necessary to introduce periodic expenditure limits, expressed its opposition to the establishment of expenditure limits but suggested that the introduction of "cooling-off" periods for services above a certain threshold, thereby affording consumers time to consider the purchase, would be a possible way to minimise harm.

#### *Confusion for End-users*

- 3.125 Some of the respondents suggest that the introduction of a "double opt-in" will confuse end-users and may even cause "irritation" or cause the subscriber to believe that they have been charged twice for the service. ComReg notes that no evidence has been provided to support these submissions. ComReg suggests that what is more likely to confuse end-users of PRS is how end-users may find themselves being subscribed (i.e. established a direct debit) to a PRS without having had the opportunity to reflect on the transaction before the establishment of a contract.
- 3.126 The practice of "MSISDN<sup>15</sup> forwarding"<sup>16</sup> has recently come to ComReg's attention, whereby a consumer's contracted Mobile Network Operator (MNO) may facilitate the passing of the consumer's MSISDN from their mobile handset to selected PRS providers prior to the consumer completing a transactional purchase with the PRS provider. The mobile networks will have a direct contractual relationship with the PRS provider but, until the purchase transaction in respect of the PRS offered is completed, the end-user will not

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<sup>15</sup> MSISDN is the telephone number of the SIM card in a mobile phone. It is the number that uniquely identifies a consumer's handset within a GSM or a UMTS (3G) mobile network.

<sup>16</sup> The practice of "MSISDN forwarding" also raises issues under Data Protection legislation but notwithstanding any action by the Office of the Data Protection Commissioners in this regard, ComReg considers that the provisions in the revised draft Code and explained below in the remainder of this section will assist in addressing this issue.



have any contractual relationship with the PRS provider. Nevertheless, once the Mobile Network Operator facilitates “MSISDN forwarding”, the PRS provider will be aware of the consumer’s MSISDN (read mobile phone number) before any commercial relationship exists between themselves and the consumer. Mobile Network Operators and PRS providers alike would maintain that the purpose of “MSISDN forwarding” is to improve the customer experience within WAP or mobile sites by allowing end-users to subscribe to a PRS by “clicking” on a link or button within a WAP/mobile site. Essentially, a person browsing a WAP or mobile Internet site may subscribe to a PRS service by merely clicking on a link. The practical implications, however, are that end-users may:

- (a) enter a contract which establishes “direct debit” deductions from their phone account,
- (b) enter a contract with a company with whom they have had no previous direct relationship,
- (c) not be provided with an opportunity to reflect on the transaction through the availability of a “cooling-off period”, and
- (d) never be asked to provide their mobile phone number.

While the Data Protection Commissioner may have to consider these issues, ComReg believes that it is also appropriate that it do so as well.

- 3.127 Irrespective of the clarity of pricing and other information, ComReg believes that the revised draft proposals relating to subscription initiation are appropriate - in particular because there is no industry-wide standard, ensuring end-users receive the necessary information in a consistent and uniform manner, such that they are fully equipped to make an informed decision.
- 3.128 ComReg considers that the revised draft proposals for Subscription Service initiation will also enable ComReg to obtain verifiable evidence to determine whether an end-user did in fact subscribe to a service. With a substantial proportion of end-users alleging that they did not subscribe to a PRS, enhanced provisions in this area will benefit PRS providers as well as end users.
- 3.129 Furthermore, with 39% of end-users being unaware that they may be charged for receiving a premium rate SMS<sup>17</sup>, some subscribers may not be even aware that they have set up a contract which results in charges being incurred on their phone account.

#### *Proof of the End-user’s Acceptance of Charges*

- 3.130 ComReg’s proposed provisions take cognisance of the level of technological sophistication and maturity within the Irish market. It was suggested by some respondents that the proposed provisions are too prescriptive, were not “future-proofed” and will interrupt the end user’s experience whereby end-users will have to exit their browsing session to respond to the regulatory SMS.

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<sup>17</sup> Refer to Ipsos MRBI Quantitative Research at Annex A

ComReg's approach is grounded on the requirement for PRS providers to be able to obtain verification that the end-user has consented to accepting the relevant charges. The submission from the ODPC is particularly relevant in this regard as it would provide a PRS provider with non-repudiable evidence that an end-user did in fact subscribe, and thereby provide a robust defence in respect of "any proceedings which may arise for an offence under Regulation 13 of S.I. 535 of 2003 (as amended)"<sup>18</sup>.

- 3.131 It is common practice that some Subscription Services are initiated by a consumer entering a mobile number on a website, or mobile website, or by clicking on an icon/link. In such cases, the end-user's Mobile Network Operator has no record of an agreement to purchase and so, ComReg currently finds itself relying on the "evidence" of a subscription initiation being provided by the PRS provider which is likely to be the party against which the end-user has raised an issue. Such evidence normally takes the form of an Excel spreadsheet which cannot be independently substantiated by any other party. PRS providers may, in some instances, provide ComReg with details of the end-user's mobile handset model which would suggest that the end-user has interacted with the PRS offered. However, this is not sufficient to categorically confirm that the end-user positively consented to accepting the published charges, especially when the consumer denies entering the Subscription Service.
- 3.132 In the UK, an industry-wide system called "Payforit"<sup>19</sup> has been adopted with the support of the MNOs who accredit a series of payment intermediaries, thereby ensuring the Payforit scheme rules are adhered to. This system ensures that the consumer payment transactions are consistent across all Accredited Payment Intermediaries and Mobile Networks, which presents the on-screen payment pages to the end-user in a regular and transparent format. ComReg would welcome the transparency and certainty that a scheme such as Payforit could bring to the Irish industry and its consumers. However, in the absence of a unified approach from industry, ComReg considers that its proposals to require that, in the case of Subscription Services, the important information is delivered to consumers in a consistent and transparent manner and the end-user is subsequently required to confirm their consent to accept the charges by sending an SMS from their handset (MO text), are both necessary, proportionate and non-discriminatory.

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<sup>18</sup> Regulation 13(14) of the European Communities (Electronic Communications Network and Services) (Privacy and Electronic Communications) Regulations 2011, provides that 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 an issue, the onus of establishing that the subscriber or user concerned unambiguously consented to receipt of the communication or call lies on the defendant. As such, this requirement in the revised draft Code compliments the provisions in these Regulations.

<sup>19</sup> Payforit is a UK mobile payment service industry initiative, started jointly by Vodafone, Orange, 3, T-Mobile and 02. It enables consumers wishing to purchase content and charge it to their mobile phone account. End-users are presented with a standard 'Payforit' screen that includes clear information on the content/service they are buying, the merchant they are buying from and how much it will cost them. Once the consumer authorises payment by pressing 'Pay Now' or 'Subscribe', a payment request goes directly to the mobile operator for validation.

- 3.133 ComReg considers that the 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.
- 3.134 ComReg also welcomes the initiative by a mobile operator that will allow end-users of PRS access to a portal that will enable them to see in near "real-time" the costs they incur on PRS. The portal will also provide the subscribers with a simple means of unsubscribing from a service by alerting the customer care agents of the subscribers intention. However, the introduction of this initiative and the benefits that it will provide are relevant only after a consumer has already subscribed to a service and consequently, the requirement for consumers to be fully informed in advance of making a purchase transaction still applies. For these reasons, ComReg believes that additional consumer protections included in the revised draft provisions are required.

#### *End-user Apathy*

- 3.135 The IPPSA submitted that 97% of potential end-users will fail to proceed with a subscription initiation if the proposals in the draft Code, which requires PRS providers to first send an SMS with all the required information to the end-user's handset, are implemented. The IPPSA, however provided no information as to why such a large proportion of consumers would decide not to proceed with the transaction presented to them and any suggestion that it is as a result of the transaction mechanism being too cumbersome is speculative and without substantiation. ComReg's research indicates that the reason why consumers may choose not to proceed with a subscription is as a result of the end-user being unaware of the true cost and nature of the service via the promotion or entry mechanism required which contrasts to other payment mechanisms.

#### *Double Opt-In Above a Price Threshold*

- 3.136 Some submissions pointed to the fact that the "double opt-in" requirements in the UK only apply to Subscription Services that cost in excess of £4.50 per week. However, it does not follow that no harm is occurring below this price point and PhonepayPlus, the UK PRS regulator, retains the ability to amend the provisions of its Code if it is in consumers' interests to do so.
- 3.137 Additionally, PhonepayPlus has the authority to require providers of certain types of PRS to obtain prior permission to operate the services. At present, providers of Subscription Services that cost in excess of £4.50 per week are required to obtain prior permission but, as outlined above, it remains for PhonepayPlus to amend this threshold as it sees fit. ComReg, is however, bound by the licensing regime established in the Act and considers it arbitrary at this stage to include a price point for the purposes of "double opt-in". It is entirely reasonable, therefore, for ComReg to adopt a more uniform and non-discriminatory approach and apply the proposed measures to all Subscription Services, regardless of price. This position may change in time and would

depend on a variety of reasons such as the level of consumer harm, technological developments and industry practices.

#### *International Experience*

3.138 Through its participation in the “International Audio Text Regulators Network” (IARN), ComReg has engaged with regulators in other jurisdictions on this issue and it is apparent that Subscription Services in other jurisdictions were either:

- (a) considered by other regulators, to have the potential to cause significant consumer harm sufficient to warrant the introduction of precautionary consumer protection measures, or
- (b) in the absence of precautionary measures, considered by other regulators to have caused a sufficiently significant level of consumer harm to warrant retrospective regulatory intervention.

“Double opt-in” or “positive confirmation” of an end-user’s intention to purchase a PRS has been widely implemented including in the United Kingdom, Belgium, Finland, Australia, South Africa, the Netherlands, Sweden, the Czech Republic and Finland. Several regulators also report that, despite predictions from some quarters, the introduction of “double opt-in” would signal the demise of the PRS industry, this has not turned out to be the case<sup>20</sup>.

3.139 As stated above, it is noteworthy that some countries introduced “double opt-in” from the outset (i.e. once MT-billed SMS and/or Mobile Subscription Services appeared on the market) as a standard precautionary consumer protection and without waiting to determine if a sufficient level of consumer harm would occur to justify its introduction. For example:

- (a) Sweden introduced “double opt-in” as far back as 2006 (with modification in 2009),
- (b) Czech Republic, in 2005, coinciding with the emergence of reverse-billed (MT-billed) premium SMS,
- (c) Germany introduced double opt-in in 2007, with augmented provisions in 2010,
- (d) Belgium introduced a requirement for positive confirmation in 2008,
- (e) the United Kingdom, in 2009, following a 108% increase in mobile-related complaints in 2007/8 from the previous year,
- (f) Australia introduced “double opt-in” 2009 and in 2010 introduced additional measures that require all Mobile Network Operators to offer

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<sup>20</sup> Information provided by the Australian regulator indicates that the mobile market declined by approx 5% (from AUS\$210 million to \$200 million) between 2009 and 2010. Double opt-in was introduced in July 2009 but it is unlikely that the total decline is attributable solely to the introduction of this measure. Australian research notes that the premium SMS market is declining due to the greater use of smart phones and internet based content such as apps.

barring of premium SMS/MMS services as an optional consumer protection, and

- (g) Finland, in 2010, following a large number of consumer complaints since 2008
- (h) South Africa introduced “double opt-in” as recently as 07 July 2011.

It is therefore clear that ComReg’s draft proposal is neither radical nor innovative but is in fact in line with good practice in well developed jurisdictions and is considered necessary by a host of regulators in other jurisdictions.

### *Summary*

- 3.140 ComReg’s conclusions are that since a Subscription Service would, in theory, permit a limitless expenditure level (i.e. the theoretical amount that a subscriber may spend is only capped by the length of time they remain subscribed to the service), then it is appropriate to propose the introduction of what would in effect be a “cooling-off” period for Subscription Services which would afford the end-user the opportunity to reflect on their potential purchase.
- 3.141 Having carefully considered the merits of each of the submissions, ComReg has formed the view that the introduction of a requirement for a consumer to positively confirm their intention to subscribe to a PRS is a necessary and justifiable measure to protect the interests of end-users of PRS. ComReg further considers the likely subsequent benefit to consumers to outweigh any minor additional cost that an individual consumer may incur (i.e. the cost of an SMS indicating their intention to proceed) or any potential loss to the industry.
- 3.142 Accordingly, ComReg’ proposals are set out in Section 5 of the revised draft Code which is now subject to further consultation.

## **Sign-Up Fees**

### **The Consultation Issues**

- 3.143 ComReg outlined in its Consultation (ComReg document 10/92a) a relatively recent industry development which has seen end-users incurring “sign-up” or “joining” fees in addition to the first period’s charges. The sign-up fees could be considered analogous to a minimum subscription period i.e. the end-user must incur a minimum cost which is a prohibited practice under the existing Code.
- 3.144 ComReg sought opinions in respect of the matter of “sign-up” fees and proposed that it might be considered reasonable for any initial “sign-up” fee to be considered as the charges for all, or a portion, of the first charge period.
- 3.145 ComReg also proposed that, for the benefit of consumers and industry alike, end-users should be able to access any content that they have already paid for after they unsubscribe from a PRS.

**Q. 12. Do you agree that any sign-up fees should be considered the subscription charges for the first billing period? If not why not?**

**Summary of Respondents' Views**

- 3.146 Xiam, mBlox, TV3, Vodafone, BT and Magnet Networks agreed that the sign-up fees should be off-set against any subsequent subscription charge within the first billing period. The NCA also considers viewing sign-up fees as being the subscription charge for the first billing period.
- 3.147 Modeva, Eircom/Meteor and the IPPSA disagreed with the proposal citing the requirement for PRS providers to clearly and transparently display pricing and terms and conditions as being a preferable solution to including specific requirements about sign-up fees in the Code.
- 3.148 Eircom/Meteor submitted that the provisions of the draft Code will enhance consumer protection with regard to providing consumers with information that will assist them in making an informed transactional decision and these provisions combined with market forces are sufficient to protect consumers.

**ComReg's Position**

- 3.149 ComReg considers sign-up fees to be an unwelcome development with some Subscription Services applying the sign-up fee plus the first period subscription fees simultaneously and, typically, immediately after an end-user has subscribed to the service. This results in end-users of the service incurring what amounts to "double" costs without necessarily having received anything for their purchase.
- 3.150 Nonetheless, ComReg considers that enhanced transparency requirements, including the provision of pricing and terms and conditions to the end-user's handset prior to the initiation of a subscription ("double opt-in") as provided in the Section relating to the "Promotion of PRS" above, will provide adequate consumer protections. As such, ComReg sees no impediment to allowing PRS providers to continue to structure the payment for their services in this manner, provided that consumers are in a position to make an informed decision on whether to proceed with a purchase transaction, and are in compliance with the requirements of the Code. ComReg does not consider it necessary to include provisions in the Code that would require sign-up fees to be considered to be the subscriptions charges for the first billing period.
- 3.151 Therefore after considering the submissions to Consultation 10/92a with respect to Subscription Sign-Up Fees, ComReg has amended the provisions of the draft Code. The amended provisions are set out in the revised draft Code which is now subject to further consultation.

## **Requirement to Reconfirm Intention to Remain Subscribed**

### **The Consultation Issues**

3.152 ComReg found, through active monitoring of a variety of Subscription Services, that some regulatory messages sent to end-users, once they have incurred costs of €20 on a PRS, do not clearly restate the cost terms and conditions of the service, as required. Instead, ComReg's monitoring has revealed that these regulatory messages, as required under Section 11.13.5 of the current RegTel Code (which sets out the terms and conditions such as the cost of the service, the periodic charge period, the PRS provider's customer care number and how to unsubscribe from the service) were often indistinguishable from subscription "welcome" messages or promotional messages. As a result, end-users are unsure, as to whether the message is free or imposes a cost and who is responsible for sending the message. ComReg therefore proposed prescribing the format that the expenditure reminder message should take and has proposed a format in the draft Code.

ComReg believes that this should assist in fully alerting and informing end-users of the costs that they have incurred to date and require that the end-user positively indicates his/her desire to continue receiving the services.

ComReg sought responses to the following question:

**Q. 13. Do you agree with the proposal to require end-users to provide positive confirmation of their desire to continue in a Subscription Service after a certain expenditure level? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

- 3.153 Modeva opposed the proposals and considered the specific message wording and the requirement for PRS providers to keep a running total of all costs incurred in the past by consumers to be disproportionate to the issues raised and an undue burden on the PRS providers.
- 3.154 Similarly, H3GI, Bluestream, Tacutext, Vodafone, Eircom, Ericsson IPX and Telecom Express disagreed with the proposal with most citing the requirement to clearly inform the consumer, both at the time of sign-up, and periodically, of the costs and how to exit the service if the end-user should so wish.
- 3.155 mBlox agreed with the format of the Expenditure Reminder Message and considered that the proposed mechanism, together with other enhancements around promotions and pricing clarity, provide sufficient consumer protections as they keep the consumer informed. Their submission, however, added that, if implemented, the effect of the proposal would lead to the end of Mobile

Subscription Services which is a legitimate commercial practice utilised in many other industry sectors.

- 3.156 Xiam disagreed with the proposal and argued it would provide substantial technical difficulties to provide a solution to meet the requirement. RTE also questioned the technical feasibility of the proposal but agreed with its implementation, subject to the technical barriers being overcome.
- 3.157 The IPPSA disagreed with the proposal and advocated that instead the regulatory message sent at €20 intervals should be in a format that is clear and distinct from other message types.
- 3.158 Phonovation, IAPI, ALTO, and BT concurred with the proposal though did not expand on their views or provide further comment.

### **ComReg's Position**

- 3.159 ComReg's primary objective is to ensure that end-users of PRS are, at all times, aware of and in control of their interactions with PRS particularly in so far as the interactions incur costs for end-users. However, having considered the submissions and considering the inclusion of enhanced provisions relating to promotions and with the introduction of positive confirmation ("double opt-in") to initiate a subscription, it is not considered necessary to introduce a requirement that end-users reconfirm their intention to continue with the PRS, at this time.
- 3.160 However, ComReg considers that it is proportionate and justifiable to ensure that the necessary information is delivered in a consistent and clear manner and has therefore included proposed provisions to standardise regulatory information messages.
- 3.161 Therefore, after considering the submissions to Consultation 10/92a with respect to the requirement for an end-user to provide positive confirmation of their wish to continue in a Subscription Service, ComReg has amended the provisions of the draft Code. The amended provisions are set out in the revised draft Code which is now subject to further consultation.

### **Provisions Relating to Undelivered Messages**

#### **The Consultation Issues**

- 3.162 ComReg raised concerns where messages for a Subscription Service are not delivered to the end-user, perhaps due to the fact that the end-user is out of network coverage, or, in the case of an end-user with pre-paid mobile phone accounts, as a result of the end-user being out of "call-credit". In certain cases, the undelivered messages are "stored-up" for instant delivery when the end-user regains network coverage or tops-up their call credit.
- 3.163 ComReg proposed provisions in the draft Code that the PRS Provider may only, following the initial attempt, make two further attempts in a seven-day period to send any undelivered messages.



**Q. 14. Do you agree with the provisions in the Draft Code that restrict the number of attempts that a PRS Provider may use to send an undelivered message? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

- 3.164 There was broad consensus that undelivered messages should not be stored up for an unreasonable length of time. The NDA articulated the plight of some end-users who, as a direct result of there being no specific provisions to address the matter of undelivered messages at present, can be reluctant to top up their phone "because as soon as they do their credit will be taken". This could result in a person who relies on their mobile phone as a means of contact being left in a very vulnerable position.
- 3.165 The NCA, RTE, ALTO, Vodafone, BT, Magnet and Eircom/Meteor similarly welcomed the proposals in the draft Code.
- 3.166 A number of respondents, however, raised the point that a fair balance should be struck between protecting consumers and ensuring that PRS providers are not unduly disadvantaged.
- 3.167 Modeva, Realm, TV3 and the IPPSA suggest that there should not necessarily be a limit on the number of times that a PRS provider should attempt to deliver services, while having cognisance for the principle of prohibiting messages being stored up indefinitely.

### **ComReg's Position**

- 3.168 It was suggested by some respondents that messages can only be delivered within the intended charge period i.e. if a Subscription Service is scheduled to deliver two messages per week then there would be no limit on the number of times that a PRS provider can attempt to deliver these messages within that week. However, the PRS provider cannot "carry over" any undelivered messages to the following week. ComReg believes that this proposition is reasonable and proportionate to both end-users and PRS providers in that the end-user will not receive any more messages within a charge period than they originally signed up for. Billing records would clearly indicate if additional messages, in excess of the stated number to be provided within a particular charge period, had been sent and thus provide evidence for any subsequent investigation by ComReg or query by the consumer.
- 3.169 ComReg has amended the proposed provisions in the revised draft Code to prevent undelivered messages, that are part of a Subscription Service, being resent by the PRS provider outside the original charge period.
- 3.170 In respect of an undelivered message that is not part of a Subscription Service, ComReg considers that no further attempts should be made to send it after a period of seven days have elapsed. This period is considered appropriate to afford the PRS provider sufficient time to resend the message and prevent the

end-user receiving an inordinate and perhaps unexpected number of messages at the same time.

- 3.171 ComReg has considered the submissions to Consultation 10/92a with respect to Undelivered Messages and, accordingly, amended the provisions of the draft Code. The amended provisions are set out in the revised draft Code which is now subject to further consultation

## **Unsubscribing From Multiple Subscription Services**

### **The Consultation Issues**

- 3.172 It is established practice that various PRS are delivered over the same shortcodes. In the event that an end-user is charged via the same shortcode for a number of Subscription Services, then it may be difficult for the end-user to indicate which one he or she may wish to unsubscribe from. Equally, the PRS provider may not know which particular service the end-user wishes to exit. The proposed provisions of the draft Code were intended to make it possible for the PRS provider to inform the end-user of the Subscription Services that he/she has subscribed to on a particular shortcode and permit the end-user to indicate the service(s) he/she wishes to exit from.
- 3.173 ComReg also proposed that once provided with the facility to indicate a preference, if the end-user fails to do so, then the PRS Provider must unsubscribe the end-user from all services on that shortcode.

**Q. 15. Do you agree with ComReg’s proposal in relation to unsubscribing from multiple Subscription Services that operate on the same shortcode? If not, please provide reasons to support your view.**

### **Summary of Respondents Views**

- 3.174 While there were opposing views to these proposals, most parties accepted that there are technical difficulties arising from the use of shared shortcodes and the interpretation of end-user’s intentions.
- 3.175 RTE, Telecom Express, the NCA, the NDA, Eircom/Meteor and Magnet all broadly welcomed the proposals.
- 3.176 Modeva, Hutchison, ALTO, Realm, Vodafone, BT, Ericsson IPX, Xiam and the IPPSA disagreed with the proposals, for varying reasons, but primarily the proposal to require end-users to be unsubscribed from all services if they fail to provide clarification on their intentions seems to be the most contentious.

### **ComReg’s Position**

- 3.177 ComReg considers that by sending the “STOP” command the end-user has indicated a clear intent to cease payment. Therefore, at a minimum, the PRS provider should unsubscribe the end-user from the service from which they

received their last billed message. This was previously required by RegTel and is likely to reflect the end-user's intentions in the majority of cases.

- 3.178 However, with the introduction of additional provisions relating to Subscription Services in the revised draft Code, ComReg acknowledges the concerns expressed by some respondents that if an end-user fails to correctly navigate the message flow, they may be unsubscribed from a service against their wishes.
- 3.179 ComReg therefore proposes that the "STOP" command must be recognised by unsubscribing the end-user from the last service that imposed a charge and, subsequently, the PRS provider must offer the end-user the opportunity to clarify their intentions, to include unsubscribing from all services. However, if no clarification is forthcoming from the end-user, then there is no obligation on the PRS provider to take any further action.
- 3.180 Accordingly, ComReg has carefully considered the submissions to Consultation 10/92a with respect to unsubscribing from multiple subscription services on a single shortcode and, accordingly, amended the provisions of the draft Code. The amended provisions are set out in Section 5 of the revised draft Code which is now subject to further consultation.

## **Competition Subscription Services**

### **The Consultation Issues**

- 3.181 ComReg explained in its consultation (ComReg document 10/92a), and further in this paper, that Competition Services provided on a subscription basis resulted in a significant number of consumers contacting ComReg's consumer care helpline. The primary reason for seeking redress is that end-users are unaware that the messages they receive, consequent of being subscribed to the service, result in a charge being levied to their phone account. The evidence from ComReg's customer care centre is supported from research evidence commissioned by ComReg which shows that the most commonly cited difficulty centred around Subscription Services, in particular consumers unwittingly subscribing in the belief that interaction was once-off (i.e. non-subscription). This report can be found in Annex B.
- 3.182 These service messages, typically, offer the end-user the opportunity to enter further competitions, for different prizes, other than the competition that he/she responded to in order to subscribe to the service.
- 3.183 ComReg also outlined its concerns relating to the operation of these competitions run on a subscription basis. The operation of these services may confuse the service messages and promotional messages sent, which then impacts on the end-user's entrance into the competition, and the subsequent charges they incur.

ComReg therefore sought responses to the following question;

**Q. 16. Should Competition Services be permitted on a subscription basis? Please provide reasons for your answer.**

**Summary of Respondents' Views**

- 3.184 Phonovation, Xiam, O2 and RTE all proposed that Competition Services should not be permitted to operate on a subscription basis. RTE submitted that such services damage consumer confidence in PRS and may mislead consumers particularly where there is a free or low cost entry with subsequent higher charges, which consumers may inadvertently overlook. RTE added that it receives numerous complaints about these services from consumers who mistakenly believed that the services are provided by RTE.
- 3.185 Modeva, H3GI, Electric Media, Vodafone, Eircom/Meteor and mBlox all considered that competitions should be permitted on a subscription basis. All however, acknowledged that the principles of transparency and honesty, in terms of pricing and terms and conditions, are essential to prevent consumer harm.
- 3.186 Eircom/Meteor further proposed that the effectiveness of the enhancements relating to promotions and appropriate enforcement of the Code will afford sufficient consumer protection.
- 3.187 The NCA submitted that it had no objection to particular services being offered through a PRS but submitted that the full cost of the service must be clearly notified to consumers before they enter a Subscription Service. In this regard, consumer legislation such as the Consumer Protection Act and the e-Commerce Regulations (where relevant) have direct applicability to Competition Subscription Services. The legislation raised by the NCA, in general terms requires that the material terms and conditions, of which price is considered material, should be stated clearly upfront before a service is engaged in.

**ComReg's Position**

- 3.188 The evidence from ComReg's research would indicate 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 that the enhanced provisions relating to the promotion and operation of PRS offer greater protections than currently exist and, for this reason, ComReg does not propose imposing any restrictions on the provision of Competition Services through a subscription model at this time. ComReg also considers that this is in line with the relevant consumer legislation.
- 3.189 ComReg has, accordingly, not included provisions which would restrict the operation of competitions on a subscription basis in the revised draft Code which is now subject to further consultation

## Quiz TV Services

### The Consultation Issues

- 3.190 Long-format Quiz TV programmes, which are dedicated to encouraging viewers to engage with a PRS are a relatively new development in the PRS industry. These services have, in the past, raised a large number of complaints from end-users, who maintained they were unaware they were incurring costs for every call that was made in an attempt to connect to the studio. Complaints have also been raised by some Network Operators, whom became exposed to bad debt as a result of their end-users engaging with these services.
- 3.191 While the general provisions of the Code will apply to all PRS, there are no specific provisions relating to Quiz TV PRS in the existing Code and ComReg proposed a number of provisions in the draft Code that are intended to provide certainty for both industry and end-users as to how these services should operate.

**Q. 17. Do you agree with the provisions in the draft Code relating to Quiz TV Services? If not, please provide reasons to support your view.**

### Summary of Respondents' Views

- 3.192 There was broad welcome for the inclusion of provisions relating to Quiz TV Services in the Code with no absolute objections received.
- 3.193 TV3 and IAPI both referred to the rules applied by Ofcom (the independent regulator and competition authority for the UK communications industries, including the broadcast sector) as this would lead to a consistent approach across both jurisdictions, which is particularly relevant as some Quiz TV shows from other jurisdictions are shown in Ireland.
- 3.194 ComReg is particularly mindful of the response from the BAI which correctly highlighted the requirement for cohesive regulation that will require ComReg to liaise with the BAI on matters that involve broadcasting, where the BAI also has jurisdiction.
- 3.195 ComReg would like to highlight the proposed provisions of Section 3.12 of the draft Code which explicitly states that PRS providers are responsible for obtaining any other licences, approvals or authorisations.

### ComReg's Position

- 3.196 ComReg has considered the submissions to Consultation 10/92a with respect to Quiz TV and considers that the proposed provisions should be retained in Section 5 of the revised draft Code which is now subject to further consultation.

## **Additional Sub-Sections of Section 6 of the Draft Code**

### **The Consultation Issues**

3.197 ComReg retained many of the provisions of the current RegTel Code but proposed some new provisions to reflect industry developments in respect of:

- (a) Live Services,
- (b) Children's Services,
- (c) Advice and Information Services,
- (d) Chatline Services,
- (e) Virtual Chat Services,
- (f) Sexual Entertainment Services,
- (g) Contact and Dating Services, and
- (h) Text Chat Services.

ComReg sought responses on the provisions contained in this part of Section 6.

**Q. 18. Do you agree with the provisions in the draft Code relating to the services referred to in this part of Section 6? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

3.198 Modeva highlighted the difficulties facing PRS providers when an end-user sends a "STOP" command to unsubscribe from a subscription. The provisions of the current RegTel Code, which were carried into the draft Code, require that the "STOP" command has to be sent by end-users to:

- (a) unsubscribe from the PRS, and
- (b) opt-out from receiving future promotional material.

3.199 Modeva proposed that the Code be amended such that an end-user texting "OUT" would remove them from receiving future marketing messages, thereby differentiating from the command to unsubscribe from a PRS.

3.200 Modeva also questioned the requirement for removing post-competition publicity from circulation within six months of the award of a prize and felt that where a PRS provider makes a significant investment in a prize, they should be entitled to extract the publicity benefit of that investment where the winner agrees. However, Modeva acknowledged that there is a risk that an unscrupulous provider may attempt to mislead consumers by suggesting a prize was won more recently or more frequently than is the case in reality. A preferred approach was suggested that would not limit the time within which this publicity may be in circulation (subject to the agreement of the individual)

but that would require PRS providers using post-competition publicity to include the date and year that the prize was won in the publicity.

- 3.201 TV3 and IAPI raised an issue about the definition of a “Chatline” and “Contact and Dating Services” and requested that these be clarified.
- 3.202 mBlox requested that the provision relating to PRS providers taking appropriate measures to ensure children should not gain access to Live Services should be amended from the current absolute obligation to require that “all reasonable steps” are taken.
- 3.203 Realm submitted that the regulatory information required to be delivered at the commencement of a Live Service cannot be provided within the 45 seconds permitted and suggested instead that 1 minute be allowed. Realm also took issue with the requirement for PRS providers to adopt the procedures set out in Sections 6.50 and 6.51 of the draft Code, intended to prevent the access by children to Live Services, and the unauthorised use of a phone without the bill-payers permission.

### **ComReg’s Position**

- 3.204 ComReg agrees that it is not possible for PRS providers to accurately determine the end-user’s underlying intent and users of PRS would be better served by using the “STOP” command only for the purposes of unsubscribing from a PRS. The provisions originally proposed in Section 6.22 of the draft Code have been amended accordingly. Provisions relating to opting out from receiving future promotional material are included in the Data Protection requirements set out in Section 3 of the revised draft Code.
- 3.205 ComReg also agrees with Modeva’s suggestion in relation to post-competition publicity, which would require that the award of the prize be date stamped but there would be no time-limit on how long this promotion would last. The appropriate amendments have been made in the Competitions Services provisions in Section 5 of the revised draft Code.
- 3.206 ComReg has amended its definition of “Chatline” and “Virtual Chat” which should clarify any misunderstandings that may have previously arisen. ComReg has also proposed some additional provisions as a result of these amendments to aid understanding.
- 3.207 ComReg does not agree with Realm’s submission that the required regulatory information for Live Services cannot be delivered within 45 seconds and proposes that the initial provisions are retained. It is worth noting that PhonepayPlus’ current guidance requires that the provision of introductory messages should not exceed 30 seconds in length.
- 3.208 ComReg also believes that the provisions requiring a level of scrutiny and oversight by PRS providers to prevent children, and someone other than the bill-payer, from accessing Live Services are reasonable and proportionate and, for these reasons, it is proposed that they are retained in the revised draft Code.

- 3.209 In summary, ComReg has considered the submissions to Consultation 10/92a and, accordingly, amended the provisions that were set out in Section 6 of the draft Code, with respect to Live Services, Competition Services, Chatline Services and Virtual Chat Services where it considers it appropriate. The amended provisions are set out in Section 5 of the revised draft Code which is now subject to further consultation.

## **Customer Service**

### **The Consultation Issues**

- 3.210 ComReg proposed codifying a number of provisions relating to customer service that had developed as industry practices. Added to these established practices, and reflecting the fact that there are now several recognised parties responsible for the delivery of PRS, ComReg proposed a number of additional provisions intended to ensure that end-users should have to make as few calls as possible in order to obtain redress. ComReg, therefore, proposed that the PRS provider, with whom the end-user makes initial contact, should ensure that if any further contact with the end-user is required, then the relevant PRS Provider, who is responsible for the provision of customer care in respect of the PRS, places the call to the end-user and not vice-versa.

**Q. 19. Do you agree with the provisions in respect of Customer Service? If not, please provide reasons to support your view.**

### **Summary of Respondents' Views**

- 3.211 The majority of respondents agreed with the provisions as laid out in the draft Code. Eircom/Meteor took issue with the provisions set out in Section 7.4 of the draft Code which required that any PRS provider involved in the delivery of PRS would be obliged to forward a complaint to the relevant party providing customer care for the PRS in question. It is Eircom/Meteor's opinion that the proposal would add significant cost to the provision of customer care service by each and every party in the value chain as each would have to implement systems for capturing, forwarding and recording interactions. It is also likely that such a regime would result in subsequent contacts from end-users to the first point of contact in order to follow-up on the complaints. It would also give rise to duplication as end-users could initiate complaints about the same issue with multiple PRS providers and this would cause confusion.
- 3.212 Suggestions were also made to establish a mandatory industry-wide complaints handling process and the NCA welcomed an alternative dispute resolution where the consumer is empowered to seek redress independently of regulatory agencies, if it wishes to do so.

### **ComReg's Position**

- 3.213 ComReg agrees with Eircom/Meteor's submission relating to the transferring of complaints between the providers within the PRS "value chain" and considers that better customer satisfaction may be achieved through the



redirection of customers to the PRS provider that is responsible for the service. To this end, ComReg has proposed amended provisions in the Customer Service Section of the revised draft Code. In addition, ComReg has enhanced its number checker facility on [www.phonesmart.ie](http://www.phonesmart.ie) to assist in the speedy redirection of end-users to the appropriate PRS providers. It should also be noted that further developments are planned to the number checker, which will include the provision of pricing and other relevant information, and are aimed at enhancing consumer information.

- 3.214 With regard to a mandatory complaint handling standard, ComReg is cognisant that there are many disparate parties involved in the provision of PRS and a “one size fits all” approach would be inappropriate. ComReg, in association with the Excellence Ireland Quality Association (EIQA), has published a new standard for customer service complaints handling - the Q Mark for Customer Service Complaints Handling<sup>21</sup>. This Q Mark for Customer Service Complaints Handling is a certified continuous improvement programme for electronic communications service providers in Ireland. It is intended to provide a framework for consistency in practices dealing with customer complaints across the Irish electronic communications sector, irrespective of the size of the providers operation. ComReg anticipates advancing this standard among PRS providers for the purpose of providing a consistent high level of customer care in the PRS industry in due course.
- 3.215 ComReg has also incorporated, within the Customer Service Section of the revised draft Code, certain provisions relating to refunds. Further detail relating to refunds is provided below.
- 3.216 Therefore, ComReg has considered the submissions to Consultation 10/92a relating to the Customer Service provisions and has accordingly amended the provisions of the draft Code. The amended provisions are set out in Section 6 of the revised draft Code which is now subject to further consultation.

## **Refunds**

### **The Consultation Issues**

- 3.217 ComReg set out, in Section 3 of Consultation 10/92a, matters relating to the provision of refunds to end-users who have been charged as a result of a PRS provider having not complied with or breached a condition attached to his or her licence.
- 3.218 Consultation 10/92a explained the statutory basis which provides that ComReg can, following an investigation, require a non-compliant PRS provider to remedy any non-compliance and refund affected parties. While the intention of the Oireachtas is clear that end-users, who are adversely affected by a non-compliant PRS provider should be reimbursed to redress any wrong suffered - there are, however, several complex and variable conditions that may apply

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<sup>21</sup> <http://www.askcomreg.ie/fileupload/File/Consumer%20%20-%20The%20Q%20Mark%20for%20Customer%20Service%20Complaints%20Handling.pdf>

when refunds are to be made. This is mainly attributable to a fragmented PRS “value chain”, where several parties may benefit financially through the sharing of the total charged to the end-user.

- 3.219 As mentioned throughout this paper, the enactment of the Act introduced a new regulatory framework, which recognises all parties in the “value chain” and, therefore, raised the possibility that a different party would be held liable for issuing refunds than may have been required under the previous regime. To elicit opinions on how refunds could be made given a number of different scenarios, Consultation 10/92a contained a series of questions rather than any firm proposals.
- 3.220 Consultation 10/92a also stated that ComReg, having considered the responses to consultation, would determine in what part of the regulatory framework the various necessary refunds provisions would rest. The matters on which responses were sought related to:
- (a) how to address situations where non-compliant PRS providers, including those that operate from outside the state, fail to fulfil their obligation to issue refunds,
  - (b) whether some end-users (i.e. those who register a complaint) or all end-users should receive a refund,
  - (c) should end-users be refunded for the full amount, inclusive of VAT, that was lost as a result of the operation of a non-complaint PRS, and
  - (d) how should the refund be provided?

ComReg has consolidated the questions posed in the initial consultation, and the responses received, in order to propose provisions for refunds as a unified body of work.

The questions posed in the initial consultation document were:

- Q. 20. Do you agree that the amount to be refunded to end-users should be the full charge imposed on them, inclusive of VAT, by the non-compliant PRS Provider? If not, please provide reasons to support your view.**
- Q. 21. Do you consider that ComReg should, in cases where the effect of the PRS is that end-users have been fundamentally misled in breach of the Code, require the PRS Provider to refund all end-users of the services? If not, please provide reasons to support your view.**
- Q. 22. What do you consider to be an appropriate means for end-users to receive refunds?**
- Q. 23. Having consideration for the principle of proportionality, should different methods of refunds be utilised, depending on scale of the refunds to be issued? If not, please provide reasons to support your view.**
- Q. 24. Do you agree with ComReg’s position that network operators should withhold payments for at least 30 days after the use of the PRS to which the payments relate? If not why not?**
- Q. 25. In the event that a non-compliant PRS Provider defaults on a requirement to provide refunds, who should be responsible for refunding end-users?**
- Q. 26. Is it reasonable, and proportionate, to require the non-compliant PRS Provider’s contractual partners to issue refunds in such circumstances? If not, please provide reasons to support your view.**
- Q. 27. How would compliant PRS Providers recoup the cost of administering refunds on behalf of a non-compliant PRS Provider?**

### **Summary of Respondents’ Views - Amount to be refunded**

3.221 RTE and Xiam raised concerns over the definition of “Service Provider” as it may be unclear which party in the “value chain” ComReg is referring to when outlining where the responsibility for making refunds lies. For the purposes of clarification, ComReg would like to note the following: the definition of a PRS provider is set out in Section 2 of the PRS Act as follows: “ premium rate service provider ” means a person who does any or all of the following, for gain:

- (a) provides the contents of a premium rate service,
- (b) exercises editorial control over the contents of a premium rate service,

- (c) packages together the contents of a premium rate service for the purpose of facilitating its provision,
- (d) makes available a facility as part of a premium rate service,
- (e) transfers a premium rate service from a content provider to one or more electronic communications networks, or
- (f) provides the electronic communications service over which a premium rate service is provided, or provides the electronic communications network over which a premium rate service is transmitted.

3.222 It is clear, therefore that the term PRS provider includes all parties in the “value chain”. The provisions of Section 9 of the Act recognises that all, or any, of these parties could be responsible for a breach of licence conditions or non-compliance and so it provides that following an investigation, ComReg may require a non-compliant PRS provider to remedy any non-compliance or breach and to refund any charge imposed by the provider on any end-user in respect of the PRS that is connected with the non-compliance or breach.

3.223 There was general agreement among most respondents that consumers should be refunded for the full amount spent by them where they have been incorrectly billed. H3GI, ALTO, RTE, NCA, Vodafone, BT, O2, Magnet and mBlox all considered that, in principle, the consumer should not incur a loss due to the actions of the trader.

3.224 Conversely, Modeva, Realm, Ericsson and the IPPSA submitted that the PRS provider (i.e. the party that initiates the sending of messages/charging of end-users) will not receive the full revenues charged to the consumer due to revenue-share or other contractual agreements. The conclusion by some of the parties is therefore, were ComReg to codify the requirement for any individual in the “value chain” to pay a refund greater than their revenue share, this would be equivalent to imposing a fine to the value of the difference and ComReg does not have the authority to impose a fine.

### **ComReg’s Position**

3.225 Irrespective of where the provisions for refunds are placed, ComReg’s overall position is that the provisions relating to refunds should eliminate any financial gain or benefit resulting from non-compliant activity. To this end, and as envisaged by the legislature, the end-users should be refunded any charge imposed by the provider in respect of a PRS that is connected with the non-compliance or breach.

3.226 However, ComReg is also cognisant, given the complexities of the “value chain” and the resulting revenue-sharing among those PRS providers involved in the provision and charging of the PRS to end-users, that it is prudent that the provisions relating to refunds should afford some flexibility where it may not be possible for the end-user to receive the full amount that was charged. Such an instance would be where a PRS provider, who may subsequently be found to have behaved in a non-compliant manner, has ceased trading and exited the market before any complaint is received or any investigation has commenced.

In such circumstances, where there is no evidence of any non-compliant behaviour by any other party, it may not be possible to recover any or the full amount charged to the end-user.

In the initial consultation ComReg, therefore, proposed that end-users should be refunded for the full amount spent by them for the relevant service, or for a specified lesser amount as determined by ComReg, as the case may require.

### **Summary of Respondents' Views – Requirement to refund all end-users of a service**

- 3.227 A number of respondents expressed caution at including a provision to refund all end-users, not just those who register a complaint. The issue that prompts this caution is how ComReg would objectively decide if end-users were “fundamentally misled”, which may attract the harsher penalty to refund all end-users as opposed to a service that may be considered somewhat misleading such that it would be appropriate to refund only those end-users who registered a complaint.
- 3.228 Realm, Modeva and the IPPSA assumed that ComReg will be making subjective decisions on these matters which could result in discriminatory actions and, as such, clear-cut rules to ensure objectivity and non-discrimination should be developed.
- 3.229 mBlox agreed with the principle to refund all end-users in certain limited cases and Vodafone, O2 and Eircom/Meteor similarly highlighted that in less serious cases, where it could be reasonably assumed that those end-users that remained silent are satisfied with the PRS, ComReg would consider a more limited obligation to refund those who complain.

### **ComReg's Position**

- 3.230 ComReg acknowledges the difficulty that respondents may have in commenting on potentially burdensome provisions, which may require that all end-users of a service be refunded, without some context and an indication of what scale of a problem such a provision is intended to address.
- 3.231 ComReg recognises that if, following an investigation of Section 9 of the Act, it is determined that a PRS provider has breached a term or condition of its licence but nevertheless some end-users of the service will have derived some benefit or utility from the services, it would then be appropriate that only those end-users who register a complaint would be refunded. This is likely to be in the majority of cases.

- 3.232 However, if there is clear evidence of widespread consumer harm, for example through reckless and/or wilful behaviour<sup>22</sup> or perhaps where the PRS has no intrinsic value, then a more appropriate remedy, requiring that all revenues be refunded to end-users may be warranted. ComReg considers that the requirement to invoke this provision may be rare but it is important to note that the number of complaints received may not be the only trigger for requiring this widespread remedial action.
- 3.233 In cases where there is a grave and serious breach of the terms and conditions of a PRS provider's licence, and where end-users are found to have been fundamentally misled or where the PRS has no intrinsic value, then flexibility will be required to ensure a suitable outcome for these end-users which may not be limited to those who register a complaint. ComReg may consider it appropriate, having taken all circumstances into account, including ComReg's obligation to be proportionate, that end users, should be refunded for the full amount spent by them or for a specified lesser amount as determined appropriate by ComReg.

### **Summary of Respondents' Views - Appropriate means to receive refunds**

- 3.234 There was broad agreement from respondents that there should be several methods of providing refunds such as cheque, postal order, bank transfer, PayPal etc., depending on the circumstances and consumer preference.
- 3.235 Xiam suggested an innovative solution and what would appear to be an efficient method of refunding consumers whereby Mobile Network Operators (MNOs) allow their contractual partners to provide "reverse premium credits". Xiam outlined that this is currently the position in the United States market whereby certain MNOs will accept a negative-billed MT message which returns the credit to the end-user's phone account in the most efficient manner. This mechanism also provides for the situation whereby thousands of consumers can be refunded quickly if such a need occurs, without any large administrative input from the MNO.
- 3.236 Similar to the suggestion above, Eircom/Meteor, Vodafone and BT suggested that Network Operators could apply credit to their customers telephone accounts, though Eircom/Meteor considered that this method would only be appropriate in the event that there was a large number of end-users to be

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<sup>22</sup> 1.1 An example of where ComReg would consider imposing such a sanction would be the "undelivered parcel" scam that has occurred in the UK on a couple of occasions. In summary, 'delivery cards' are distributed to personal post boxes. These cards state that a postal company/courier attempted to deliver a parcel while the occupant of the premises was out and the consumer is prompted to call a helpline phone number printed on the card in order to rearrange delivery of their parcel. Unfortunately for callers to the "helpline", the number attracted a premium rate charge (the organisers depended on lack of consumer awareness of premium rate number ranges and charges), there was no parcel to be delivered and in some cases when the consumer connected to the service, they were then subject to further delays or confusion in order to maximise revenue for the provider/promoter of this "service." In such circumstances it is clear that there is, in fact, no service and a refund to all consumers affected would be appropriate. Additionally, such practices are clearly fraudulent and ComReg would be notifying other regulatory bodies and An Garda Síochána, which have more robust powers to address such matter.

refunded. In other cases where there is a limited number of complainants to be refunded, this should then be left to the PRS provider responsible for making refunds to arrange with individual end-users.

- 3.237 Vodafone, NDA and BT proposed that refunds should be provided in a uniform and timely manner which would be through re-crediting an end-user's telephone account.
- 3.238 O2 submitted that the PRS provider who was found to be non-compliant should be liable for any administrative costs that a Network Operator may incur with the delivery of refunds
- 3.239 Telecom Express proposed that refunds should be administered through Network Operators which would then invoice the relevant PRS provider responsible for issuing the refunds.

### **ComReg's Position**

- 3.240 ComReg agrees with respondents that the timely application of refunds is essential to redress any consumer harm and maintain/restore confidence in the PRS market. In this regard ComReg has discretionary powers under Section 9 of the Act to determine the timescale by which refunds must be issued and will exercise its powers accordingly and timeliness will be a consideration in this regard.
- 3.241 ComReg believes that end-users, who have been adversely affected by the operation of a PRS, should receive any refund due to them promptly and in an easily accessible manner, such as but not limited to, the re-crediting of a telephone account (whether pre-pay or post-pay), electronic transfer to a bank account, crediting a PayPal account, cheque, postal order, money order, etc. ComReg also considers that any refund should be provided in Euros (€) and not require the end-user to incur any transactional fees such as currency/foreign exchanges fees. This has been included in the revised draft Code in the Consumer Care Section at Section 6 as it is relevant to the consumer care functions of PRS providers.
- 3.242 It would appear that re-crediting a phone account is a logical and intuitive method that would address consumer expectations. However, ComReg appreciates that in some instances, where there is a small number of complainants to be refunded, it may be more efficient for a PRS provider to directly issue refunds to the end-users without recourse to the end-users' Network Operator, which may have to wait for a billing cycle to apply re-credits to the phone accounts and consumers may not wish to receive refunds in this manner. Therefore, it is appropriate that there are a range of payment options available to end-users to deliver a timely refund.
- 3.243 Due to the possibility of not being able to fully identify all end users of a non-compliant PRS, for example where the end-user's Calling Line Identification (CLI) has been withheld, ComReg does not see the merit in providing strict provisions relating to the mechanisms and manner of making refunds on a large scale. However, as previously stated, ComReg considers that refunds

should eliminate any financial gain or benefit resulting from non-compliance and therefore proposes that where it is not technically or legally possible to notify consumers, ComReg may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected by ComReg.

- 3.244 In summary, ComReg proposes that end-users should receive any refund due to them promptly, and in an easily accessible manner, and that refunds for the full amount spent, or a specified lesser amount, are paid within a specified time period that reflects this underlying principle. Refunds will, in the majority of cases, be paid to those consumers who make a valid complaint and, in situations of grave and serious harm, ComReg may, subsequent to an investigation pursuant to Section 9 of the Act, require that all consumers who have used the relevant service, regardless of whether they have claimed a refund, be refunded. In such cases, ComReg may require that refunds are credited directly to the consumer's account with his or her Network Operator.

### **Summary of Respondents' Views – Supplementary Refund Considerations**

**Q. 24. Do you agree with ComReg's position that network operators should withhold payments for at least 30 days after the use of the PRS to which the payments relate?**

**If not why not?**

**Q. 25. In the event that a non-compliant PRS Provider defaults on a requirement to provide refunds, who should be responsible for refunding end-users?**

**Q. 26. Is it reasonable, and proportionate, to require the non-compliant PRS Provider's contractual partners to issue refunds in such circumstances? If not, please provide reasons to support your view.**

**Q. 27. How would compliant PRS Providers recoup the cost of administering refunds on behalf of a non-compliant PRS Provider?**

- 3.245 H3GI, Phonovation, Telecom Express, Vodafone, O2, Ericsson IPX and Magnet Networks all agreed with the proposal that networks should withhold payments to PRS providers for a period of 30 days.

- 3.246 ALTO and BT proposed that the withholding period should be for a longer period of perhaps 60 days.

- 3.247 Many PRS providers, however, raised a concern with specifying a time period requiring the Network Operators to withhold payments as it would interfere with existing contractual arrangements between Network Operators and other PRS providers. Additionally, several submissions highlighted that a 30 day withholding period already exists in practice and, in some cases, it can be up to 90 days and there is, therefore, no need for ComReg to mandate such provisions.



- 3.248 As the purpose of withholding payments is to ensure that a refund can be made to end-users who are adversely affected, it was suggested by Modeva, O2, the Sligo Community Alliance and the IPPSA that a service provider bond mechanism be put in place if there is a risk of default.
- 3.249 There were robust responses to the question as to where the responsibility for issuing refunds should lie if a PRS provider defaults on an obligation to refund end-users of the non-compliant service for which the PRS provider is operationally responsible. Most respondents were firmly of the view that only the PRS provider who has been found to be non-compliant should bear a responsibility for issuing refunds.
- 3.250 Vodafone, Phonovation, Magnet and Telecom Express submitted that Network Operators should withhold payment from the non-compliant PRS provider and provide a refund to end-users, as appropriate.
- 3.251 There were submissions from almost all respondents stating that a non-compliant PRS provider's contractual partners should not be held responsible for refunds if there is a default on payment of refunds.
- 3.252 On the question of how compliant PRS providers may recoup the cost of administering refunds on behalf of a non-compliant PRS Provider, Xiam and Phonovation were of the view that Network Operators should bear the cost, while in BT's opinion the cost should be borne by the consumer and no penalty should be borne by compliant providers.

### **ComReg's Position With Regard To Refunds**

- 3.253 The issues surrounding refunds are complex, and ComReg set out in its "Response to Consultation – Scope of Premium Rate Services Regulation" (ComReg document 10/50) its intention to conduct a consultation on the discrete issue of refunds, in order to examine in greater detail, the basis and circumstances by which refunds can be made to consumers. ComReg therefore invited, in the initial consultation on the Code, the views of industry and other interested parties to a series of questions relating to refunds.
- 3.254 In addition to the responses received, ComReg is also cognisant of its powers under Section 7(1)(b) of the Act which requires ComReg to make regulations specifying conditions including the basis and circumstances upon which refunds may be made. Furthermore, Section 9 of the Act outlines ComReg's powers to require PRS providers to refund end-users where ComReg has made a finding of non-compliance.
- 3.255 Given the legal considerations and ComReg's appraisal of the detailed responses received, ComReg is including the majority of the refunds provisions in the Regulations. ComReg has however, retained an element of the refunds provisions in the revised draft Code as ComReg believes that it fits in the Consumer Care functions of PRS providers.
- 3.256 Following from the consultation, ComReg's approach to refunds can be summarised as follows:

- (a) Where end-users are entitled to a refund they should be reimbursed for the full amount of the loss incurred. There may, however, be circumstances where this is not always possible, or appropriate<sup>23</sup>, to refund an end-user for the full cost incurred but ComReg considers it has prescribed a reasonable and proportionate set of provisions that would mitigate against this possibility.
- (b) Where it has been determined, following an investigation pursuant to Section 9 of the Act, that refunds are required, it will be the responsibility of the PRS provider, who is responsible for the non-compliance, to issue refunds to those end-users that register a complaint. Refunds must be made in a timely manner, which may be prescribed by ComReg, and in an easily accessible manner for the end-user.
- (c) Where there is a finding of a breach(es) of licence conditions by a PRS provider, which results in serious consumer harm, it may be considered appropriate to issue refunds to all consumers who have used (i.e. been affected by) the service, regardless of whether they have registered a complaint or claimed a refund.
- (d) It is not ComReg's intention to hold compliant PRS providers liable for the actions of a non-compliant PRS provider with whom they have contracted. In this regard, any remedy required, pursuant to a finding under Section 9 of the Act, will not be addressed to any other party other than the non-compliant PRS provider.
- (e) The PRS industry has established reasonable precautions that would prevent a non-compliant PRS provider from quickly exiting the market with a financial gain from its non-compliance. The proposed contractual relationships address, and in some cases exceed, the 30-day "retention" provision which would require Network Operators to withhold payments to contractual partners, as examined in the responses to Question 24, and ComReg does not propose interfering in established practices and mandating this requirement at this time.

3.257 Therefore, ComReg has considered the submissions to Consultation 10/92a with respect to refunds and, accordingly, drafted the provisions set out below which are in accordance with its powers under the Act. These provisions will now be incorporated in the revised Regulations:

- 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"):*

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<sup>23</sup> An example of where it may not be appropriate for an end-user to receive a full refund would be in circumstances where they agreed to pay €1 for a music track download but were incorrectly charged €1.50. Subject to an investigation and finding in accordance with Section 9 of the Act, ComReg may decide to impose a sanction on the non-compliant PRS provider but where it is clear that the end-user has received the music track it is reasonable to assume that they derived some utility from it and therefore the appropriate amount to be refunded would not be for the entire cost incurred but only for the difference between the declared price and the initial cost incurred.

- (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.*

## **Control of Access to Adult (including Sexual) Entertainment Services**

### **The Consultation Issues**

- 3.258 In the initial consultation, ComReg wished to elicit the views of stakeholders on a number of issues relating to the regulation of Adult Entertainment Services. Such issues included the establishment of an age verification and content classification framework to prevent access by children to inappropriate content.
- 3.259 ComReg also sought views on whether responsibility for controlling access to Adult Entertainment Services should lie with the providers of such services or perhaps a more precautionary approach would be to require Network Operators to bar access to the number ranges set aside for such services.
- 3.260 Finally, ComReg asked for views on the merits of establishing a Compensation Scheme to provide refunds to end-users whose telephones have been used without authorisation.

- Q. 28. What are your views on the establishment of an Age Verification Framework for ensuring appropriate access to Adult (including Sexual) Entertainment Services?**
- Q. 29. What are your views on requiring Network Operators to bar access to the number ranges set aside for Adult (including Sexual) Entertainment Services in the numbering conventions?**
- Q. 30. What are your views on placing the responsibility for controlling access to Adult (including Sexual) Entertainment Services with the PRS Provider?**
- Q. 31. What are your views on establishing a Live Service Providers Compensation Scheme to provide for refunds to end-users whose telephones have been the subject of unauthorised use to call Adult (including Sexual) Entertainment Services?**

### **Summary of Respondents' Views**

- 3.261 There was broad support for the proposal to establish an age verification standard and a content classification framework.
- 3.262 Phonovation and Eircom/Meteor suggested that further consultation was required to examine more closely the issues raised. Eircom/Meteor indicated that there should be robust age verification and access controls if Adult or Sexual Entertainment Services are to be provided.
- 3.263 MNOs in general welcomed the proposals, with H3GI highlighting that Network Operators and technology providers should not be held accountable for content accessed via the Internet. Vodafone highlighted the convergence of PC and mobile interfaces and, therefore, recommended that any framework and its implementation should be more stringent than that which applies to fixed line internet access. O2 stated that the requirement to bar access to number ranges set aside for Adult Services would not be required if services are subject to an established age verification framework.
- 3.264 Ericsson IPX and mBlox recommended the implementation of a framework similar to that in the UK.
- 3.265 O2 submitted that the requirement to bar access to number ranges set aside for Adult Services would not be required if such services were subject to an established age verification framework. H3GI stated that MNOs can bar access to all PRS numbers (15XX) for any consumer, or bar access to an individual PRS for all consumers but cannot, without significant development, bar some services for some consumers.
- 3.266 ALTO cautioned against being overly prescriptive and instead suggested providing for differing, but valid, age verification standards. Telecom Express

considered that ComReg would not be required to bar access to specific number ranges if there were appropriate age verification standards in place.

- 3.267 Eircom/Meteor considers that robust age verification and access controls are prerequisites if Sexual Entertainment Services are to be provided but such systems may involve significant development costs and involve co-ordination of systems across various service providers. For these reasons, Eircom/Meteor considers that ComReg should consult separately and in more detail on the issue.
- 3.268 H3GI proposed that end-users should ultimately be responsible for their own actions and effective monitoring and enforcement of the Code is the best way in which to prevent consumer harm. Telecom Express similarly suggested that the use of a phone is the individual subscriber's responsibility.
- 3.269 ALTO proposed that verification and authorisation responsibilities should be placed at the content provider level and not with the Network Operators. Vodafone believed that while there is a public expectation that Network Operators should be responsible for controlling access to Adult Services, the reality is more complex and requires a co-operative approach between parents and access providers and it is unreasonable to expect PRS providers to be able to control access.
- 3.270 BT, Phonovation and the Sligo Community Alliance were firmly of the view that control of access should lie with the content provider and not the Network Operator, while Magnet submitted that this is too onerous a burden. mBlox suggested that the content provider has an important role to play but, in the absence of the co-operation and implementation of systems by Network Operators, any measures put in place by the content provider can be overcome.
- 3.271 H3GI submitted that end-users are ultimately responsible for access to Adult Services and, as such, there is no requirement for a compensation scheme to be established. ALTO and mBlox concurred stating that there are mechanisms for controlling access to PRS and there is therefore no requirement to establish such a fund.
- 3.272 BT and Eircom/Meteor also disagreed with the proposed requirement to establish a compensation fund stating that it would be a tax on industry and open to abuse. They submitted that there are existing mechanisms in place to bar access to premium rate numbers and it is the account holder's responsibility to manage who is allowed access to their phone.
- 3.273 Vodafone and Ericsson IPX believed that such a fund has merit and is worthy of consideration.

### **ComReg's Position**

- 3.274 Underlying ComReg's position on this matter are the principles expressed by the Irish Film Classification Office as follows:

*"We believe that adults (i.e. persons over 18) should be free, within the law, to choose what they wish to view"*

*We have a duty to protect children and young persons from harm*

*We strongly encourage and promote the exercise of parental responsibility”*

- 3.275 Central to the issue of protecting children is the establishment of a classification framework for mobile content and ComReg undertakes to engage directly with the industry with a view to establishing:
- (a) such a classification framework, and
  - (b) a mechanism which will provide for the investigation of complaints from both consumers and content providers about the classification of commercial content.
- 3.276 ComReg will also engage with fixed and Mobile Network Operators and PRS providers who wish to provide Adult Entertainment Services to determine the various options that are available to protect children from accessing inappropriate content. ComReg is mindful of the existing technological limitations and the requirement for individuals and parents to exercise their responsibilities to prevent the unauthorised use of phones. Further consideration is required to determine the best practice approach to establishing age verification.
- 3.277 ComReg also undertakes to seek the establishment of a Content Classification Framework in conjunction with industry. The provisions in the revised draft Code allow for the delivery of Adult Services (including Sexual Entertainment Services) but will be subject to the establishment of a Content Classification Framework, best practice guidelines on age verification measures and compliance with the National Numbering Conventions.

## **Numbering – Fundraising for Charitable Organisations**

### **The Consultation Issues**

- 3.278 ComReg explained in Consultation 10/92a that charitable organisations have recently utilised the power, reach and convenience of PRS to raise funds for their fundraising campaigns. In conjunction with contractual partners, typically Aggregator Providers and Mobile Network Operators who are involved in the promotion and provision of a wider range of PRS, charitable organisations provide end-users with the facility to donate funds by sending an SMS and a keyword to a mobile shortcode.

The potential benefits of providing a designated shortcode range for charitable donations are:

- (a) for the public, it will assist in identifying charitable donations from other forms of PRS, and
- (b) for Mobile Network Operators and Aggregator Providers, it will assist with accounting processes by clearly delineating revenues for charitable donations from other PRS.

ComReg sought responses to the following questions:

- Q. 32. Do you consider that a designated shortcode range should be made available for the purpose of fundraising for charitable organisations through mobile PRS?**
- Q. 33. If so, do you have a view on what range should be used?**
- Q. 34. If a shortcode range is set aside for fundraising through mobile PRS, do you consider that there should be any restriction on the types of organisations that could apply for a shortcode within this range? If so, please state what these restrictions should be.**

### **Summary of Respondents' Views**

- 3.279 There was broad support for the proposal. The main benefits that would be derived were identified as:
- (a) the clear identification of revenues for charitable purposes, which would benefit industry and ComReg in the application of the PRS levy, and
  - (b) raising consumer awareness and providing consumer confidence once the designated range became embedded in the public's mind.
- 3.280 ALTO & BT submitted that the provision of a designated number range for the purpose of fundraising for charitable organisations should not be limited to mobile shortcodes and, ideally, there would also be a premium rate number range on fixed networks for exclusive use by registered charities.
- 3.281 H3GI and Ericsson IPX suggested that any number range should be separate from the 5XXXXX shortcode range to ensure there is no confusion with existing PRS. RTE similarly suggested that there should be a new range to distinguish it from existing PRS activity.
- 3.282 With reference to the existing National Numbering Conventions, Eircom/Meteor suggested the 57XXX range would provide for donations in excess of €0.80 while Vodafone suggested that two ranges should be available, with one for VAT-exempt charities, and the other for non-VAT exempt charities.
- 3.283 There was almost unanimous support that only registered charities should be permitted to make use of the shortcodes within any designated range. The IPPSA proposed that registered charities that have been provided with a registered charity (CHY) number and political parties registered with the register of political parties should be permitted to use the number range.
- 3.284 Xiam suggested that broadening the types of organisations beyond registered charities will potentially create confusion in the public and Eircom/Meteor suggested that ComReg should rely on the current VAT exemption status of charitable organisations until an official register of charities is available. Eircom/Meteor further recommended that monitoring of the activities on the

shortcodes would be required to ensure that other non-charitable services are not provided on the designated shortcodes.

### **ComReg's Position**

- 3.285 ComReg considers that the provision of a dedicated, discrete shortcode range and premium rate number range for the purposes of charitable donations is merited. Charitable organisations would most likely wish to “fix” or set the cost to a donor rather than operate premium rate numbers that charge on a per minute basis, where the cost to the consumer would vary according to the length of time spent on a call. Based on this approach, it seems reasonable that the premium number ranges for making donations to charities should be new sub-ranges from within the existing 5XXXX PSMS and 15XX PRS numbering ranges (where there is a requirement to operate on a “per call” basis). Should this require an amendment to the National Numbering Conventions, ComReg will seek to review the matter as part of a future review process.
- 3.286 ComReg's preliminary position is that the range will be limited to those charities which have been granted charitable tax exemptions and those who have obtained a CHY reference number from the Revenue Commissioners.
- 3.287 However, ComReg believes that the best approach, at this time, is for these matters to be addressed by the Numbering Advisory Panel which will include these matters on its agenda for the next meeting.



## **4 Consultation Questions**

### **Further Consultation on Revised Draft Code of Practice and Draft RIA**

- 4.1 Having carefully considered the responses to ComReg's initial consultation, set out in ComReg document 10/92a, ComReg now sets out its Draft Decision in the form of a revised draft Code of Practice.
- 4.2 This latest draft Code and the associated draft RIA are now the subject of further consultation. To assist in consolidating the responses, ComReg invites the responses from all stakeholders including PRS providers, interested persons and other regulatory bodies in the State, to the following questions:

- 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.**
- Q. 2. Do you agree with the draft provisions relating to the promotion of PRS as set out in Section 4 of the draft Code? Please provide reasons to support your position.**
- Q. 3. Do you agree with the draft provisions applicable to the operation of Subscription Services as set out in Section 5 of the draft Code? Please provide reasons to support your position.**
- 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.**
- Q. 5. Do you agree with the draft provisions relating to Customer Service as set out in Section 6 of the draft Code? Please provide reasons to support your position.**
- Q. 6. Do you have any comments on the provisions on the revised draft Code?**
- Q. 7. Do you have any views on the Regulatory Impact Assessment with regard to the revised draft Code of Practice? Please provide reasons to support your position.**

## **5 LIST OF ANNEXES**

**ANNEX A – Premium Rate Services Quantitative Research - Report  
by Ipsos MRBI October 2010**

**ANNEX B - Premium Rate Services Qualitative Research - Report  
by Ipsos MRBI February 2011**

**Annex C – Draft Regulatory Impact Assessment (RIA)**

**Annex D - Revised draft Code of Practice - ComReg document  
11/51d**