Commission for
Communications Regulation

Submissions to Consultation

Scope of Premium Rate Services regulation

Submissions received from respondents

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Response to Consultation:	**10/50**

An Coimisiún um Rialáil Cumarsáide
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ComReg 10/50s5

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2. Irish Phone Paid Service Association ("IPPSA")

25 Institute of Advertising Practitioners in Ireland ("IAPI")

Ms. Michelle Townshend,
Commission for Communications
Regulation,
Irish Life Centre,
Abbey Street Freepost,
Dublin 1

14th May 2010

Institute of Advertising Practitioners in Ireland

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Dear Ms. Townshend,

Re: Scope of Premium Rate Services Regulation (Comreg 10/27)

I am writing on behalf of the Institute of Advertising Practitioners in Ireland (IAPI) in response to the consultation document no. 10/27. IAPI is the trade and professional institute for Irish advertising agencies. Our primary role is to promote the highest professional and creative standards in the production of advertising, across all media. We are committed to promoting the right to advertise, on the condition that it is honest, decent, truthful and legal.

The Premium Rate Services (PRS) sector has emerged over the past decade as one which is replacing other traditional media as an additional channel for communications and marketing. In this, it is reflecting consumer trends and patterns in how they communicate and receive information. In 2008, the PRS sector spent €41.2 million in the Republic of Ireland on TV, Radio, Print and Outdoor advertising and €25.8 million in 2009. Much of the expenditure is related to the promotion of subscription services, and does not include creative or production expenditure. Our members estimate that this accounts for approximately 50 jobs within advertising agencies in Ireland.

We understand the concern about the actions of unscrupulous service providers, and as a sector, would not condone or protect the promoters of such activity. However, there are specific issues raised in the consultation document, which we consider require both further analysis and greater enforcment of the additional powers of Comreg, before the introduction of regulations which may be hitting the wrong targets.

As with other forms of new media, such as the internet and social marketing, our members have a wealth of information and data on the practical application of these channels. We have

worked very closely with the Broadcasting Authority of Ireland (BAI) and the Advertising Standards Authority of Ireland (ASAI) on drafting Ireland's response to the EU Commission on the AVMS Code, and this has just been published by the BAI as the revised codes.

We would welcome an opportunity for a constructive engagement with Comreg on the development of the code of practice. We would also hope that the involvement of the ASAI would also be sought, in terms of their experience of dealing with complaints on the clarity and fariness of advertisements.

If you require any additional clarification, please do not hesitate to contact me.

Yours sincerely,

Sean Mc Crave
Chief Executive Officer

IAPI
Dublin 2

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Consultation submission to Comreg on the Scope of Premium Rate Services Regulation (Comreg 10/27)

Contents

Executive Summary

The Irish Phone Paid Services Association, and it's members, welcome the opportunity to participate in this consultation.

The consultation is particularly welcome as it sets the tone for positive forward looking interaction between the regulator and those industry players that are to be regulated.

The Association believes that the proposed regulations arising from Comreg's powers under Section 7 of the recent PRS legislation have the potential to cause significant impact on the economic market of Premium Rate Services.

These regulations are likely to affect competition within the sector to the detriment of the consumer and to those regulated unless adequate research, impact analysis, and cost/benefit studies underpins an appropriate and considered approach to regulation.

We believe that the starting point to Comreg's commencement of regulation in this sector should be an approach which takes a de novo stance.

PRS regulation has been lacking for many years and the market desperately needs some of the most basic regulatory processes to be put in place, such as;

1. The introduction of an **industry wide complaints handling process** that gives the benefit of the doubt to the consumer and allows reliable statistics to be gathered in relation to any issues that might exist.

2. The introduction of the licensing regime under the new Act and **effective enforcement** of the provisions therein.

3. The development of a **consumer awareness website** and the promotion of this to consumers in a similar way to the www.callcosts.ie site.

4. It would be of fundamental benefit to the Industry and effective regulation to establish a **Premium Rate Services Working Group.** This group could actively address the complexity of issues facing the sector, such as massive technological change, and a business environment which has to function at 'Internet Speed'.

It is clear from the analysis we present in this consultation submission that the impact of the possible proposed regulatory measures although small in the scheme of all the markets that Comreg regulates, could impact on the specific market of premium rate services and those players active and dependent on that sector in a potentially very significant way.

We believe that there are many factors that need to be further considered to analyse fully the impact certain of the proposals alluded to. ***Specifically, the analysis used to underpin the proposals presented in Part 9 of the consultation document is, we believe, unsound, insufficient, and without adequate quantitative grounding***. Additionally, we believe the Section 9 proposals to be unconsidered, without nuance and disproportionate to any apparent policy objective.

We are particularly concerned that other respondents to the consultation may base their views on the unsound and misleading analysis contained within Section 9.

Moreover, we believe that without all parties being subject to licensing, the fundamental requirements under the legislation of transparency, proportionality and non-discrimination will not be adhered to. As such, we would fundamentally disagree with the notion in section 7.1 that any service should exist which is not a specified service, nor any service provider who is not legally subject to the Code of Practice.

IPPSA has structured this response to the consultation in a manner that positively address what we understand are the underlying issues that are raised in the document.

Introduction to IPPSA

The Irish Phone Paid Service Association was founded in 2008 with the goal of supporting the members of the association, who are active in the Premium Rate Services industry in Ireland, to engage pro-actively with the industry's stakeholders in collaborative manner.

The core aims of the association are:

Philosophy:	Promote an environment where fully informed consumers enjoy the freedom of choice.
Products & Services:	Support best practice by members and encourage innovation and investment.
Consumers:	Promote professional and fair business practices between members and towards customers to facilitate a responsible, co-operative and professional culture within our industry.
Regulatory & Compliance:	Encourage a proportionate, fair and accountable self-regulatory environment.
Stakeholders:	Promote a professional image and awareness of the industry to all stakeholders.
Membership:	Provide value for money benefits to members.
Communication:	Promote effective communications and engagement to achieve an environment within which members' businesses can flourish.

The members of the association include industry leading firms such as:

Together the members of IPPSA represent the majority of the industry in terms of revenue.

Q. 1. Do you agree with ComReg's preliminary view that twenty cents (€0.20) retail cost per minute/per call/per text is a reasonable price threshold below which certain services may be exempted from licensing?

<table>
<tr><td colspan="3">Statement of Apparent Policy Objective</td></tr>
<tr><td></td><td colspan="2">There doesn't appears to be a clearly articulated policy problem that is addressed by this proposal, However the proposal appears to be based on a perception that;

• Comreg resources will be stretched, to the detriment of the consumer, to regulate the entirety of the PRS industry
• PRS providers, will be unduly burdened, by being in an obligated regulatory regime for all services, even those which have less of a potential – on cost ground – to cause consumer harm</td></tr>
<tr><td colspan="3">Identification and Description of Options</td></tr>
<tr><td></td><td>No Change</td><td>This would be in line with the current COP – No PRS Threshold

Costs; The costs to all parties (SPs, Regulators, Consumers) continues to be negligible, and in the case of the regulator carried by industry via the levy.

Benefits; The exclusion, on an arbitrary basis, of a class of service based on an arbitrary price, without determining, or quantifying, the problem the proposal is trying to address nor the benefit the solution is proposing may undermine some of the fundamental reasons for the new licensing regime that has been introduced by the Oireachts, in so far as;

Regulatory effectiveness – the Licensing Scheme, being applied to all participants, will we believe, achieve an increase in compliance in the market and therefore prevent consumer harm; This is especially true given that, for the first time, all members of the value chain will be subject to licensing. The 'loophole' of the price level of the PRS service being a determinant may allow down stream participants in the value chain to avoid licensing if an upstream SP for example produces a 'loss leader' service in order to get new subscribers for other higher end PRS services through upselling.
Universal impact – the new licensing Scheme will deliver more tangible benefits, avoiding any perception of any bias, to everyone involved in phone-paid transactions, including consumers, if and only if, it is applied transparently and fairly across all market participants;
Evidence-based – Only a fully comprehensive, objective, and factual dataset of Premium Rate Services Providers which will be available to aid in the formulation of policy going forward can provide a comprehensive understanding of the industry and facilitate the measuring and mitigation of risk;</td></tr>
</table>

		Minimising barriers to entry – the Licensing Scheme will not restrain trade as registration will be low-cost and simple to complete, their will be little or no cost advantage to service providers from avoiding licensing and compulsory Code of Practice obligations; **Cost-effective** – benefits will be delivered in proportion to (and are likely to exceed) costs; **Future-proofed** – the licensing system, and the code of practice, will still facilitate a regulatory capacity to cope with any increase in the number of industry participants and will be flexible enough to facilitate foreseeable changes to the current regulatory regime.
	Limited Change	Reflect only those services, where *'there is a charge for the provision of the service <u>which exceeds the cost attributable to communications carriage alone</u>'*. • **As such an appropriate price point may be if the cost was 11 cents or less (the upcoming mandated price of an EU roaming text).**
	Full Acceptance	**Costs;** Consumers may suffer harm: The benefits available from the licensing system, such as transparency of billing information, obligations with regards to customer service etc. will be lost to consumers when using services that would be covered by the proposal. As was demonstrated in the consultation, although these service may have a lower price point, they do tend to be service which are bursty and may have infrequent but intense use - while a typical service may require 1 message for the SP to generate a good margin within the code of practice, it may make sense - especially for unscrupulous operators, to target vulnerable and impulsive users with the lower priced service and encourage rapid-repeat type usage. Consumers may not be aware, that certain services are exempt, from the rules, and rely on the regulatory environment being effective for all services. Consumers will not distinguish between a licensed service and an exempt one, especially since all the characteristics are homogeneous. This dual but diverse treatment of different PRS services may provoke confusion with consumers and lead to dissatisfaction with all members of the value chain including the regulator. Benefits; Given the likely low cost and simple to use licensing system - there are no tangible benefits to a compliant SP

		from this proposal. Given that the consultation appears to indicate that the regulatory burden for this niche is minimal - there are no tangible benefits to the Regulator. Furthermore, the regulator has the capacity to raise a levy adequate to fund the costs of regulation of the sector. As such, there is no undue, or onerous burden, which would fall on the regulator or the exchequer. Given that the consumer would suffer from a lessor degree of protection, and a regulatory void, it would appear that there is no benefit to the consumer.
Analysis of Costs, Benefits and Other Inputs		
	The Act clearly contains a defining criterion, as to what constitutes a PRS service, that 'there is a charge for the provision of the service which exceeds the cost attributable to communications carriage alone'. The discussion in the document states that there are certain services which are of such low value that they cause few complaints. However, it may be that the mere fact that these service are: Low Cost; and therefore there is less consumer impetus to report harm or poor behavior, and Regulated; so operated in compliance with the Code of Practice. Additionally, there is no indication that PRS operators have experienced any difficulties or problems arising from these types of services being regulated to date. Moreover, the proposed new licensing regime, as outlined in the Act does not appear to be unduly burdensome or onerous such that it would cause any problems for services providers providing services such as these to be licensed and comply with Code of Practice rules. From a regulators point of view, it is clear from the consultation, that the work load originating from these services has been negligible and has not put any disproportionate strain on the regulator's resources. Moreover the capacity of the regulator to fund all regulatory costs from the industry levy is clear, and thus a full regulation of the PRS sector exposes no risk to the exchequer.	

Conclusion:

No, we don't agree, either that; There should be a threshold other than that in the legislation, nor That €0.20 would be a correct figure. The EU mandated level of .11 cents is more appropriate.

Q. 2. Do you agree with ComReg's intention to regulate live services?

In December 2009, Phonepayplus in the UK undertook a qualititative survey the results of which, in combination with a structured forward looking analysis provided a report into the current structure of the UK market, and underpinned an analysis of the forward looking prospects for the sector.

Furthermore, the study was able to propose a Taxonomy of PRS services which was more nuanced and accurate than previously available.

As an industry association we strongly believe that regulation is most appropriately made on the examination of fact based research. We would encourage Comreg to examine the Phonepayplus study at http://www.phonepayplus.org.uk/upload/Current-and-future-market-FINAL-Thinktank.pdf and undertake a similar and deeper study of the Irish market.

We are particularly concerned that Call Services such as Cheap Call Dial Around services, which are inherently safe, simple and non contentious may be captured within a section of the code of practice that may quite unsuitable.

Conclusion:
Yes, we agree, however we would encourage Comreg to immediately undertake an adequate market study to understand in greater detail how the actual market for PRS services is composed.

Q. 3. Do you agree with ComReg's intention to regulate PRS services of a sexual nature, irrespective of cost?

We believe that, as in other countries, it ought to be possible to address the practicalities of an age verification process.

This would allow a set of services which is shown to be one that is in demand in other jurisdictions to be made available here.

As technologies progress, it would seem to make sense to establish a formal structure, possibly through an industry working group with MNOs and SPs, to develop and test a proposal to achieve this.

Conclusion:
Yes, we agree, however we would encourage Comreg to undertake, possibly as part of an industry working group, an examination of possible mechanisms to support a generally available, and industry wide, age verification scheme.

It is assumed that 'irrespective of cost' is subject to there being a cost over an above the cost of carraige of the call/message.

Q. 4. Do you agree with ComReg's intention to regulate competition services?

Competition services are an important component of the services mix of PRS services in Ireland with over **25% of the population using competitions at least monthly** according to a recent Amarach Research survey (Apendix 8).

Their growing importance is a direct result of the level of enjoyment that consumers extract from the service.

It is clear from the UK experience, that the market for competition services in Ireland is driven by consumer demand. This was reinforced by a recent Phonepayplus survey, where users said that the service they most used were Competition Services.

The current COP sets out clear operational guidance for competition services. This guidance is almost a total duplication of other regulations and codes including National Consumer Agency, Gaming and Lotteries Act and Advertising Standard Association of Ireland.

Rather than duplicate regulation and then have to maintain consistency between agencies and codes it may make more sense to refer to the relevant agencies/codes and require service providers to comply with these in addition to the general requirements around the provision of any premium service.

Conclusion:
Yes, we agree that competitions should be regulated but that any regulations should refer to external codes and regulations that apply rather than duplicating them within any PRS code.

Q. 5. Do you agree with ComReg's intention to regulate children's services, irrespective of cost?

We believe that further study is necessary to adequately understand, in the Irish context, exactly how such services are designated and are regulated to ensure that Phone-paid Services aimed at children should not:

• Contain anything which is likely to result in harm to children, or that exploits their credulity, lack of experience, or sense of loyalty

• Include anything which a reasonable parent would not wish their child to hear or learn about in this way

• Involve an invasion of privacy to any child

• Make direct appeals to children to buy products, unless that product is one which a child could be expected to afford for themselves

• Encourage children to use the same service again, or other premium rate services

• Exploit the way in which children react or interact with the internet

We believe it is essential that Comreg undertake appropriate market research to understand the usage patterns of the different services across all demographics so that decisions as to which services would be covered by the definition 'childrens service' could be based on fact based research.

We believe that, in so far as issues relate to Data Protection, that the proper authority is the Data Protection Commissioner. The industry is clearly willing to engage with the DPC to understand their requirements relating to children's Services.

We would note that the Data Protection Commissioner through it's participation in the EU Working Group 29 has already developed policies around Children in the context of data protection (See Appendix 10).

The level of expertise, the legal domain competence and the legal jurisdiction of the Data Protection Commissioner should not be, or attempted to be usurped by Comreg in these matters.

We would note that the proposal to provide consumers with the option of barring PRS services will eliminate the stated possibility of an informed and interested parent, being taken advantage of by their children running up bills.

Conclusion:
Yes, we agree with the principle of the proposal and would like to participate in an industry working group to collaborate on the detail to be proposed in the forthcoming draft code of practice.

It is assumed that 'irrespective of cost' is subject to there being a cost over an above the cost of carraige of the call/message.

Q. 6. Do you agree with ComReg's intention to regulate fundraising and charitable donations

We believe that, in the interests of consumer protection, only the following organisations should be eligible to raise monies in this manner:

1. ***Charities authorised under the Scheme of Tax Relief for Donations to eligible Charities and other Approved Bodies under the terms of Section 848A Taxes Consolidation Act, 1997, or when established***, ***Charities registered under Section 39 of the Charities Act 2009***
2. ***A Political Party registered under Section 25 of the Electoral Act, 1992, as substituted by the Electoral Act, 2001,***

We believe a key issue would be to co-ordinate with the Revenue Commissioners to establish a number range which would be Zero Rated for VAT purposes.

We believe that this number range be available, subject to adherence to the Code of Practice, to any service provider, and not just MNOs, in a non-discriminatory manner.

We believe that if there is any restriction or limitations relating attached to the donation by the promoter that they must be fairly promoted.

Conclusion:
Yes, we broadly agree with Comreg's position on this.

Q. 7. Do you agree with ComReg's intention to regulate internet dialler software, irrespective of unit cost?

We understand the scope for this exact problem is diminishing as users move to always-on broadband connections.

However, based on the current eircom RIO pricing and on the Switched Transit Routing Price Lists, it appears that some current ISPs would be covered under the PRS definition as the outbound payments are generally significantly higher then the regulated cost for 1891/1892 type services. Such that there is a revenue share as it related to the charge being levied on the consumer by eircom.

We also believe that as technology evolves issues may arise with devices such a mobile phones, TV set-top boxes, etc. Many of the current Smart phones/set-top boxes allow applications to send any SMS or make calls, potentially without the knowledge of the user. It is possible that by using MO SMS billing these applications can generate significant charges to consumers without their knowledge.

It is clear that such applications should comply with general regulations around price clarity, fair operation, etc.

Conclusion:

Yes, We agree, but the definition should be broadened to include any application or software configuration downloaded to a consumers device that initiates PRS calls or messages from the device.

It is assumed that 'irrespective of cost' is subject to there being a cost over an above the cost of carraige of the call/message.

Q. 8. Do you agree with ComReg's intention to regulate virtual chat, contact and dating services, irrespective of cost?

Yes, We Agree. It is assumed that 'irrespective of cost' is subject to there being a cost over an above the cost of carraige of the call/message.

Q. 9. Do you agree with ComReg's intention to regulate pay-for-product services?

We would support generally the implementation of this service type.

We would ask that consideration be made to the implementation of this, with the Financial Regulator, especially on prepaid phones, as it relates to S.I. 383 of 2009, the European Communities (Payment Services) Regulations 2009

http://www.finance.gov.ie/documents/publications/statutoryinstruments/2009/si38309.pdf

We would support the general UK Code of Practice framework.

We would ask that Comreg not duplicate regulatory protections that are already in force and available to consumers under the auspices of the National Consumer Agency or any other agency/body.

We believe that the principle legal basis for consumer protection in this category is contained in the **EUROPEAN COMMUNITIES (PROTECTION OF CONSUMERS IN RESPECT OF CONTRACTS MADE BY MEANS OF DISTANCE COMMUNICATION) REGULATIONS, 2001**

Conclusion:
Yes, we agree, that such service such be regulated and made available on a non-discriminatory, transparent basis as soon as possible.

Q. 10. Having due regard for the issues raised above, do you consider ComReg should regulate MNO's "on-portal" services as "Specified PRS"?

<table>
<tr><td colspan="3">Statement of Policy Objective</td></tr>
<tr><td></td><td colspan="2">To limit consumer harm arising from consumers;

• Being unable to distinguish a legitimate service from a Scam (Legitimacy)
• Being inadequately aware of tariffs and spend (Pricing Clarity)
• Being misled as to how the service operates (Fair Operation and Content)</td></tr>
<tr><td colspan="3">Identification and Description of Options</td></tr>
<tr><td></td><td>Change</td><td>Regulate 'on-portal' services. This would be in line with Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010</td></tr>
<tr><td></td><td>No Change</td><td>This would discriminate against Service Providers who provide the same services 'off-portal' and would be in contravention of section 7.2 of the Act.</td></tr>
<tr><td colspan="3">Analysis of Costs, Benefits and Other Inputs</td></tr>
<tr><td></td><td colspan="2">We believe that in the first instance Comreg should bear in mind the "Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372 , 09/12/1997 P. 0005 – 0013."

'Relevant product markets` are defined as follows:</i><br><i>'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use`.

'Relevant geographic markets` are defined as follows:</i>
<i>'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area`.

Non-Discriminatory: "Fair and unbiased; not discriminating; not biased against a particular group" - Webster's Revised Unabridged Dictionary, published 1913 by C. & G. Merriam Co.

Service provided by MNOs on-portal:

• they are premium-charged
• they are potentially identical to phone-paid services offered by third parties "off-portal"
• they generally raise the same consumer protection issues as other phone-paid services.</td></tr>
</table>

	Section 7.2 of The Act specifically requires that Any attachment of conditions, or non-application of conditions, under subsection (1) shall be objectively justified in relation to the premium rate service concerned and shall be **nondiscriminatory, proportionate and transparent.** We believe that the issues outlined below apply equally to all SPs and not just to MNOs in the context of on-portal services: 1. Access to a redress mechanism applies equally to a on-portal as much as to an off-portal Service Provider 2. Smartphone Apps such as games and java applications are available equally from off-portal SPs as they are from on-portal MNOs 3. Price Transparency must apply equally 4. Fair Trading 5. Network/Consumer relationship - In all cases the MNO has the direct contractual relationship with the consumer, whether on-portal or off-portal, however it is clear that the consumer needs to have a clear escalation path in all circumstance, as the MNO is as likely to dispute a customer complaint to it as a SP. In such circumstances a consumer has a right to benefit from the protections that would be available under the regulated environment of the Code of Practice and of being a specified service. 6. Commercial Bias Additionally, there is a likelihood of Payforit type payment mechanisms being sought to be introduced into the market. These services have potential for harm and are in essence MT style in operation/functionality except without the messaging element, as such they pose greater risk of consumer harm. It is clear from a UK Study, "Review of Scope of Regulation for Premium Rate Services: Comparison Study of e-commerce Payment Mechanisms, A Study for Ofcom by Europe Economics" (attached as Appendix 1) that there is no basis to argue that there is differentiation as a result of the payment platform in the potential for consumer harm and risks: *"1.4 All of the e-commerce payment mechanisms studied in this report face the same or very similar risk issues, particularly as regards consumer protection concerns, such as:* *a) Providing clear information to the consumer as to the nature of the transaction and the consumer's responsibilities;* *b) Providing a clear process whereby the consumer positively authorises a transaction to take place;* *c) Providing a clear and straightforward process whereby the consumer can cancel ongoing (subscription) services;* *d) Providing clear and easily accessible billing records; and*

	e) Providing measures for redress and complaint handling in case of problems." It is clear that on-portal risks or the same as off-portal risks and that they need to be addressed within the coherent framework that the new PRS Bill provides. Additionally, while in the UK MNOs may argue that the legislation does not allow for them being covered, that is explicitly not the case in Ireland, where they are most definitely caught by the PRS definition within the Act.

Conclusion:

Yes, we believe that there is an obligation on Comreg to regulate the on-portal PRS business. Any decision to exclude 'on portal' services from regulation would be discriminatory and as such in contravention of Section 7.2 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010.

It should be noted that under European Communities (Directive 2000/31/EC) Regulations 2003 services cannot be subjectively restricted in manner being suggested by Comreg.

Q. 11. Do you agree with ComReg's proposal that certain categories of services could be exempted from regulation, provided the cost is below the proposed 20 cent (€0.20) price threshold?

<table>
<tr><td colspan="3">Statement of Apparent Policy Objective</td></tr>
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• Comreg resources will be stretched, to the detriment of the consumer, to regulate the entirety of the PRS industry.
• PRS providers, will be unduly burdened, by being in an obligated regulatory regime for all services, even those which have less of a potential – on cost ground – to cause consumer harm.</td></tr>
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Costs; The costs to all parties (SPs, Regulators, Consumers) continues to be negligible

Benefits; The exclusion, on an arbitrary basis, of a class of service based on an arbitrary price, without determining the problem the proposal is trying to address nor the benefit the solution is proposing may undermine some of the fundamental reasons for the new licensing regime that has been introduced by the Oireachts, in so far as;

Regulatory effectiveness – the Licensing Scheme, being applied to all participants, will we believe, achieve an increase in compliance in the market and therefore prevent consumer harm; This is especially true given that, for the first time, all members of the value chain will be subject to licensing. The 'loophole' of the price level of the PRS service being a determinant may allow down stream participants in the value chain to avoid licensing.

Universal impact – the new licensing Scheme will deliver more tangible benefits, avoiding any perception of any bias, to everyone involved in phone-paid transactions, including consumers, if and only if, it is applied transparently and fairly across all market participants;

Evidence-based – Only a fully comprehensive, objective, and factual dataset of Premium Rate Services Providers which will be available to aid in the formulation of policy going forward can provide a comprehensive understanding of the industry and facilitate the measuring and mitigation of risk;

Minimising barriers to entry – the Licensing Scheme will</td></tr>
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		not restrain trade as registration will be low-cost and simple to complete, their will be little or no cost advantage to service providers from avoiding licensing and compulsory Code of Practice obligations; **Cost-effective** – benefits will be delivered in proportion to (and are likely to exceed) costs; **Future-proofed** – the licensing system, and the code of practice, will still facilitate a regulatory capacity to cope with any increase in the number of industry participants and will be flexible enough to facilitate foreseeable changes to the current regulatory regime.
	Limited Change	Reflect only those services, where *'there is a charge for the provision of the service <u>which exceeds the cost attributable to communications carriage alone</u>'.* • As such an appropriate price point may be if the cost was .11 cents or less (the upcoming mandated price of an EU roaming text).
	Full Acceptance	**Costs;** Consumers may suffer harm: The benefits available from the licensing system, such as transparency of billing information, obligations with regards to customer service etc. will be lost to consumers when using services that would be covered by the proposal. As was demonstrated in the consultation, although these service may have a lower price point, they do tend to be service which are bursty and may have infrequent but intense use - while a typical service may require 1 message for the SP to generate a good margin within the code of practice, it may make sense - especially for unscrupulous operators, to target vulnerable and impulsive users with the lower priced service and encourage rapid-repeat type usage. Consumers will not distinguish between a licensed service and an exempt one, especially since all the characteristics are homogeneous. This dual but diverse treatment of different PRS services may provoke confusion with consumers and lead to dissatisfaction with all members of the value chain including the regulator. **Benefits;** Given the likely low cost and simple to use licensing system - there are no tangible benefits to a compliant SP from this proposal.

		Given that the consultation appears to indicate that the regulatory burden for this niche is minimal - there are no tangible benefits to the Regulator. Furthermore, the regulator has the capacity to raise a levy adequate to fund the costs of regulation of the sector. As such, there is no undue, or onerous burden, which would fall on the regulator or the exchequer. Given that the consumer would suffer from a lessor degree of protection, and a regulatory void, it would appear that there is no benefit to the consumer.
Analysis of Costs, Benefits and Other Inputs		
	The Act clearly contains a defining criterion, as to what constitutes a PRS service, that 'there is a charge for the provision of the service which exceeds the cost attributable to communications carriage alone'. The discussion in the document states that there are certain services which are of such low value that they cause few complaints. However, fewer complaints may be due to the fact that these service are: Low Cost; and therefore there is less consumer impetus to report harm or poor behavior, and Regulated; and therefore have been in compliance with the Code of Practice; Additionally, there is no indication that PRS operators have experienced any difficulties or problems arising from these types of services being regulated to date. Moreover, the proposed new licensing regime, as outlined in the Act does not appear to be unduly burdensome or onerous such that it would cause any problems for services providers providing services such as these to be licensed and comply with Code of Practice rules. From a regulators point of view, it is clear from the consultation, that the work load originating from these services has been negligible and has not put any disproportionate strain on the regulator's resources. Moreover the capacity of the regulator to fund all regulatory costs from the industry levy is clear, and this full regulation exposes no risk to the exchequer nor the Office.	

Conclusion:

No, we don’t agree, either that; there should be a threshold other than that in the legislation, nor that €0.20 would be a correct figure. If any absolute threshold is to be use The EU mandated level of €0.11 is more appropriate.

Q. 12. Do you consider that ComReg should regulate Directory Enquiry services, within their current remit, as specified PRS?

<table>
<tr><td colspan="3">Statement of Policy Objective</td></tr>
<tr><td></td><td colspan="2">To limit consumer harm arising from consumers;

• Being inadequately aware of tariffs (Pricing Clarity)
• Being misled as to how the service operates (Fair Operation and Content)</td></tr>
<tr><td colspan="3">Identification and Description of Options</td></tr>
<tr><td></td><td>Change</td><td>Regulate Directory Enquiry services. This would be in line with Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010</td></tr>
<tr><td></td><td>No Change</td><td>This would discriminate against Service Providers who provide the similar services using non-DQ numbering and would be in contravention of section 7.2 of the Act.</td></tr>
<tr><td colspan="3">Analysis of Costs, Benefits and Other Inputs</td></tr>
<tr><td></td><td colspan="2">We believe that in the first instance Comreg should bear in mind the “Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372 , 09/12/1997 P. 0005 – 0013.”

'Relevant product markets` are defined as follows:</i><br><i>'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use`.

'Relevant geographic markets` are defined as follows:</i>
<i>'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area`.

Non-Discriminatory: “Fair and unbiased; not discriminating; not biased against a particular group” - Webster's Revised Unabridged Dictionary, published 1913 by C. & G. Merriam Co.

Services provided by DQ SPs:

• are premium-charged
• are potentially identical to phone-paid services offered by third parties
• generally raise the same consumer protection issues as other phone-paid services.

Section 7.2 of The Act specifically requires that ;</td></tr>
</table>

	Any attachment of conditions, or non-application of conditions, under subsection (1) shall be objectively justified in relation to the premium rate service concerned and shall be **nondiscriminatory, proportionate and transparent.** We believe that the issues outlined below apply equally to all SPs including DQ SPs in the context of DQ services: 1. Access to a redress mechanism applies equally to a DQ Service as much as to non DQ Service. 2. Price Transparency must apply equally 3. Fair Trading 4. Standardised complaint handling process should apply across all phone paid services. 5. An exemption from regulation would create a Commercial Bias where similar services were provider by regulated service providers.

Conclusion:

We believe that Comreg should regulate DQ services for the reasons stated above.

Q. 13. Do you consider that DQ services, within their current remit, could be exempted from regulation, provided their cost is below the recommended price threshold?

We do not believe that any service, including DQ services should be exempted from regulation purely based on cost unless this cost is at or below the cost of communications carriage alone.

We do not believe that DQ service should be exempt in any event on the basis that it would be discriminate against other service providers and would deny consumers their legitimate expectations of having appropriate regulatory protections and standardised complaints handling processes for all services that incur a premium rate charge.

Q. 14. Do you consider that it is preferable to maintain the current clear focus of 118XX on strictly telecommunications directory services or should it be permitted to expand to allow a diverse range of "general information services" and, therefore, become subject to PRS regulation?

We believe that DQ should be focussed on services that are related to its core activity of telecommunications directory services.

This might include providing the caller with additional related information to the enquiry they made, such as providing opening hours, location, or a list of alternative branches/numbers.

However, DQ services should not be extended, beyond services with a direct connection to DQ, to other general information services such as weather, news, etc.

Any decision to allow DQ firms to provide a diverse range of 'general information services' would put service providers at a significant commercial disadvantage unless 118 short-codes we made more widely available to all SPs. We would have significant concern that this would cause considerable confusion.

In every circumstance however we believe that DQ should be subject to regulation as a Specified Service under the regulations.

Q. 15. Do you consider that the provision of general information services by DQ SP's would be unfair to 'Ordinary' SP's of similar services or does the option for them to provide DQ services mitigate this?

We believe there are issues whereby the use of a 11811 style number has advantage over other PRS numbers. For example, a 5xxxx number can't be voice dialled.

We would be keen to work with Comreg to identify aspects of the numbering plan that could be changed such that the business environment would be non-discriminatory as to the capacity of ordinary SPs to offer services on a similar basis to DQ firms.

Until there is a level playing pitch in this regard, we would ask that a working group would be convened and a solution acceptable to all industry be found prior to the opening of the DQ numbers to general information services.

Q. 16. Do you consider it appropriate to delineate the additional "general information" services that would be acceptable on 118XX short codes where prior approval by ComReg would be required on a case-by-case basis?

Yes, We Agree.

Section 9 Concerns

Prior to responding to the individual questions set out in Section 9, in this chapter we outline some of the inconsistencies that appear to ground, through assertion as opposed to fact, some of the proposals.

We are particularly concerned that other respondents to the consultation will base their views on the mis-information and bias contained within Section 9.

We believe that the level of inconsistency, combined with the lack of a fact based approach to measuring the relative harm of the measures being proposed compared to the undetermined level of asserted consumer harm, has meant that the proposals being advanced are disproportionate to the outcome being sought.

In our next chapter, where we answer the questions posed by Comreg, we have outlined proposals for more measured and proportionate actions that would more proportionately substitute for the otherwise crude and blunt proposed measures.

Reliability of the numbers

"The promotion and operation of mobile subscription services are the predominant issues currently affecting regulation of the PRS market."

We believe that this statement has blatant and obvious biased and sets the tone for a Section of the consultation which stands out in marked difference, in terms of professionalism and reasoned impartiality, to the generality of those Sections preceding and coming after.

The current PRS industry market place is one where subscription services are the services that consumers elect to choose and purchase with most frequency and in which the majority of the message by volume and by value are part of a subscription service.

According to the consultation (Part 9.4) the market for PRS SMS is €62 million. As part of this consultation the IPPSA engaged KPMG to survey members and to get a breakdown of these revenues by billing type and service type.

	Market Analysis	**2009 (Rev)**	**% of Rev**
A	PRSMS Revenues of IPPSA Members*	€36.2 million	
B	PRSMS MO-Billed Revenues of IPPSA Members	€0.43 million	1.2%
C	PRSMS MT-Billed Revenues (A-B)	€35.8 million	98.8%
D	MT Subscription Revenues of IPPSA Members	€35.0 million	96.7%
E	Subscription 'entertainment-type' services*	€28.9 million	79.8%

Figure 9.1 Based on figures compiled by KMPG from IPPSA members in May 2010.
**Low estimate as not all members returned a figure by the deadline.*

Based on these figures it is not unreasonable to assume that the level of calls to the Regtel call center should include a level of queries in relation to subscription services proportionate to their activity in the market.

As such, the assertion which is made about an absolute figure of circa nine thousand calls in relation to subscription services having been made being a problem in itself, is inconsistent with the

admission made on page 52 which states that *"While RegTel's investigations demonstrated that, in the majority of cases, a valid subscription had been effected, it is unclear why so many consumers failed to understand what they were entering."*

In fact, the admission explicity states that Comreg has not the information to hand to make any determination as to what are the root causes of the issues facing the relatively small amount of subscribers who encounter difficulties.

Indeed, there is no basis as such, to rely on any supposition drawn from the call center statistics. Indeed a report (Appendix 2) commissioned by Regtel's board in 2008 highlights the fact that "*In the opinion of one [Regtel] staff member the dividing line between queries and complaints is difficult to draw with any certainty*".

Added to this, there is total inconsistency with how Regtel classifies complaints and queries and they seem to adjust the classification at will. Again to quote directly from the same report *"RegTel argues that of the 30,000 or so calls, texts, e-mails and letters made annually[2008] by consumers in relation to PRS, only 2,000 or so are complaints, with most of the rest queries."*

In 2008 Regtel received 30,000 calls and of these 2.000 or so were complaints then in 2009 they receive 28,600 calls, a reduction of 4% on 2008 figures but yet the consultation suggest that complaints have increased massively. This directly conflicts with Regtel's own 2009 annual report in which states that "*by international standards the incidence of complaints is relatively low*"

The consultation is unclear as to how many complaints exist today, there is a suggestion within the consultation document "*that a substantial number of consumers - 9,500 or 35% of **complainants** - who contacted RegTel "s Helpline contesting that they had ever entered into a subscription service*"

This suggests that 9,500 represents 35% of 2009 complaints which infers that of the 28600 calls in 2009 that 27,142 where complaints. This suggests that in 2009 even though the % of calls to the call centre reduced by 4% that the number of complaints went from 2,000 (6.6% of calls) to 27,142 (94.9% of calls). These figures make no sense and cannot be relied upon as a basis for any decision that Comreg might make in relation to understanding or quantifying the scale of any issue.

Regtel also report an increase of 125% in written complaints between 2008 and 2009. Statistically it would be reasonable to expect written complaints to move broadly in parallel with calls to the call centre. It is highly unlikely that you would see less people contacting Regtel by phone at the same time see an increase of 125% in written complaints. Again these statistics are highly questionable.

The consultation makes reference to issues around Data Protection and indeed states that *"In addition, the Office of the Data Protection Commissioner (ODPC) considered it necessary to prosecute several Aggregators and Content Providers".* What is not pointed out, and is again typical of the biased nature of this section of the consultation, is that the ODPC has seen a marked reduction in the number of complaints in this area over the last 3 years.

In fact in the ODPC's most recent annual report states that "*Regarding unsolicited marketing text messages, my Office opened 50 fewer complaints in 2009 than in 2008, and almost 250 fewer complaints than in 2007."*

Given that the ODPC received only 262 complains in this area in 2009 it suggests a reduction of circa 16% on 2008 figures and almost a 50% reduction on 2007 figures. IPPSA members have also seen a

similar drop in consumer complaints over the past 2 years, with Q1 2010 figures suggesting that further falls in complaint numbers are likely this year.

There are a number of factors that may be contributing to Regtels figures being totally inconsistent with other sources such as the ODPC and service providers.

1. They are being distorted wilfully to support a prejudiced and biased view that there exists an issue of significant scale and are being used to justify extraordinary measures being introduced.

2. The lack of a clear industry wide complaints handling process means that consumers are being handled and classified differently from year to year by Regtel, networks and service providers. This means the volume and nature of calls to Regtels call centre can change for reasons independent of any issues that exist.

3. Regtel is incapable of keeping basic records. This report (Appendix 2) gives a general picture of an organisation that cannot keep even the most basic records "*several members of [Regtel] staff drew our attention to the fragmented nature of the records that RegTel keeps. Applications documents, for example, are not easily followed through to documentation relating to complaints or breaches of the Code.*"

   Section 7 of the same report confirms "*The PRS regulator is no longer adequately resourced to deal with the size or complexity of the PRS market*" and "*What is surprising is not that the regulatory mechanism is creaking but that it has worked as long as it has*". It is not reasonable to rely on such a source for critical information used to make regulatory decisions.

It is our view that until an industry wide complaints handling process is put in place and has operated for a reasonable period of time that there is not sufficient data to asses the scale of any consumer issue within the market.

Understanding the issues

Based on these highly questionable statistics the consultation then goes on to identify various possible issues with MT and Subscription services that might be the underlying cause of the call volumes;

1. Consumers overlooking the information provided to them by SPs
2. MT billing not being intuitive to consumers
3. Unscrupulous "out-of-schedule" payments
4. No regular billing information being available to Prepaid users
5. Web opt-ins
6. Unsolicited messages

1. Consumers overlooking the information provided to them by SPs

There is a suggestion that the current measures in the Regtel code of practice have been ineffective in ensuring that consumers are informed. This assertion incorrectly assumes that the Code of Practice has been enforced effectively to date.

The Europe Economics Report (Appendix 2) highlighted a number of issues with Regtel. They found "*the general perception is that RegTel is not easily able to cope with the complexity of pace of development in the PRS market. It has too little policy-making and technical expertise, the legal underpinning for its activities is regarded as unreliable, and the Board is felt to be out of touch with the dynamics of the market. RegTel's willingness to consult meaningfully is widely criticised. Above all, RegTel is regarded as not having taken sufficiently vigorous action against rogue operators, who have undermined consumer confidence in PRS in Ireland, with the result that the industry has lagged behind developments that have benefited other economies*"

Furthermore the report highlights the lack of enforcement "*We learned that on average between three and four service providers breach the Code each week, and that it tends to be the same providers who most regularly offend. Subscription services tend to be the category of PRS in which breaches of the Code most often occur. RegTel staff felt that service providers know that RegTel deploys only limited audit resources and that it is possible for them to get away with flouting the Code for extended periods.*"

It is clear from this report that the Regtel Code of Practice has not been effectively enforced and that the issues around subscription services are likely due to a lack of enforcement of existing regulatory requirements rather than these requirements being overlooked or misunderstood by consumers as is suggested in this section of the consultation.

2. MT Billing not being intuitive

"Consumers intuitively expect to be billed for sending a text message. This form of billing is known as Mobile Originating (MO) payment. However, mobile subscription services almost exclusively use Mobile Terminated (MT) payments – where the cost of the text is charged to the consumer when the consumer receives an SMS/MMS from the Service Provider."

There is no proof or factual basis for Comreg to assert this. Our assertion is that a well-informed consumer expects to be billed for content.

There needs to be a clear distinction made between sending text messages as a commonly used method of peer to peer communication and the purchase and billing of mobile content. There is no evidence that consumers confuse these very distinct activities.

In the case of mobile content it is clear that consumers expect to be billed for the content. In the event the content is not available consumers would certainly not expect to be billed for requesting it as would be the case if it was charged for using MO-Payment.

The linking of text messaging to service billing, either MO-Payment or MT-Payment is inconsistent with the technical operation of the industry and how it is developing internationally. In order to provide consumers with innovative services it is necessary to break the link between SMS messaging and service billing.

With the advent of in-application billing, pay per view mobile internet content and online micropayments there is a growing requirement to facilitate the consumption and billing of content using more than just MO SMS messages.

Service delivery, service billing and service promotion are very separate components as can be seen in the attached market map. (Appendix 3)

In the UK, the payforit scheme (www.payforit.org) disconnects the concept of service billing being integrated with SMS messaging/billing and includes almost no messaging components. In Ireland MNOs charge subscriptions for on portal content such as mobile TV without linking the service billing and service delivery.

There is no evidence that consumers do not understand the concept of subscription services which are common across all forms of content; magazine subscriptions, cable TV packages, mobile phone packages, music & video content, online dating, etc. In these examples delivery of the content is not integrated with the billing of the content which is generally done by Direct Debit, credit card or direct debit or indeed mobile payment.

It is clear that consumers expect to be billed for content and not for the sending or receiving of text messages. It is our assertion that it is more intuitive for consumers to expect to be billed for content rather than for requesting content or incidental messaging.

MT-Payment allows service providers to bill consumers for content rather than messaging. In some cases the content, messaging and billing may be integrated into a single SMS message but this is becoming the exception rather than the norm.

Under the current code of practice consumers are informed in advance of using an MT billed service that messages are billed per message received. Furthermore once using the service they are provided with clear information that outlines the costs per message received. Then every time they have spent €20 they are again informed again of the costs and told that they are billed per message received.

No intuition is needed by consumers to be fully informed of how MT-Billed services work.

Indeed the consultation itself goes on to provide an intuitive example of how *"A mobile subscription service on your mobile phone account using MT payment is, therefore, analogous to a direct debit on your bank account.*

The MT-payment features of a mobile subscription service, which make it an efficient and convenient payment method for both suppliers and consumers, also provides opportunities for unscrupulous "out-of-schedule" payments, where the consumer is billed for receiving more alerts that they should or, in more extreme cases, where the consumer is billed without ever having subscribed to the service."

Direct Debit services in Ireland are a normal, accepted and successful method for implementing automated financial transactions in Ireland. Indeed, the banking version of MT payments has been wildly successful and consumers as well as businesses make extensive use of automated payments.

Direct Debits, Standing Orders, Online and other Automated Payments						
	2003	2004	2005	2006	2007	2008
Volumes of Automated Payments						
Number of Automated Debit Payments	76.6m	n/a	82.3m	84.8m	96.8m	104.0m
Number of automated Credit Payments	71.8m	76.7m	94.9m	103.6m	105.7m	122.4m
Total Number of Automated Payments	*148.4m*	*n/a*	*177.2m*	*188.4m*	*202.5m*	*226.4m*
Values of Automated Payments						
Value of Automated Debit Payments	n/a	n/a	n/a	€59.4b	€84.6b	€106.2b
Value of Automated Credit Payments	n/a	n/a	n/a	€132.0b	€149.5b	€170.7b
Total Value of Automated Payments	*n/a*	*n/a*	*n/a*	*€191.4b*	*€234.1b*	*€276.9b*

Consumer awareness of how DD style payment systems operate has never been higher. We are almost all certainly touched by this mechanism whereby a payment can be drawn from our bank account at a time and for a value without our intervention, and only based on an agreed service contract and a notification requirement.

MT payment mechanisms, being analogous to Direct Debit is not in itself a problem, as there is no evidence advanced that shows the correct and scrupulous use of automated transaction systems to be harmful to customers. Indeed, the consumer benefits of MT and DD have led to this style of payment mechanism having been adopted, as demonstrated in the table, with great takeup. Some of those benefits for MT services include:

a. Consumer choice as to service payment mechanism is extended and more flexible.

b. The requirement for a consumer to remember to purchase a desired repeat service is forestalled.

c. The billing cost is transparent, and easy to opt-out of, under effective implementation of the current Code of Practice.

d. Many organisations offer discounts when a consumer pays in this manner to reflect the lower costs incurred by the service provider in billing the consumer.

The volume, value and importance of an MT payment infrastructure mechanism to the PRS industry is clear from the statistics outlined below:

Market Analysis	**2009**
PRSMS Market Size (from consultation)	€62 million
Estimated Market Size of MT Subscription	€45 million

Figure 9.2 Compiled by KMPG from IPPSA members in May 2010.

The area of concern which appear to be driving this discussion within the consultation appears to primarily be in the case of unscrupulous operators who betray consumer trust with fraudulent MT billing.

3. Unscrupulous "out-of-schedule" payments.

The extent to which unscrupulous 'out-of-schedule' payments is a problem has been quantified within the consultation and it seems to be more of a hypothetical problem with MT payments than an actual current issue.

We believe that the small minority of cases in which out-of-schedule payments might exist can be dealt with more effectively by drawing on the learnings of the DD scheme as opposed to restricting or eliminating MT billing mechanisms which we believe is disproportionate. Such mechanisms may include:

a. Requiring Service Providers to adhere to an industry wide code of practice on the customer handling process, including a structured process with regards to refunds, in the case of a customer having been harmed due to an Error or Ommission on the part of the service provider.

b. Requiring Service Providers to purchase, and be in possession, of a regulator agreed bond – against which the regulator may draw from following a determination as to a proportionate breach of the Code of Practice

c. Implementing a 'Co-Operation Agreement' with the Data Protection Commissioners office, such that all parties to the PRS sector are aware of how the jurisdictional overlap shall be managed to ensure a speedy and effective prosecution of those suspected of being in breach of the law. It is obvious, as can be seen by the ODPC Annual Report, that unscrupulous operators, who bill without authorisation, already face the full power of the law, in cases where the DPC takes part, and they do not believe that any additional powers are required on their part.

4. No regular billing information for pre-paid users and limited access to customer service.

The consultation incorrectly makes the assertion that that prepaid users do not have access to billing information. Indeed many operators provide access online. See attached example from O2 (Appendix 4)

Furthermore all prepaid users are provided with free and easy access to balance information direct from their handset. This allows them to see any reduction in their balance due to receiving a message instantly.

In addition to the billing information provided by network operators, under the code of practice, Service Providers are required to send the consumer regular (after every €20 spent) free reminder messages informing them of the costs of the service.
All of the mobile operators also provide access to their customer service call centres via 19XX free phone numbers which in many cases are pre-programmed into the phones address-book.

There are a number of measures that would further inform prepaid users when it comes to phone-paid services;

a. When prepaid users top-up provide them with details of the MNO online billing facility in the top-up confirmation message.

b. Use modern communications tools such as www.phonebrain.org.uk and indeed in Ireland www.callcosts.ie to improve consumer awareness.

c. Have SPs and MNOs promote these awareness tools to their customers.

5. Web opt-ins

"*Another area of concern to ComReg is the concept of "Web Opt-In", where it is possible for SPs to promote their services via the internet and to acquire mobile subscribers through this medium. Some consumers inadvertently subscribe via the internet when, for example, they provide their mobile phone number to enter a quiz or receive the results of an IQ Test. With MT billing, it is possible, in theory, for those who have "captured" these mobile account numbers to send MT premium text messages and charge these consumers, without the consumer having signed-on for any service. This form of "opt-in" is also open to further abuse in circumstances whereby a person could provide a mobile phone number, which is not their own, thereby subscribing another person to a service without their knowledge or consent.*"

The basis to this assertion is flawed. In the case where an MT service is being advertised on the 'Web', Phonepaid members have, implemented a mechanism called 'PIN Verification' to ensure that only the person is possession of the phone can initiate a service.

We believe a 'PIN Verification' mechanism should be explored further as part of the Code of Practice update in this context, to ensure all value chain members, operate to the same best practice.

It is obviously a matter for the Code of Practice that the Service Provider makes clear when they are advertising the service that they ensure it is clearly advertised as a subscription service.

The practice of sending MT messages without authorisation is not solely linked to the 'Web', numbers can be obtained in many ways (e.g. the purchase of lists, the picking up of business cards on the street etc.), however in all such cases it is clear, that sending such numbers either as promotional messages or MT billing message is strictly illegal.

The ODPC have already stated that they believe their prosecutions in this matter have been successful and they have stated that they need no further powers to police this area of consumer harm.

6. Unsolicited Messages

While unsolicited messages may have previously been an issue within the sector it is important to note that the ODPC is the body with the clear legislative competence in this area.

They engaged in direct action to address this, and their most recent Annual Report states that:

"Regarding unsolicited marketing text messages, my Office opened 50 fewer complaints in 2009 than in 2008, and almost 250 fewer complaints than in 2007. This decrease can be attributed to the effect on the text marketing sector of prosecution proceedings which I lodged in the District Court towards the end of 2007 against a number of companies operating in the premium rate text messaging sector."

It is clear that they believe that they have sufficient powers to pursue offenders, and have not only prosecuted several Aggregators and Content Providers but have seen a successful outcome in the form of reduced complaints and issues arising as a result.

Additionally, it was recently reported that the Commissioner is not seeking any additional powers in this area.

It is interesting to note, that as the body who had a statutory basis and legislative footing in this area, that they only opened a total of 262 complaints. This disparity with Regtel's figures indicates that the underlying problems were not in fact related to 'subscription services' in and of their own right, and may be put down, more accurately to issues around enforcement, transparency of pricing information etc.

There is no basis where a proportionate outcome of this consultation would be a restriction or elimination of subscription services.

The consultation does not attempt to quantify the scale or root cause of the specific issues identified and does not propose any solutions that might address each specific issue on a reasonable and proportional basis.

In points 7-12 below we have highlighted a number of additional issues that might be contributing to call volumes, these are;

7. The ineffective enforcement of the existing Regtel Code of Practice
8. The lack of a transparent, mandated and recognised, industry wide consumer complaint handling process
9. The lack of a consumer focused education programme on phone-paid servces
10. The current STOP handling process, particularly in the shared short-code environment
11. Other ancillary issues

7. The ineffective enforcement of the existing Regtel Code of Practice

Regtel has not been effectively enforcing the existing regulations. This was highlighted in Section 5.29 of the attached report (Appendix 2) which states that "*A universal belief among those we spoke to is that the industry is suffering from regulatory inadequacy, with a particular weakness in enforcement.*"

The same report in section 6.29 confirms "*that on average between three and four service providers breach the Code each week, and that it tends to be the same providers who most regularly offend.* ***Subscription services tend to be the category of PRS in which breaches of the Code most often occur***." The report continues, "*RegTel staff felt that service providers know that RegTel deploys only limited audit resources and that it is possible for them to get away with flouting the Code for extended periods.*"

There can be little doubt that enforcement of the existing code of practice has facilitated and enabled consumer harm.

8. The lack of a transparent, mandated and recognised, industry wide consumer complaint handling process.

We believe that had an appropriate Code of Practice for the Customer Complaints Handling Process been in place, similar to http://www.comreg.ie/_fileupload/publications/odtr0167.pdf that the majority of the issues would have been addressed without the need to escalate to a call center operated by a third party on behalf of Regtel.

Moreover, this lack of a consistent approach, as demonstrated by the Amarach study on concsumer perceptions on how to handle complaints, has not been of any help to encourage certainty and trust of the consumer in the PRS sector.

9. **The lack of an effective consumer focused education programme.**
It is common within other jurisdictions to inform and thus empower consumers to make best use of phone paid services.

A number of high profile media campaigns were run by Regtel informing consumers of the existence of the STOP command. While well intentioned, it was done in the absence of rigorous enforcement polices, an industry wide complaint handling process, a consumer focused website or an effective STOP process.

The net effect of these campaigns was to drive consumers towards Regtel as their first point of contact which given what we know about Regtels modis-operandi (Appendix 2) was bound to be a frustrating experience for consumers which naturally led to more complaints. The fallout from these can still be seen today.

We believe that it is important to look towards the success in the UK of using modern communications tools such as www.phonebrain.org.uk and indeed in Ireland www.callcosts.ie is widely regarded as having influenced a sea change in consumer awareness.

10. **The current STOP handling process, particularly in the shared short-code environment**
There have been long standing issues within the industry with the way STOP messages from consumers are handled that can cause significant issues for consumers.

There is currently a requirement for Service Providers to use the keyword STOP for both un-subscription and marketing opt-out on the same service. There is no clear convention within the code of practice as to how this can be done.

The current requirements are akin to being made to ask someone if they want tea or coffee but the only answer you're allowed accept is yes. Service providers have done their best to comply with the code and have suggested alternatives to Regtel (Appendix 5) over the years, but to no avail.

An added complexity here is that aggregators are forced to put all of their service provider's services on to one short code. This is primarily because of the high charges imposed by Mobile Networks for implementing short codes on their networks, but also because out-payments improve significantly based on the volume of messages on an individual short-code.

In a shared short-code environment consumers who are using more than one service from a particular aggregator may only be able to stop from the last service that has sent them a message.

There are a number of way this issue could be remedied.

a. A clear STOP handling process should be agreed at an industry level that caters for this technically complex issue thereby significantly improving upon the current system.

b. MNOs could be required to allow service providers to aggregate volume across all their short-codes thereby removing a significant incentive for aggregators to use single short-codes for many services.

11. Other ancillary issues

Although, as an industry, we would be delighted to see a zero level of complaints, given that the majority of the population uses Phonepaid services during the course of a year, it is undeniable that there would be a base level of enquiry activity.

However, taking the above for granted, we do not understand why Comreg have chosen to assert that the Regtel Code of Practice is a not an element of the reason as to why there are such an amount of contestations.
We believe that there are many possible reasons as to why enquiries may be at this level, including but not limited to:

a. The poor consultation history of Regtel with Industry to date.

b. A reported level of confusion at board level within Regtel as to the PRS Industry

c. Lack of consultation with Regtel staff in the operations of the body

d. Ineffective record keeping

e. A code of practice which was not properly updated, and when it was updated, a 'consultation' process that degenerated into a shouting match in a hotel auditorium.

We have attached to this response (Appendix 2), a copy of a consultants report on the operation of Regtel, to highlight the existence of weaknesses within the system, and how they might have impacted on an ineffective code of practice.

We are not suggesting that Comreg shouldn't address the issues raised with the IARN principles in an effective, reasonable, and proportionate manner. However, we believe that a first step should be to more fully understand the value chain of the industry, more fully understand the service and demographic makeup of choice made within the industry, look for underlying patterns as opposed to symptoms to understand where the Code of Practice might be updated etc.

In essence, we believe that the issues identified in this consultation, are not based on a sound, or factual, understanding of the market - and if that understanding is available to Comreg it has not been shared as part of this consultation process, which is unfair to those who will be effected by the outcomes of this process.

International experience

The United Kingdom
The UK is probably the most appropriate market to compare Ireland to. The consultation provides little by way of useful information regarding the issues experienced in the UK and their approach to resolving them. No specific case was referenced.

There has been no suggestion in the UK that MT-billing as a model should be prohibited. After considerable analysis of their particular issues they did introduce a double opt-in requirement for subscription services costing over £4.50 per week.

The USA
The case referenced from the USA concerned the promotion of services in a misleading way. The solution here was not to ban or limit MT or subscription services but was to ensure those concerned complied with the relevant codes of practice in future.

Australia
Like in Ireland, their equivalent of the competent body, the DPC, prosecuted offenders. The issue here had nothing to do with MT billing or subscription services.

The ACMA instituted proceedings against eight respondents in the Federal Court in December 2008, alleging contraventions of both Acts in relation to premium SMS chat services. The ACMA alleged that the respondents were engaged in a complicated scheme to obtain mobile phone numbers from members of dating websites, using fake member profiles, in order to send commercial electronic messages by SMS.

The ACMA alleged that:

> after the numbers were obtained, unsolicited messages were sent to the mobile phone numbers offering the opportunity to chat via SMS using services described as the 'Safe Divert' or 'Maybemeet' services;
>
> the chat was not offered by genuine members of dating websites but employees of Mobilegate and Winning Bid;
>
> consumers were charged up to five dollars per message; and
>
> when users questioned whether the messages were from a real person, they were told that it was a real person who was using the "Safe Divert" service to keep their mobile phone number private."

It is clear that were a similar issue to arise in Ireland that the DPC would move quickly to prosecute offenders.

Q. 17. Should ComReg introduce a "double opt-in" requirement for entry into a mobile subscription service?

<table>
<tr><td colspan="3">Basis for suggesting this remedy</td></tr>
<tr><td></td><td colspan="2">No clear policy objectives have been articulated in this section of the consultation. A number of potential concerns have been highlighted but no detailed analysis has been provided as to impact or scale of any of the issues mentioned.

The primary justification seems to be that 9,500 callers to Regtels call centre denied subscribing to a service. These figures are highly un-reliable given the lack of an industry wide complaints handling process. This data also provides no sense of what the root cause of these complaints is.

There seems to be an assumption that consumers do not understand subscriptions, this is not borne out by reality. A survey of SPs found that between 40% and 60% of consumers signing into subscription services had used the service for a period previously and were returning to the service.

No market analysis has been provided to understand what percentage of the market is made up of Subscription services. With the assistance of KPMG it is our estimation (Appendix 8) that subscription services make up the vast majority of the market.

The UK was singled out as an example where double opt-in has been successfully implement and has reduced complaints significantly. It should be noted that in the UK double opt-in only applies to services costing more than £4.50 per week. It should also be noted that a number of other factors including the introduction of www.phonebrain.org.uk are just as likely to have contributed to the reduction in complaints.

We believe it is premature to make any decision regarding 'double opt-in' until the most basic regulatory measures as been put in place first; an industry wide complaints handling process, the current code of practice is effectively enforced and a consumer awareness website is put in place to improve consumer awareness.

The alleged policy problem is the perceived high level of consumer harm being caused by subscription services:

The issues that are identified in the consultation primarily appear to be:

1. Unscrupulous Operators

2. Transparency as to whether people are aware they are purchasing a subscription service

3. Concern as to whether a third party can opt somebody into a service on some internet sites

4. Out of Schedule Messages</td></tr>
<tr><td colspan="3">Identification and Description of Options</td></tr>
<tr><td></td><td>No Change</td><td>Need for urgent change is not compelling
Indications from the DPC suggest that complaints have fallen almost</td></tr>
</table>

		50% in the past 2 years, in the case of Regtel calls have fallen 4% in the past year. Other figures provided by Regtel are highly unreliable. **Current code not being enforced** There is strong evidence that the current code of practice has not been enforced effectively (Appendix 2) and so time should be given for Comreg to improve enforcement procedures. The problem should not exist if consumers are properly informed as required by the current code of practice. It is highly likely that complaints will diminish once Comreg takes over regulatory enforcement. **Little understanding of root causes** There is no industry wide complaints handling process so it is likely that consumers are being frustrated and that Regtel statistics are unreliable (See page 29). There is insufficient evidence or understanding of the root issues to make significant changes yet. **No analysis is provided on the impact of proposed changes** There is no understanding of the impact of the proposed change. Consumers may be just as likely to think they will be billed a second time if they respond to a confirmation message. Service Providers businesses are likely to be decimated. Consumers are likely to be deprived of the services they desire. **New licensing regime about to come into force** All Service providers are required to be licensed under the new Act. There are also significant enforcement powers available to Comreg and sizable fines can be imposed on unscrupulous operators. It is likely that his alone will resolve any remaining issue that exist within the sector.
	Limited Change	Before any change is considered a complaints handling process should be put in place so a real analysis of the issues consumers are experiencing can be done. Once this has been done there are a number of measures that could be introduced, depending on the root cause, scale of the issue and an analysis of the impact each regulatory option would have on the market. **Require PIN verification of Web opt-ins** This would eliminate the possibility that a consumer could be subscribed to a service by another person online. This is currently being done by IPPSA members and should be extended industry wide. As part of this process SPs should be required to record the IP Address of the PC used in the web opt-in.

		Mandate ASAI compliance All service providers could be bound to comply with the Advertising Standard Authority of Ireland (ASAI). The ASAI are responsible for setting and maintaining advertising standards in Ireland. They have an extensive code of practice and the operational expertise to ensure all advertising, including PRS advertising meets acceptable standards. **Gold Plated – Industry Complaints handling process** Ensure that all consumer complaints are handled directly by service providers. A reference number should be given to every complainant by the SP and there should be clear timelines that the complaint must be resolved within. Give the benefit of doubt to the consumer and ensure that refunds form part of the process. This would put the onus and cost on service providers to resolve customer complaints. It would also ensure that consumers get satisfaction promptly and in a consistent no matter what service they use. **Improve Consumer Awareness** Modern communications tools should be used to provide children, young adults and parents/teachers with information about phone-paid services. In the UK www.phonebrain.org.uk (Appendix 6) targets the root issue of consumer awareness and has recently won a prestigious Hollis Sponsorship award. Indeed Comregs own www.callcosts.ie website has been highly effective in driving consumer awareness and has won a number of very prestigious awards such as the golden spiders. As an industry we would strongly support such an initiative and believe it would be highly effective in promoting awareness and trust which would undoubtedly drive demand for phone-paid services. **Industry working group** Mobile content and technologies are developing quickly and any effective regulatory regime will need a strong level of active industry participation. Understanding the root causes of issues and the development of reasonable and proportionate responses requires active and timely engagement with those that operate within the industry. We would strongly support the creation of an industry working group that could work with Comreg develop draft proposals for code or practice changes in advance of formal consultation. **Improved information on MNO bills** MNOs could be required to provide improved information on their

		bills. In particular it would be most helpful if consumers were provided with the SP name and customer service number beside any PRS charge. This would ensure consumers can contact the SP concerned with any queries. In conjunction with an industry wide complaints handling process this would empower consumers and ensure easy and swift resolution of queries.
	Acceptance of the proposal for "double opt-in"	**UK style double opt-in** If having implemented more reasonable and proportionate measures there is still a quantifiable issue that would be resolved by introducing double opt-in then it should be implemented in a way that targets the services where there is a greater potential for consumer harm. In the UK this has been done by requiring services that charge more than £4.50 a week to have a double opt-in process. This reflects the reality that lower priced services and particularly those that don't have high joining fees cause less harm. Before this option would be considered a detailed regulatory impact analysis would be needed to ensure that unforeseen consequences are avoided. **Many more reasonable and proportionate measures exist** In the section below we have identified many more proportional measures that should be introduced in advance of a blanket double opt-in. **Double opt-in is likely to confuse consumers.** Single opt-in has been in use for many years. The majority of consumers understand how it works at this stage and could be confused by any changes to the process. There is also considerable risk that consumers would not respond to the double opt-in message for fear they would be charged twice. **The impact of double opt-in would be disproportionate** In conjunction with KPMG we have surveyed members who expect that double opt-in would increase the cost of acquiring customers considerably and would render services unviable. The net impact of this would be the effective elimination of subscription services, at a cost of at least €35.2 Million of the PRSMS market. There would be a similar knock on effect on media outlets who generate significant income from advertising PRSMS subscription services. **Double opt-in fails to target the supposed root issues** Many of the issues being caused in this sector are purportedly due to

		service providers who are not adhering to the current code of practice and who are sending out-of-schedule messages or unscrupulously Double opt-in would only impact service providers who comply with the code and would do nothing to remedy the problems caused by those that don't. In that sense it is a disproportionate remedy that does not target the likely cause of the root issue but rather impacts everyone. It should also be noted that the UK has a different complaints handling process were consumers are primarly dealt with by service providers or networks before being forwarded to PhonePayPlus. They also introduced a number of measures including the phonebrian.org.uk which are also likely to have had a positive effect. **Double opt-in is a technological specific remedy** This means it will not stand the test of time. It is likely to become quickly outdated and in many ways already is, particularly with the advent of app-store type services. It is generally accepted that effective regulation should be technology neutral.

Conclusion:
Double opt-in should not be introduced until the most basic regulatory practices, that have been missing to date, have been implemented and allowed to operate for a reasonable time.

From the menu of options we have highlighted above we suggest that Comreg should take the following approach;

1. The introduction of an industry wide complaints handling process that gives the benefit of the doubt to the consumer and allows reliable statistics to be gathered in relation to any issues that might exist.

2. The introduction of the licensing regime under the new Act and effective enforcement of the provisions therein.

3. The development of a consumer awareness website and the promotion of this to consumers.

4. The establishment of an industry working group that can actively address any concerns as they arise and deal with the issues that ongoing technological development presents.

5. In advance of any actions that may negatively impact consumers or industry there should be a clear analysis of the underlying cause and then only reasonable and proportionate remedies should be introduced.

Q. 18. Should ComReg prohibit the use MT billing (reverse-billed SMS) by PRS providers? Should MT billing be permitted only for certain types of services?

Basis for suggesting this remedy	
	Comreg seems to be a suggesting that no matter what regulations are introduced that some unscrupulous operator will breach them and that the judicial systems of the Irish state are insufficient to ensure compliance with the law. It goes on to suggest that the only solution is to prohibit MT-billing. This is the akin of prohibiting Direct Debits or Credit Cards or any other form of payment purely on the basis that criminals might make use of them. It is totally preposterous that an entire industry would be decimated because those responsible for regulation have not conducted a detailed analysis of the problem and have not considered more proportional options. There is no evidence in Ireland that the regulatory or judicial processes have been an ineffective deterrent. Indeed the experience of the Data Protection Commissioner is very different. He states in his most recent report; *"Regarding unsolicited marketing text messages, my Office opened 50 fewer complaints in 2009 than in 2008, and almost 250 fewer complaints than in 2007. This decrease can be attributed to the effect on the text marketing sector of prosecution proceedings which I lodged in the District Court towards the end of 2007 against a number of companies operating in the premium rate text messaging sector."* It is clear that the ODPC believes that they have sufficient powers to pursue offenders, and have not only prosecuted several Aggregators and Content Providers but have seen a successful outcome in the form of reduced complaints and issues arising as a result. The most recent Act covering this sector providers very significant penalties of up to €250,000 on firms that break the law. It is totally unfathomable how Comreg might think that as a result of this tough legislation that the risks from rogue operators is significant. Not only does the new legislation require licensing of all parts of the value-chain it creates a specific offence around out-of-schedule billing. No attempt is made in the consultation to quantify the scale of any issue around rogue service providers and no consideration is given to more reasonable or proportional remedies. **The misguided assumption that MO payment is a suitable replacement for MT payments** There are number of reasons that this is not the case; 1. If competitions use MO-Payment the consumer will be billed upon sending their entry even though the competition may be closed. With MT the service provider can send a free message to the consumer informing them that the

competition is closed. A similar issue exists for TV voting where the vote has closed. MT-billing is considerably more suitable for such services.

2. As suggested in the consultation If MO codes were used to bill consumers for subscription services it would be necessary for high tariff MO (€10 or €20) codes to be used so that a reasonable period of subscription could be initated. A number of specific issue would arise;

    a. Customers would be billed even if the keyword they sent was un-recognised and could not be processed. Each further attempt would be billed at €10 or €20 per message even though no content could be provided. Currently SPs can respond with a free error message and therefore the consumer is not billed for content they did not receive

    b. Once the customer has signed up, if they were to try opting out of marketing messages, they would be charged the full MO charge again for sending STOP to the MO short code. Sending stop is a natural response and has been ingrained in the public consciousness over the past number of years.

    c. If the user decided to cancel their subscription by sending STOP to the short code they would be charged the full cost of the MO, €10 or €20.

    d. Network latency is a common issue with SMS and it is not uncommon for consumers to become impatient if they do not receive an instant response. They then send multiple requests for content. If MO was used the consumer would be billed for each message sent. Unscrupulous operators could implant a deliberate delay to encourage multiple messages from un suspecting users.

3. In the event that MO was used to order content there would be significant risk that if the content was unavailable or the keyword/content code provided by the user did not match any particular item the user would be charged even though no content could be delivered. With MT the service provider can respond with a free error message and the consumer is not billed. This generally occurs in 10 % of cases.

4. In an MO-payment environment the customer is billed for sending the message, irrespective of whether the content they requested can be supplied. We believe that MO-Payment, in the context of billing for content or service is incompatible with section 13(c) of the legislation as it is clear that under the legislation consumers can only be charged if the content is supplied. MT-Payment is the only payment mechanism that ensures that payment is linked to the supply of content.

5. MT is the most widely accepted model (over 90% of all PRSMS traffic) and has been implemented across all the entire industry. 10s of millions of euro have been invested in developing services, billing systems and educating consumers. It would not be possible to change the entire industry from MT to

MO without many years development and many 10s of millions of investment.

6. High tariff MO would open up more options for abuse by unscrupulous operators; tricking customers into sending MO messages, faking SMS latency or even using smart-phone applications to initiate MO messages without the knowledge of the consumer.

7. The consequence of sending an MO to a high tariff caused the consumer to be instantly billed. There is no opportunity for the consumer to receive a regulatory message informing them of the charges in advance of them being billed. There is no opportunity for a cooling off period. The consumer cannot reverse their decision by sending stop.

8. Many prepaid customers may not have sufficient credit to send high tariff MOs. This would prevent them from consuming the services they desire. Significant analysis would need to be done to verify that the majority of prepaid consumers would have sufficient credit to text a high tariff MO code. This would require that 80% of prepaid users would need an available credit balance of more than €20 euro.

9. Prepaid consumers that have sufficient credit to send an MO would likely be left with almost no credit after responding to an MO message.

10. By charging customers €10 or €20 euro in advance for a service there is a significant disincentive for consumers to try services. Currently consumers can try the service and STOP anytime with little ore no risk.

It is clear that MO is not a realistic alternative to MT and that in itself it will create a whole raft or consumer issues and does nothing to prevent unscrupulous operators from harming customers. Indeed it potentially opens even more harmful ways for unscrupulous operators to harm consumers.

The false assumption that PRS services are attractive to children.
The assertion that many mobile services are attractive to children is not borne out by research conducted by Amarach consulting on behalf of the IPPSA (Appendix 7). In the case of Competitions, which are by far the most popular form of premium rate service there is a significant bias towards consumers aged 25+. It is interesting to note that use of competitions tails off very significantly between 16-24.

In general it is clear from this research is that overall PRS services are not particularly attractive to children and that such assertions are misguided.

It is reasonable that services that are unsuitable for children would not be marketed during children's programming on TV or within children's magazines. It is not however reasonable or proportional to restrict MT-billed services on the basis that they are attractive to children.

The assertion that children are less informed consumers and are less likely to pursue a complaint is premised on the false assumption that children are significant users of PRS service. This is a baseless assumption. It also ignores the fact that parents or

	guardians of children are very likely to pursue a complaint in the event that they feel their child has been treated unfairly. **The inaccurate statement that prepaid users have no access to billing information.** Prepaid users are most acutely aware for their credit balances and have instant access to 'balance on screen' which allows them to check their credit anytime for free. In some cases mobile networks, such as O2, provide access to online bills (Appendix 4). Prepaid customers also have access to freephone 19XX customer service numbers. Often this number is pre-programmed the consumers address book. Mobile networks are improving the level of service and access to billing information all the time. There is not basis to suggest that prepaid users are unaware of their credit balance or that they do not have easy access to it. Further improvements could be made to some mobile operator websites to facilitate improved access to prepaid bills and no doubt this will happen over time. **Assertion that services should be classified and restricted based on their type.** There seems to be a suggestion that certain services may attract vulnerable consumers and that these types of services could in some way be classified. The consultation seems to suggest that services could be classified based on 'information type' services and 'entertainment type' services. An assumption is being made that entertainment-type services may be more attractive to vulnerable consumers, particularly children. It is our experience that that is not a sound basis for classification. A case in point is that while competitions might be considered entertainment, they are in no way attractive to children. If there is to be any classification it should be on the basis of services that are designed and targeted towards children and those that are not. It is reasonable to place some restrictions on services aimed towards children. It is also reasonable that services that are not aimed towards children should not be promoted during children's TV programmes or in childrens magazines. It should be noted that under European Communities (Directive 2000/31/EC) Regulations 2003 services cannot be subjectively restricted in manner being suggested by Comreg. **The false assertion that consumers have no control over MT-payments.** The only scenario that consumers have no control over MT-payments is when an unscrupulous service provider breaks the law and sending unscheduled messages.

	This scenario is unlikely to exist given the harsh penalties within the legislation. In every other case the service provider only bills the consumer for services that they have requested. In the case of MT-Billed services the consumer is provided will all the information required in advance of signing up to the service. They are then sent a clear text message that outlines how the service works, how much it costs, and how to stop from the service. They may send STOP anytime. They are in total control. Each time they have spent €20 they are reminded of the service terms again and provided with the customer service number of the provider as well as details on how to stop from the service. Service providers can only bill the consumer in accordance with the terms published and any billing outside this is an offence under the Act. It is clear that consumers are full in control and protected by the law at every step. There is no basis to say that consumers are not fully in control.	
Identification and Description of Options		
	No Change	**Need for urgent change is not compelling** Indications from the DPC suggest that complaints have fallen almost 50% in the past 2 years, in the case of Regtel calls have fallen 4% in the past year. Other figures provided by Regtel are highly unreliable. **Current code not being enforced** There is strong evidence that the current code of practice has not been enforced effectively (Appendix 2) and so time should be given for Comreg improve enforcement procedures. The problem should not exist if consumers are properly informed as required by the current code of practice. It is highly likely that complaints will diminish once Comreg takes over regulatory enforcement. **Little understanding of root causes** There is no industry wide complaints handling process so it is likely that consumers are being frustrated and that Regtel statistics are unreliable (See page 29). There is insufficient evidence or understanding of the root issues to make significant changes yet. **No analysis is provided on the impact of proposed changes** There is no understanding of the impact of the proposed change. Consumers may be just as likely to think they will be billed a second time if they respond to a confirmation message. Service Providers businesses are likely to be decimated. Consumers are likely to be deprived of the services they desire.

		New licensing regime about to come into force All Service providers are required to be licensed under the new Act. There are also significant enforcement powers available to Comreg and sizable fines can be imposed on unscrupulous operators. It is likely that his alone will resolve any remaining issue that exist within the sector regarding unscrupulous operators. **The basis for suggesting change is flawed** Almost every basis that Comreg has considered this issue are material flawed or based derived data or data that has not been shared in the consultation.
	Alternative options	Assuming that following analysis it was deemed necessary to add additional protection to consumers from unscrupulous operators then there are a number of more proportional options **Require a bond from providers of MT services** This would be an added deterrent to any unscrupulous operators and could be used to compensate any consumers affected in the event that an unscrupulous operator absconded or failed pay relevant refunds. The process that providers would need to go through in order to get a bond would also weed out unscrupulous operators. **Allow consumers to bar access to PRS services.** This would allow parents or guardians to bar access to PRS services from their children's phones thereby giving the parent full control. **Restrict advertising PRS services in children's programmes** This would ensure that unsuitable services are not targeted towards children. **Create an awareness website targeted at children.** This has been particularly successful in the UK. See www.phonebrain.org.uk (Appendix 6) Once such a site is in place MNOs could send a message to their customers each quarter informing them of the existence of the awareness website. **Informational Top-up messages** MNOs could provide additional information to consumers when they top-up their phones. This might include details of how they can check their bills online, etc.
	Acceptance of Comreg 's proposals	**Is disproportionate as it decimates all service providers** Currently 90% of PRSMS services use MT billing. According to the KPMG report the impact of the Comreg proposal would result in a reduction in revenues in the order of X%. This would totally decimate

		the industry. **Does not protect consumers from rogue service providers** Rouge service providers can use smart-phone applications to perpetrate MO based scams. These scams would be just as damaging to consumers. Only law abiding service providers would be damaged by this approach. Rogues would not. The solution to rouge operators is adequate enforcement of the law. **It reduces consumer choice**There will be less competitors and less services for consumers to choose from. As a result it is likely that costs to consumers will rise. **It stifles innovation** Irish companies in this sector generally operate internationally. It is important that they can develop services using the same types of billing models that are common internationally. MT-payment as a model is being used within app-stores and in relation to online micro-payment. It is important that innovation is not restricted or Irish companies will be placed at a significant competitive disadvantage. **It goes against government policy** As recently as February 2010 the Minister for Finance, Brian Lenihan, confirmed that "Government policy is to promote the increased use of electronic payments throughout our economy" m-payments form an integral part of the e-payment eco system and this proposal from Comreg would effectively eliminate the most important and most common form of m-payment. It is critical that a sound regulatory framework be put in place to enable m-payments rather than prohibit or restrict them. **It is out of step with international practice.** This has not been the approach of markets such as the UK. Regulating any market poses challenges and no regulator will achieve 100% success on day one. It is however the role of the regulator to facilitate the orderly development of the market while at the same time protecting consumers from harm. It is totally unreasonable for a regulator to begin their regulatory

		approach with prohibition.

Conclusion:

We do not believe Comreg should prohibit or restrict MT billing. It would be a totally unreasonable and disproportionate response to a problem that has not even been properly analysed.

The suggestion that MO is a real alternative to MT or that it would protect consumers from unscrupulous operators is gravely flawed, as outlined above.

There are many more proportional responses to the specific issues that Comreg has identified as possible issues with MT-Billing.

From the menu of options we have highlighted above we suggest that Comreg should take the following approach;

1. The introduction of an industry wide complaints handling process that gives the benefit of the doubt to the consumer and allows reliable statistics to be gathered in relation to any issues that might exist.

2. The introduction of the licensing regime under the new Act and effective enforcement of the provisions therein.

3. The development of a consumer awareness website and the promotion of this to consumers.

4. The establishment of an industry working group that can actively address any concerns as they arise and deal with the issues that ongoing technological development presents.

5. In advance of any actions that may negatively impact consumers or industry there should be a clear analysis of the underlying cause and then only reasonable and proportionate remedies should be introduced.

Q. 19. Should ComReg prohibit the use of "invisible" reverse billed (MT) SMS by PRS providers?

It is reasonable to prohibit 'invisible' messages as outlined in the consultation. However, rather than prohibit the user of 'invisible' messages outright we would suggest that if service providers are using invisible SMS that they must make consumers aware that their phone is being charged for services they are consuming in another way that is clear and transparent.

This may be particularly applicable in app-store or portal type environments.

It is not always the case that there is a linkage between messaging and billing. The most important principle is that consumers are informed. Prohibiting any particular technology only leads to a dated and ineffective code or prevents innovation.

Conclusion:
No, Comreg should not prohibit the use of 'invisible' reverse billed (MT) SM without further study into the actual usage and extent of the problem, as well as consultation as part of an industry working group.

Q. 20. Should ComReg prohibit chargeable messages being "stored-up" for delayed sending, when a pre-pay account is out of credit?

<table>
<tr><td colspan="3">Basis for suggesting this remedy</td></tr>
<tr><td></td><td colspan="2">There is an assumption that prepaid consumers may have difficulty in unsubscribing from subscription services because there is a cost in responding to 5XXXX shortcodes.

While in some cases this is true, it is also the case that many service providers provided free 50XXX shortcodes that allows consumers to send STOP even when they have no credit.

There is also an assumption that messages are 'stored up' and delivered in quick succession once the account is topped up. This is not the case. Generally service providers attempt to deliver messages once per day. This attempt is not linked with the user having topped up.

It is not the case that such messages will be triggered by the user topping up. On average a consumer will have 12 hours to stop from a service after they have topped up.

It should be noted that when pre-paid run out of credit they can still receive calls and texts. Prepaid users are also able to send free 'Ring Me' texts messages to their parents, guardians or friends when they have no credit.

Overall the issue highlighted here is not significant and can be addressed is a more proportional way.</td></tr>
<tr><td colspan="3">Identification and Description of Options</td></tr>
<tr><td></td><td>No Change</td><td>This would be in line with the current COP</td></tr>
<tr><td></td><td>Limited Change</td><td>Make texting PRS MT short-codes Free
The sending of all messages to premium short codes should be billed to the sp and free to the user so they can always stop, even if they have no credit.

Clear all pending PRS messages if STOP is received.
The sending of 'stop' should clear the queue of any pending PRSMS messages. This would ensure that prepaid consumers can easily unsubscribe from services anytime and that when they do top-up that no queued messages would arrive.

Prohibit the accumulation of charges beyond one subscription period.
This would mean that if a consumer is availing of a weekly subscription and their messages are not delivered during that week, that they cannot be retried the following week. This will ensure the number of messages that could ever queue would be minimal.

Publicise the 'Call Me' Text so prepaid users can always be contacted.
Some research should me conducted to see how many prepaid consumers are aware of the 'Call Me' functionality provided by</td></tr>
</table>

		MNOs. If awareness is low then MNOs should further publicise the 'Call Me' functionality so that all prepaid consumers are aware of it.

Conclusion:
No, Comreg should not prohibit chargeable messages being 'stored-up' for delayed sending, when a pre-pay account is out of credit. Instead the options proposed above should be considered as part of a more detailed discussion in an appropriate industry working group.

Q. 21. Should MNOs in Ireland be required to provide all customers with the option of barring premium calls and/or barring consumer access to Premium SMS/MMS, whether on an outgoing (MO) or incoming (MT) basis?

Conclusion:
We agree that consumers should be provided with a facility to bar access from their phone to premium SMS/MMS.

While it is obvious that the vast majority of consumers wish to have access to premium rate services this option would provide additional control to both consumers and parents.

Q. 22. Should ComReg restrict the class, or type, of service that can operate a subscription payment model?

Basis for suggesting this remedy	
	There seems to be no basis as to why certain types or classes of services should be restricted. In particular a subjective classification based on irregular alerts verses access to content seems entirely arbitrary. It is likely being made because of a total mis-understanding of the market, where entertainment-type subscription services represent the vast majority of services. This naturally means that most of the complaints regarding subscriptions are relating to entertainment type services. Indeed the evidence suggests that consumers generally do wish to subscribe to many forms of content including; magazine subscriptions, cable TV packages, mobile phone packages, music & video content, online dating, etc. In these examples delivery of the content is not linked to alerts or events. In fact the vast majority of non phone-paid subscriptions are not linked to alerts or time based events. From the Amarach Research report we can see that 25% of the population are entering competitions monthly or more frequently. This represents about 900,000 people. It is totally reasonable that a high percentage of these people would wish to subscribe to a competition service that allows them greater access to competitions at a low weekly or monthly cost. The majority of consumers subscribing to subscription competitions have been subscribers previously and are returning to the service. This pattern is not unique to competition services and is common across most of the 'entertainment-type' subscription services. The assertion that 'the consumer wants one ringtone and not several per week' shows a complete misunderstanding of the market. Many consumers actively consume content on a daily basis, be it music, chat, news or other digital content and such consumers are attracted to fixed priced all you can eat subscriptions. It is much more likely that problems with subscription services are linked to unscrupulous operators being allowed to operate in contravention of the current code of practice or the lack of a clear industry wide complaints handling process. It is important to note that according to Amarach Research (Appendix 7)there is significantly negative feelings towards the Government being the ones to decide what services you are permitted to access on your phone with 68% disagreeing that control should fall at a government level. Any restrictions on services must be considered in the context of the European Communities (Directive 2000/31/EC) Regulations 2003 which clearly spells out the very limited circumstances where restrictions can be placed on services. The suggestion that certain classes/types of subscription service could be provided using MO is discounted in our Q.18 response.
Identification and Description of Options	

	No Change	**Need for urgent change is not compelling** Indications from the DPC suggest that complaints have fallen almost 50% in the past 2 years, in the case of Regtel calls have fallen 4% in the past year. Other figures provided by Regtel are highly unreliable. **Current code not being enforced** There is strong evidence that the current code of practice has not been enforced effectively (Appendix 2) and so time should be given for Comreg improve enforcement procedures. The problem should not exist if consumers are properly informed as required by the current code of practice. It is highly likely that complaints will diminish once Comreg takes over regulatory enforcement. **Little understanding of root causes** There is no industry wide complaints handling process, so it is likely that consumers are being frustrated and that Regtel statistics are unreliable (See page 29). There is insufficient evidence or understanding of the root issues to make significant changes yet. **No analysis is provided on the impact of proposed changes** There is no understanding of the impact of the proposed change. Consumers may be just as likely to think they will be billed a second time if they respond to a confirmation message. Service Providers businesses are likely to be decimated as entertainment type subscription services make up 79.8% of providers revenues. Consumers are likely to be deprived of the services they desire.
	Limited Change	Before any change is considered a complaints handling process should be put in place so a real analysis of the issues consumers are experiencing can be done. Once this has been done there are a number of measures that could be introduced, depending on the root cause, scale of the issue and an analysis of the impact each regulatory option would have on the market. **Mandate ASAI compliance** All service providers could be bound to comply with the Advertising Standard Authority of Ireland (ASAI). The ASAI are responsible for setting and maintaining advertising standards in Ireland. They have an extensive code of practice and the operational expertise to ensure all advertising, including PRS advertising meets acceptable standards.

		Gold Plated – Industry Complaints handling process Ensure that all consumer complaints as handled directly by service providers. A reference number should be given to every complainant by the SP and there should be clear timelines that the complaint must be resolved within. Give the benefit of doubt to the consumer and ensure that refunds form part of the process. This would put the onus and cost on service providers to resolve customer complaints. It would also ensure that consumers get satisfaction promptly and in a consistent no matter what service they use. **Restrict advertising PRS services in children's programmes** This would ensure that unsuitable services are not targeted towards children. **Improve Consumer Awareness** Modern communications tools should be used to provide children, young adults and parents/teachers with information about phone-paid services. In the UK www.phonebrain.org.uk (Appendix 6) targets the root issue of consumer awareness and has recently won a prestigious Hollis Sponsorship award. Indeed Comregs own www.callcosts.ie website has been highly effective in driving consumer awareness and has won a number of very prestigious awards such as the golden spiders. As an industry we would strongly support such an initiative and believe it would be highly effective in promoting awareness and trust which would undoubtedly drive demand for phone-paid services. **Industry working group** The mobile content and technologies are developing quickly and any effective regulatory regime will need a strong level of active industry participation. Understanding the root causes of issues and the development of reasonable and proportionate responses requires active and timely engagement with those that operate within the industry. We would strongly support the creation of an industry working group that could work with Comreg develop draft proposals for code or practice changes in advance of formal consultation.
	Restriction based	**The impact of restricting types or classes of subscription**

	on type	**services would be disproportionate** In conjunction with KPMG we have surveyed members who confirmed that the effective elimination of entertainment type subscription services, would impact 79.8% of the revenues being generated by PRSMS. There would be a similar knock on effect on media outlets who generate significant income from advertising PRSMS subscription services.

Conclusion:
We do not believe Comreg should prohibit or restrict certain classes or types of Subscription service. It would be a totally unreasonable and disproportionate response to a problem that has not even been properly analysed.

The suggestion that MO is a real alternative to MT or that it would protect consumers from unscrupulous operators is gravely flawed, as outlined in our Q.18 response.

From the menu of options we have highlighted above we suggest that Comreg should take the following approach;

1. The introduction of an industry wide complaints handling process that gives the benefit of the doubt to the consumer and allows reliable statistics to be gathered in relation to any issues that might exist.

2. The introduction of the licensing regime under the new Act and effective enforcement of the provisions therein.

3. The development of a consumer awareness website and the promotion of this to consumers.

4. The establishment of an industry working group that can actively address any concerns as they arise and deal with the issues that ongoing technological development presents.

5. In advance of any actions that may negatively impact consumers or industry there should be a clear analysis of the underlying cause and then only reasonable and proportionate remedies should be introduced.

Q. 23. Do you agree with ComReg's recommendation in relation to cancellation of subscription services and marketing opt-ins when an account expires or the number is quarantined?

Conclusion:
The issue here is that there have been instances where the lack of a common agreed process on the removal of numbers from services and promotional lists following the cessation of an account and the reallocation of a number have caused problems.

There should exist a;

1. Common and Clear Failed delivery message error from MNOs indicating subscriber number quarantine.

2. Clear, Industry wide, Protocol on handling of the issue

We broadly agree with Comreg's proposal in this regard and believe that this issue should be addressed via an industry working group.

Appendices

Appendix 1 Review of Scope of Regulation for Premium Rate Services – Europe Economics

Appendix 2 Strategic Review of Regulation of PRS services in Ireland – Europe Economics (Released under FOI, following successful appeal)

Appendix 3 Market Map of UK PRS industry – PhonePayPlus.

Appendix 4 Copy of online bill for Prepaid O2 user

Appendix 5 Draft proposals on STOP command send by IPPSA to Regtel

Appendix 6 Screen shots of www.phonebrain.org.uk

Appendix 7 Survey on consumer usage of PRS services - Amarach Research

Appendix 8 Figures compiled by KPMG regarding industry revenues and impact

Appendix 9 Current Regtel Subscription COP requirements

Appendix 10 Article 29 Working Party guidelines on the protection of children's personal data

Appendix 1

Review of Scope of Regulation for Premium Rate Services – Europe Economics

Review of Scope of Regulation for Premium Rate Services: Comparison Study of e-commerce Payment Mechanisms

A Study for Ofcom
by Europe Economics

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1 EXECUTIVE SUMMARY

Introduction

1.1 This report has been produced by Europe Economics for Ofcom as part of Ofcom's general review of the role, structure and application of regulation for premium rate services (PRS) and in light of the growing importance of PRS as a micro payment mechanism. The primary objective of this study is to compare the regulation of PRS against that of other e-commerce payment mechanisms and to consider the efficacy of different regimes in preventing and addressing consumer harm.

1.2 To conduct this study, Europe Economics collected data from publicly available information sources, including published research, corporate material and media reports, and obtained information and views from industry participants, regulators and industry associations. Work was undertaken in four areas:

a) Auditing the e-commerce payment mechanisms currently in use in the UK;

b) Identifying any new payment mechanisms that might become active in the short to medium term;

c) Establishing what legislation and regulation applies to the payment mechanisms identified and what may apply as a consequence of the e-commerce review and Payments Directive; and

d) Evaluating the risks that the different payment mechanisms present for consumers and how regulations mitigate these risks.

Conclusions

1.3 Having reviewed the different e-commerce payment mechanisms, including PRS, we find that the consumer risks and regulatory issues arising can more clearly be compared for the different payment mechanisms when distinguishing between micro payments and larger payments. There are important differences between the consumer risks and regulatory treatment of payments (and payment systems) designed for small value transactions compared with those established to handle larger value transactions. In particular, we feel that the existing well-established consumer protection measures governing issues related to payment systems transactions are considerably more likely to be well-enforced in the context of more significant larger value payments.

1.4 All of the e-commerce payment mechanisms studied in this report face the same or very similar risk issues, particularly as regards consumer protection concerns, such as:

a) Providing clear information to the consumer as to the nature of the transaction and the consumer's responsibilities;

b) Providing a clear process whereby the consumer positively authorises a transaction to take place;

c) Providing a clear and straightforward process whereby the consumer can cancel ongoing (subscription) services;

d) Providing clear and easily accessible billing records; and

e) Providing measures for redress and complaint handling in case of problems.

1.5 Legislative measures and regulations governing financial prudence are generally clearly set out, well understood and widely enforced. However, the regulation and practical enforcement of consumer protection issues vary considerably for the different e-commerce payment mechanisms. Whereas PRS are regulated under the ICSTIS Code, with specific requirements in terms of the consumer information to be provided and establishing complaint mechanisms, in practice other e-commerce payment mechanisms have no specific regulatory supervision in respect of consumer protection issues. While it is true that, in many cases where there is a potential cause for complaint, general consumer protection legislation could ultimately provide a means for redress, in the context of the e-commerce micro payments market, such forms of redress are unlikely to be effective, not least because the relevant regulatory authorities would tend naturally to prioritise complaints about higher value issues and complaints where evidence of harm can more easily be obtained.

1.6 There would clearly be some value in standardising (at least to some extent) the scope and degree of protection offered to consumers when using micro payment mechanisms for e-commerce. Such standardisation would provide consumers with confidence that they enjoy at least the basic levels of consumer protection, regardless of which payment mechanism they select for e-commerce transactions. Moreover, requiring payment mechanism providers all to offer a standardised level of consumer protection would ensure that all of the e-commerce payment systems could compete on a relatively level playing field, with broadly similar compliance costs.

Recommendations

1.7 Based on our review of the market, we believe that there is a prima facie case for some form of light touch regulation in the e-commerce micro payments market. While there is a developing competitive market, most of the payment mechanisms are not well developed or very widely used by the majority of consumers. Many of the providers of such payment mechanisms do not have established brands and reputations in the area of payment services. This means that many consumers may not have the level of confidence in e-commerce micro payment mechanisms which is required to encourage more widespread use. Any consumer protection problems that may arise in the future and which are not (or can not be) resolved could give rise to further significant concerns about the robustness of such payment mechanisms and substantially dampen consumer trust and demand.

1.8 We do not believe that a company-specific or scheme-specific rules provide sufficient protection for consumers in the absence of a strong brand protection driver and while the e-commerce micro payment market is still in its formative stages. Such rules do not amount to an effective form of "self-regulation" since:

a) they can be changed at short notice and without consultation;

b) there is potential for the rules to be applied arbitrarily or in a fragmented manner (by different providers within the same payment scheme);

c) there is a lack of independence and transparency in the manner in which the rules are drawn up and enforced; and

d) there is no (or at best very limited) means of enforcement or redress by outside parties against the scheme members.

1.9 We believe that it may be disproportionate to apply the full terms of the current ICSTIS Code to e-commerce micro payment mechanisms. Many of the rules of the ICSTIS Code may not be relevant to the payment mechanisms, depending on their individual design. Some of the rules may not be required since many payment mechanism providers remain fully independent of the goods or service being supplied (unlike a traditional PRS). More importantly, the ICSTIS Code may be too slow to adapt to the fast-moving requirements of the sector because of its remit to govern PRS (and not e-commerce payment mechanisms, as such).

1.10 We would therefore recommend that an alternative model should be adopted to provide consumer protection for users of e-commerce micro payment systems. The model we recommend would essentially be a self-regulatory model but with important controls to address the concerns listed above with regard to company-specific and scheme-specific rules. The design of this regulatory approach would provide flexibility so that the rules could be amended rapidly to adapt to the fast developing market but would also incorporate independent oversight and transparency to ensure that the rules remained fair and open, and were appropriately enforced.

1.11 We agree with the concerns of those payment mechanism providers who argue that it would be unfair to impose regulations on some providers and not on all (or to impose different requirements on different providers). Ideally, all providers of e-commerce micro payment mechanisms should face the same (or very similar) requirements in terms of consumer protection measures. However, we note that achieving a uniform regime may be very difficult.

1.12 While it is outside the scope of our terms of reference, we therefore would recommend that there is a need for a cross-sectoral governmental and regulatory review to consider the consumer protection requirements of e-commerce micro payment systems and how such consumer protection measures could be enforced in a uniform manner.

2 INTRODUCTION

2.1 This report presents the results of a study carried out by Europe Economics for Ofcom on the subject of e-commerce payment mechanisms.

Context of the report

2.2 In light of increasing convergence in the communications sector and the growing importance of premium rate services (PRS) as a micro payment mechanism, Ofcom considers that the time is now right for a first principles examination of the role, structure and application of regulation in this area. The aim of Ofcom's review is to consider whether current PRS regulation meets the needs of consumers whilst supporting an innovative and growing PRS industry.

2.3 Specifically, Ofcom will consider: the characteristics of the PRS sector; the consumer experience of PRS; the types of services, including new services, that are subject to current PRS regulation; the extent of protection for consumers from the current rules and, in light of these considerations, whether the current regulations are proportionate.

2.4 As part of this wider review into the scope of regulation for PRS, Ofcom has commissioned this report to develop its understanding of the different payment mechanisms that operate for e-commerce, particularly in regard to current and proposed legislation in Europe, and the regulations and redress mechanisms that apply to such payment mechanisms.

Study Objectives

2.5 The primary objective of this study is to compare the regulation of PRS against that of other e-commerce payment mechanisms, while discussing the efficacy of different regimes in preventing and addressing consumer harm.

2.6 The tender document requests four areas of work:

a) Auditing the e-commerce payment mechanisms currently in use in the UK;

b) Identifying any new payment mechanisms that might become active in the short to medium term;

c) Establishing what legislation and regulation applies to the payment mechanisms identified and what may apply as a consequence of the e-commerce review and Payments Directive; and

d) Evaluating the risks that the different payment mechanisms present for consumers and how regulations mitigate these risks.

Methodology and Data

2.7 This section briefly discusses the methodology employed in gathering the information presented in this study.

2.8 Generally, the project team followed two complementary approaches:

a) Collected data from publicly available sources; and

b) Obtained information and views from a range of different stakeholders.

Publicly Available Information

2.9 The project team collected data from a range of different publicly available sources, including published research, corporate material and media reports. For example, the websites of payment mechanism providers, such as PayPal and ClickandBuy, supplied some information as to how those payment mechanisms work and views as to how those providers' operations are regulated. Other publicly available sources also provided useful information as to what sort of payment mechanisms are expected to appear in the e-commerce market in the near future.

2.10 The use of such publicly available information directed us to the types of payment mechanisms that were relevant for this study and informed us of their key characteristics. We then followed up this information with more detailed discussions with relevant stakeholders, where possible.

Stakeholders' Views

2.11 The project team contacted a number of relevant stakeholders. Our contact generally took the form of an initial questionnaire, supplemented by discussions. In cases where stakeholders were available for a discussion, Europe Economics met them, using the questionnaire as a basis for the discussion. In other cases, stakeholders simply completed the questionnaire. The stakeholder discussions took a number of different forms (face-to-face meetings, telephone conferences and email exchanges), reflecting the need to be as efficient as possible given the short timescale of this project.

2.12 The stakeholder communications achieved the following:

a) Provided the project team with information regarding the characteristics of individual payment mechanisms;

b) Helped the project team determine which new payment mechanisms are expected to appear in the UK market in the short to medium term;

c) Provided views on different relevant forms of regulation for each payment mechanism and how the forthcoming Payment Services Directive may affect the regulation of the different payment mechanisms; and

d) Informed the project team of the risks that consumers face when using e-commerce payment mechanisms.

2.13 Two types of stakeholders were contacted:

a) Industry participants; and

b) Other organisations, such as regulators and industry associations.

2.14 In contacting industry participants, we were primarily attempting to obtain factual information (e.g. how many retailers accept the payment mechanism; how many users use each specific payment mechanisms; and how long has the payment mechanism been operational). In addition, we asked industry participants for their views on issues relevant to consumer protection. While the views of the industry participants were still valuable in this area, we were careful to filter their views in the light of their likely commercial focus. We took similar care to balance the views of other relevant organisations, such as the FSA, ICSTIS, trade associations and consumer representative groups.

List of Stakeholders Contacted

2.15 The project team contacted the following stakeholders:

a) PayPal and PayPal Mobile;

b) ClickandBuy;

c) ICSTIS;

d) FSA;

e) Mobile Broadband Group;

f) Mobile Data Association;

g) Association of Communication Service Providers;

h) mblox; and

i) BT.

2.16 A number of other stakeholders were contacted but, unfortunately, due to the short timescale of the project, not all parties were able either to complete the questionnaire or to arrange discussions with Europe Economics.

About Europe Economics

2.17 Europe Economics is an independent economics consultancy, specialising in economic

regulation, competition policy and the application of economics to public policy and business issues. The firm advises a wide range of clients, including government departments, regulators, international bodies, law firms and private sector companies. It is especially experienced in network industries generally and in the communications sector particularly.

2.18 More details on the firm can be found at www.europe-economics.com.

Structure of the report

2.19 This report is structured along the following lines:

a) Identification and discussion of the various payment mechanisms;

b) Description of the regulatory framework currently in operation;

c) Discussion of the risks to consumers and other users of these payment mechanisms; and

d) Conclusions and recommendations.

3 PAYMENT MECHANISMS

Introduction

3.1 In this section we describe PRS as a payment mechanism and compare it to other e-commerce payment mechanisms.

3.2 There are many payment mechanisms which are used for e-commerce in addition to (or in competition with) PRS. Most of these payment mechanisms operate on a relatively small scale, ie. are currently not extensively used by consumers, although there is increasing customer awareness of some of the payment mechanisms, as shown in the table below.

Table 3.1: Adoption rate of new payment systems in Europe

	Country of origin	Platform	Use system	Aware of system	Adoption rate
GeldKarte	DE	Smartcard	14%	1%	0.21
PayPal	UK	Online	13%	29%	0.45
Postpay	IT	Prepaid card	5%	39%	0.11
Moneo	FR	Smartcard	4%	79%	0.05
PayPal	DE	Online	3%	18%	0.17
FIRSTGATE Click&Buy	DE	Online	2%	8%	0.3
MONETA Online	IT	Online	2%	17%	0.12
PayPal	FR	Prepaid card	1%	5%	0.29
PayPal	IT	Online	1%	6%	0.21
NOCHEX	UK	Online	1%	8%	0.16
BT click&buy	UK	Online	0.7%	10%	0.07
BANKPASS Web	IT	Online	0.6%	6%	0.09
EggPay	UK	Online	0.6%	12%	0.05
Catxa Movil	ES	Mobile	0.5%	21%	0.03
w- HA	FR	Online	0.5%	1%	0.37
FastPay	UK	Online	0.4%	6%	0.07

Source: "Which New Payments Do Europeans Use?", March 2005, FR.

3.3 These payment mechanisms are mostly offered by electronic money institutions. An electronic money institution is entitled to issue electronic money and is defined in the E-Money Directive (2000/46/EC) as follows:

> "'electronic money institution' [is] an undertaking or any other legal person, other than a credit institution as defined in Article 1, point 1, first subparagraph (a) of Directive 2000/12/EC which issues means of payment in the form of electronic money;
>
> 'electronic money' shall mean monetary value as represented by a claim on the issuer which is:

(i) stored on an electronic device;

(ii) issued on receipt of funds of an amount not less in value than the monetary value issued;

(iii) accepted as means of payment by undertakings other than the issuer."

3.4 In the UK, an electronic money institution is authorised by and is subject to the regulations of the Financial Services Authority (FSA).

3.5 Generally, an electronic money institution has to meet the following FSA requirements:

a) Strict requirements apply to proof of capital and funds. In addition, an electronic money institution must at all times have sufficient liquid assets available to repay all outstanding electronic money.

b) There are also clear requirements regarding the security of investments that define how the capital resulting from outstanding electronic money can be invested.

c) Regarding the suitability of the persons responsible for the management of the company, the following applies: at least two independent minds should be applied to both the formulation and implementation of the policies of the firm (the FSA assesses whether at least two individuals effectively direct the business of the firm).

d) An electronic money institution is required to provide adequate operating systems and processes in order to protect the company from operating risks.

3.6 These, and other regulatory issues, are discussed in more detailed in the following section of this report dealing with the regulatory framework.

Payment Mechanisms Covered

3.7 The payment mechanisms covered in this study are the following:

a) Premium rate services (PRS);

b) ClickandBuy;

c) LUUP;

d) Nochex;

e) PayPal and PayPal Mobile;

f) EggPay; and

g) Payforit.

Premium Rate Services

Description

3.8 PRS are defined formally in section 120 of the Communications Act 2003 and have been described by Ofcom as follows:[1]

> "PRS are services commonly providing information or entertainment via the telephone, fax, PC (e.g. internet), mobile (e.g. short message services ('SMS')), or interactive digital TV. Services range from sports and voting lines to competition, chat and business information services.
>
> The money paid for the telephone call is shared between the various telephone companies carrying the service and the organisation responsible for providing the content, product or service, whether directly or indirectly."[2]

3.9 A more comprehensive list of typical premium rate services is provided on the website of the Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS), the industry-funded regulatory body for premium rate services. This list includes:

a) TV voting lines (for example, Big Brother and The X Factor);

b) Competitions;

c) Mobile ringtone and logo downloads;

d) Technical helplines (for example, for computer or internet problems);

e) Competition scratchcards;

f) Phone chatlines;

g) Horoscopes;

h) Charitable fund-raising;

i) Sports results;

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1 As stated in a report by Cullen International SA and WIK Consult GmbH ("Study on pan-European market for premium rate services", published on 24 June 2005), DG INFOSOC of the European Commission (EC) defines PRS in a slightly different way: "***'Premium rate services' refers to services, provided by an Information Service Provider (ISP), that are accessed by the use of a premium rate telephone number in which the caller pays a special premium rate that is above the normal tariff for voice calls. Examples of services are sports information services, games, popular voting (as opposed to electoral voting), chat lines and business information services."***

2 Ofcom (26 August 2004), "A Review of Numbering Arrangements for Premium Rate Services."

j) Interactive TV games;

k) Adult entertainment;

l) Information (weather, traffic, etc.); and

m) Directory enquiry services.

3.10 The definition of PRS includes the concept of revenue sharing between the network operator(s) and service provider(s) in the value chain. It is this feature of PRS which defines it as a payment mechanism. Effectively, the network operator collects money on behalf of the content provider from the consumer (the person making the call) for the service provided.

3.11 Thus, the provision of PRS includes a number of different players across the value chain, which are interlinked through a number of complex agreements. Typically, the end user is unaware of such arrangements and only pays one party (the value chain follows the scheme depicted in Figure 3.1). The figure below illustrates:

Figure 3.1: Functional Value chain for PRS

Adapted from Wik Consult and Cullen International Report for the European Commission

3.12 Access network provision is the so-called "last mile" connecting the end user to a telecommunications network. The conveyance of calls takes place on the transit network. Platform provision relates to the technical operation of a PRS platform, and content provision means the creation and packaging of content to be accessed via PRS.

Risks

3.13 PRS normally consist of instantly consumed services which are delivered over communications networks. Many such communications networks are more easily accessible by young people (ie. not yet adults) than other payment networks (which might typically require a user to hold a credit card or a bank account). As a result of this accessibility to young people, certain additional sensitivities will apply to the provision of PRS. For example, while the price for PRS is typically low value (and would be classed as a micro payment), such prices might nevertheless be expensive for young people. Similarly, content unsuitable for children might become accessible to them.

3.14 Problems experienced with PRS include the following:

a) A company may try to trick the public into calling their PRS numbers when a genuine service does not exist. Such scams can be undertaken using internet dialler software, bogus advertising, missed calls, and SMS messages.

b) A company operates a PRS number which they themselves call. The company profits by defaulting on the bills for payment of those calls, by making the calls via arbitrage or by exploiting a weak billing system. There is never any intention of providing a genuine service.

c) Services that limit the final offering by deceiving the caller, e.g. by directing all calls to the 'you've been unsuccessful' message in order to ensure that the provider gains sufficient revenues before allowing anyone a chance to win the prize.

d) Calls to popular voting platforms which continue to be carried even after votes have ceased to be counted.

e) Where companies mislead consumers as to the precise cost of the call.

f) Issues surrounding the use of PRS by minors. PRS is a micro payments mechanism which can easily be accessed by minors who can not, for example, obtain credit cards. However, the cost of PRS is higher than normal call rates and, therefore, if such calls are not authorised by the bill payer, could generate problems.

3.15 All parties involved in the PRS value chain, not just the customer, are exposed to some degree by these types of problems. For instance, an originating network operator that bills the consumer may face the risk that the customer refuses (or is unable) to pay the bill for certain PRS calls.

Regulation

3.16 PRS are subject to a number of regulatory safeguards, aimed primarily at ensuring consumer protection against the fraudulent or unauthorised use of PRS by ensuring that details of advertised services are accurate and charging is transparent, while access by minors to certain types of PRS is prevented. Further details on PRS regulation are given in the next section of this report.

ClickandBuy

Overview

3.17 ClickandBuy is an internet payment system, launched in Germany in 2000. The ClickandBuy service is now available in many European countries, the USA and Asia.

3.18 ClickandBuy's online platform offers multiple currencies, multiple languages, and multiple payment options. More than 8.65 million consumers have made payments through ClickandBuy and approximately 500,000 customers used the service in 2006.

ClickandBuy continues to expand and has recently secured two strategic investors: 3i and T-Online Venture Fund, a subsidiary of Deutsche Telekom.

3.19 In the UK, the ClickandBuy service has been commercially available since September 2002 and is accepted by approximately 1500 merchants. Merchants using ClickandBuy include Apple iTunes, Disney, Skype, AOL Music, Electronic Arts, Kiplinger, and Univision. ClickandBuy plans to offer a new service of money transfers by email during 2007.

3.20 ClickandBuy was offered originally by BT as a service licensee but, in December 2006, ClickandBuy announced that it would re-take control of its UK operation. BT continues to be a user of the ClickandBuy service and a reseller for ClickandBuy in the media sector.

3.21 Merchants can outsource all or part of their e-commerce activities to ClickandBuy, which manages the payment process and offers live customer support for consumers, credit card fraud detection, monthly invoicing and implementation of various payment methods. ClickandBuy processes, handles and manages digital content for games, songs, movies, streaming video, podcasts, VoIP calls, television, publishing and mobile devices.

Service Description

3.22 ClickandBuy offers an e-money account for its customers who wish to purchase online content and services from any one of ClickandBuy's merchants worldwide. There are different types of ClickandBuy Accounts, depending on the consumer's verification status. ClickandBuy also has spending limits for its customers:

a) a personal spending limit which the customers can create themselves; and

b) an individual spending limit generated by the ClickandBuy system which is dependent upon each customer's account status (verified or not verified).

3.23 ClickandBuy uses its discretion to assess the individual spending limit on each account, based on the consumer's chosen payment method and the account status. If the customer exceeds the system-generated spending limit in a transaction, the system automatically offers the customer other ways to increase the spending limit, e.g. by changing the account status or by changing the payment method.

3.24 For UK accounts, all fees are charged in pounds sterling. ClickandBuy may debit a customer's ClickandBuy account with any fees, charges or other amounts owing to ClickandBuy and payable by the customer in connection with the service.

3.25 The ClickandBuy e-money account can be funded via a number of methods. Payment methods offered include:

a) ***Telephone bill***. With many products and services, consumers have the option of paying for their purchases on their telephone bill. Consumers' purchases then appear on the bill they receive from their telephone company (this option is currently only

available in the UK to BT subscribers). The cost of the purchase is shown on the BT phone bill not as a telephony charge but under the category "non-telephony related, no-VAT charge".

b) ***Direct debit***. ClickandBuy account holders can authorise ClickandBuy to withdraw their payment directly from their bank account. As part of the registration process, ClickandBuy may seek to authenticate the details of any bank account selected by the customer as a source of funding by crediting a small amount of money to that bank account.

c) ***Credit Card***. Consumers can register one or more credit cards in their ClickandBuy account and authorise ClickandBuy to withdraw payments from those credit card accounts.

3.26 When the consumer completes a purchase using ClickandBuy, a record is produced, summarising the purchase information, including the identification of the supplier, description of the product, price, date and time of the transaction. Consumers can access their ClickandBuy account online, containing details of the transaction history.

3.27 One of ClickandBuy's characteristics is that it aggregates charges. For instance, if a customer were to make thirty downloads from iTunes over a period of a few days at £0.79 for each download, ClickandBuy would aggregate the cost (30 x £0.79) and issue a single invoice for £23.70.

Risk

3.28 The risks associated with the use of ClickandBuy are the common risks faced by internet users, such as identity theft. At registration, a confirmation letter is sent to new customers as a check against identity fraud. ClickandBuy use relies on unique usernames and passwords, while account records (and telephone bills in the case of ClickandBuy customers using this means of funding) allow customers to confirm the validity of their transactions.

3.29 Where customers choose to use their BT telephone bill as the means of funding, all that is needed to make a ClickandBuy payment is the customer's telephone number and account number. According to ClickandBuy, this has proved to be the most secure of all the available payment methods used by ClickandBuy (debit card, credit card, direct debit, BACS money transfer, and BT telephone bill).

3.30 ClickandBuy assured us that any cases of suspected fraudulent activity are investigated thoroughly and can be forwarded to the Serious Organised Crime Agency (SOCA). Steps are also taken to ascertain how fraudulent access to an account could have been obtained. Such investigations provide valuable information as to whether the customer was in any way negligent towards the protection of their personal details or whether any loopholes in security have been found and exploited.

Regulation

3.31 ClickandBuy (Europe) Limited is authorised as an electronic money institution by the FSA, and is therefore subject to e-money and money laundering regulations, and falls within the scope of the Financial Ombudsman Service. ClickandBuy also complies with other industry rules, such as those applying for payment cards and BT's taste and decency guidelines. ClickandBuy does not believe that its service falls within the definition of PRS.

LUUP

Overview

3.32 LUUP is a payment system for online and mobile payments, offered by Contopronto AS, a company incorporated in Norway. Having originally launched in Norway in 2002, LUUP extended its commercial operations to the UK and Germany in May 2006.

3.33 LUUP claims to have around 15,000 customers in the UK although we did not find any data to confirm the number of merchants accepting payments using LUUP. Our review indicated that LUUP may not have as wide support among retailers as some other e-commerce payment mechanisms covered in this study, particularly PayPal and ClickandBuy.

3.34 LUUP is used for a range of different transactions, including:

a) Mobile entertainment, e.g. betting via text message and downloads of ringtones;

b) Mobile games;

c) Music and movie downloads; and

d) Donations to charities.

Service Description

3.35 LUUP offers users an e-money service, whereby the funds customers pay into their LUUP "wallet" (i.e. their LUUP account) are immediately exchanged for e-money which can then be used to buy goods and services and to transfer e-money to other LUUP users. LUUP is not a credit institution and does not pay interest or other earnings on the funds customers keep on their LUUP wallet.

3.36 In order to use LUUP, consumers must have registered to obtain a LUUP account. Once the registration is complete, customers can access the account by using their username and password. Payments to fund the account can be drawn from a variety of sources, including credit and debit cards, bank accounts and from digital cash sent to the LUUP "wallet" by another LUUP user.

3.37 Anyone with a mobile phone can register for a LUUP account. Registration is very simple and the process can be completed in a few steps either online or by sending text messages on one's mobile phone. Access to the LUUP wallet and making transactions using LUUP are only possible if the customer has their mobile phone, password and PIN available. LUUP also deploys a security feature of sending a unique verification code by SMS to the user, which then needs to be entered in order to continue with the transaction. This verification code feature is used as part of the registration process and, in some cases, when users are logged in to the LUUP wallet or in the course of making LUUP transactions. When making transactions, consumers' personal information and credit card details are not made visible to the merchant.

3.38 There are a number of relatively simple text message commands used to operate the LUUP service. Some examples of these commands are provided below:

a) PAY [mobile number] [amount] – to make a payment to a mobile number;

b) PAY [shopID] [amount] – to make a payment to a merchant (using the merchant's shopID reference);

c) STATUS – to check the balance in the LUUP account;

d) LAST – to see an overview of the most recent transactions on the account;

e) PAY BANK [sort code and full account number] [amount] – to withdraw funds from the LUUP account to the user's bank account; and

f) PAY [username] [currency] [amount] – to send money in a different currency to a LUUP user.

Risk

3.39 As it is an e-money account, LUUP users face the normal risks of operating such accounts, for example, that the money deposited on the account could be at risk if LUUP should go bankrupt or become insolvent.

3.40 Additionally, LUUP users may face a higher than normal risk of making errors when completing transactions via text message, particularly where these may require remembering and correctly keying in transaction commands, account numbers, and payment references, as a result of which payments may inadvertently be sent to the wrong recipient.

Regulation

3.41 Contopronto AS is authorised and regulated by the Norwegian Financial Services Authority as an electronic money institution. In accordance with the Banking Consolidation Directive, Contopronto thus also has the right to issue e-money in the UK once it has provided the requisite notification to the FSA, which it has done. Therefore,

e-money and money laundering regulations apply to LUUP.

Nochex

Overview

3.42 Nochex is an online payments company, offering a range of payment services targeted at small and medium sized companies. Nochex was established in 1999 and has been providing electronic money payment services since the beginning of 2001. The services offered by Nochex are aimed mainly at processing credit and debit card payments on behalf of small and medium-sized businesses offering goods and services for sale on the internet.

3.43 Nochex also offers a “personal account” which allows customers to send e-money payments from their Nochex account. However, such e-money transfers can only operate to send money to another Nochex user (if the intended recipient is not a Nochex account holder, that person must open a Nochex account for the e-money to be successfully transferred).

3.44 We were unable to find information regarding the number of companies that use Nochex services or any indication that the Nochex personal account service was used to any significant extent by individual consumers (rather than businesses). Therefore, we concluded that Nochex, while presumably providing a useful payment processing service for online traders, was not a significant e-commerce payment mechanism in the context of this particular study.

PayPal and PayPal Mobile

Overview

3.45 PayPal (Europe) Ltd is a private limited company incorporated in the UK and a subsidiary of PayPal Inc. PayPal Inc was acquired by eBay in October 2002, and is based in the USA. PayPal is the 2002 SIIA CODiE Awards winner for "Best eCommerce Solution" and is recognised by PC Magazine as one of "The Top 100 Web Sites".

3.46 PayPal operates an account based online payments system which launched in 1998 and which is now available to users in 103 countries. PayPal had approximately 100 million accounts worldwide, including 15 million accounts in the UK. PayPal is a preferred payment method for the online auction site eBay and is also widely accepted as a means of payment by online merchants (PayPal states that it is accepted by several thousands of e-commerce websites in the UK).

Service Description

3.47 PayPal offers three different types of accounts, as described in the table below.

Table 3.2: PayPal account types

Account Benefits	Personal	Premier	Business
Send money	✓	✓	✓
24-hour fraud surveillance	✓	✓	✓
Customer Service availability	✓	✓	✓
eBay Tools	Limited	✓	✓
Merchant Services	Limited	✓	✓
Accept credit or debit cards	Limited	✓	✓
PayPal ATM/Debit Card		✓	✓
Multi-user access			✓

Source: www.paypal.com

3.48 PayPal's account registration process requires new users to provide PayPal with their name, address, phone number and email address. The user's email address serves as the unique account identifier. Users must be 18 or over, and must have a UK bank account, debit card or credit card (these are used as funding sources for the PayPal account).

3.49 PayPal users make payments mainly in two ways:

a) At the PayPal website or where the seller has chosen to integrate PayPal's "instant purchase" feature, the user logs in to their PayPal account, enters the recipient's email address and the amount of the payment; or

b) At the websites of merchants that have integrated PayPal's "website payments" feature, the user selects an item for purchase, confirms the payment information, and enters their email address and password in order to authorise the payment.

3.50 PayPal debits the money from the user's PayPal account balance and credits it to the recipient's PayPal account.

3.51 PayPal also offers customers who sell goods and services the ability to accept credit card payments from buyers without requiring the buyer to open a PayPal account. A seller or merchant can open a PayPal account and begin accepting credit card payments within a very short time. Merchants are approved instantly for a PayPal account, and do not need to provide a personal guarantee, acquire any specialised hardware, or comply with any complicated processes. The essential simplicity and ease of use of PayPal's payment receipt services explains much of its success, as this has proven to be a particularly attractive means by which individual sellers and small businesses can complete e-commerce transactions.

3.52 PayPal Mobile extends PayPal's service so that users can buy goods and send money

from their PayPal account using their mobile phone. Consumers must first have (or must register for) a PayPal account and then may activate their mobile phone for PayPal Mobile use. All of the major UK mobile networks support PayPal Mobile.

3.53 There are several measures that PayPal adopts in order to ensure that its transactions are secure for its customers. These include:

a) Verification of PayPal's users through a random deposit technique (whereby small sums of random values are deposited in a PayPal user's nominated bank account to ensure the bona fides of that account);

b) Email confirmation of every PayPal transaction;

c) An online dispute resolution policy that describes the process by which buyers can file a dispute against sellers and which requires that disputes are closed within 20 days;

d) A "buyer complaint policy" that covers fulfilment problems (goods ordered which are not delivered or which are significantly different to the original description); the policy requires buyers to exhaust the PayPal dispute resolution process before PayPal will intermediate to resolve the claim;

e) A "buyer protection" policy that covers fulfilment problems in respect of certain purchases from eBay; the protection is only offered for qualifying eBay sellers (generally, those which have previously enjoyed a good record of customer satisfaction); and

f) An internal fraud investigation team, which focuses on identifying and preventing fraud before it occurs, detecting fraud in process, mitigating loss if fraud does occur and delivering information to law enforcement agencies.

Risks

3.54 The risks for PayPal users are similar to those for customers of other account-based online payment systems. In particular, concerns about fraud, privacy, and other problems may discourage consumers from adopting or expanding their use of e-commerce. Major risk areas include:

a) merchant fraud and other disputes over the quality of goods and services;

b) unauthorised use of credit card and bank account information and identity theft;

c) the need to provide effective customer support to process disputes between senders and recipients;

d) potential breaches of system security;

e) potential employee fraud; and

f) use of PayPal's system by customers to make or accept payment for illegal or improper purposes.

3.55 Set against these risks, the PayPal system (whereby users only need to disclose their email address to sellers) enables buyers to store their sensitive financial information online and therefore to pay merchants without sharing this sensitive information with them and without having constantly to re-enter their information onto a website each time they make a purchase.

3.56 Nevertheless, despite the inherent benefits of this kind of payment mechanism and the internal protection measures instituted by PayPal, not all PayPal users feel that their interests are sufficiently well safeguarded. There is, for example, a website established specifically to allow dissatisfied PayPal users to air their grievances and to share their (bad) experiences of using the PayPal service.[3]

Regulation

3.57 PayPal (Europe) Ltd operates as an authorised electronic money institution in the UK and uses this UK authorisation to "passport" itself into other EU countries. Therefore the e-money and money laundering regulations apply to PayPal and it falls within the scope of the Financial Ombudsman Service.

Egg Pay

Overview

3.58 Egg plc is a financial services company primarily offering online banking products and services. Egg is one of the world's largest on-line banks with approximately 3.7 million customers. Egg plc is wholly owned by Prudential plc.

Service Description

3.59 Egg Pay is an accounts-based online payments system, which allows users to send payments by email. Only holders of online Egg Pay accounts can send an Egg Pay email payment. In order to qualify for an Egg Pay account, consumers must be 18 or over and have a UK bank account.

3.60 Sending a payment from an Egg Pay account is relatively simple and can be done in three steps:

a) The Egg Pay user sets up the email payment;

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[3] www.paypalsucks.com – which contains a "UK only" forum for grievances from UK PayPal users

b) The recipient (who does not need to have an Egg Pay account) receives an email advising them of the proposed payment, accesses the Egg website using the link provided, and enters their bank account details; and

c) Egg then transfers the money from the Egg Pay user's account to the recipient's account.

3.61 To ensure security for money transfers, the Egg Pay user and the payment recipient agree on a security question. When the recipient receives the email informing them of the proposed payment, the recipient must answer the security question (as well as providing their bank account details).

3.62 Access to the Egg Pay account for the user is protected by passwords and details of other personal information chosen by the user.

3.63 Egg has a dedicated security team to investigate new technologies, to monitor account activity and to respond promptly to any security issues.

Risks

3.64 Egg Pay faces similar risks to those faced by any account-based online payment system.

Regulation

3.65 Egg Banking plc is a bank, authorised and regulated by the Financial Services Authority. Egg Banking plc is also a member of the Financial Ombudsman Service, and the Financial Services Compensation Scheme.

Payforit

Overview

3.66 Payforit is a UK mobile network operator initiative which will enable mobile phone users to purchase goods and services from the mobile internet and charge these purchases directly to their mobile accounts.

3.67 Payforit is being promoted by the mobile network operators as a means of providing a safe and trustworthy environment for consumers buying mobile content. Initially, Payforit will apply only in respect of the purchase of digital goods and services initiated during direct to consumer or off-portal WAP sessions. However, the mobile network operators also wish to consider extending the Payforit mechanism in the future to apply also to internet purchases.

3.68 The Payforit scheme has been developed by the mobile network operators as a means of addressing what are seen as shortcomings in the existing processes for purchasing mobile content, in particular the problems experienced with premium rate SMS services:

a) Misleading advertisements, eg. which promoted downloads of ringtones as "free" without clearly indicating that agreeing to the initial free download would register the user as a subscriber to a paid service;

b) Promotions which seemed to take advantage of more vulnerable consumer groups, especially young people who might not appreciate that an ongoing financial commitment was being incurred (or be able to afford such a financial commitment); and

c) Failure to implement a clear and simple mechanism by which consumers could end such subscription services, ie. an unambiguous "stop" command.

Service Description

3.69 Payforit, therefore, adds an additional layer of safeguards to ensure that consumers are clearly shown on their mobile screens prior to making the purchase:

a) What it is that they are about to purchase;

b) Who is selling the product, including a customer service contact number in case of any problems;

c) Terms and conditions of sale, including the price of the product;

d) Positive confirmation that they wish to purchase the product; and

e) A clear confirmation that the purchase has been successfully completed.

3.70 The Payforit scheme is governed by a set of rules, "The Trusted Mobile Payment Framework", which outlines how participants (merchants, accredited payment intermediaries and operators) should implement the Payforit scheme. The key aspect of the scheme's operation is that all merchants participating in the scheme must operate through an "accredited payment intermediary". The accredited payment intermediary is the person responsible for complying with the Payforit scheme rules, in particular to provide WAP pages which are compliant in format and content with the scheme rules and which therefore ensure that all relevant information is provided to the consumer during the purchasing process.

3.71 The mobile network operators intend to show the charge for the product / download purchased through the Payforit scheme separately on the mobile account, ie. not aggregated with the price for the communications service deployed and not listed as a communication service charge.

3.72 The mobile operators intend to operate an enforcement scheme for Payforit, under which parties which fail to comply with the scheme rules will be warned ("yellow carded") and, if problems persist or are not resolved appropriately, those parties will have their accreditation removed or access to their services barred ("red carded").

Risks

3.73 For consumers, the Payforit scheme should offer considerable benefits because it should ensure that the future purchase of mobile content will follow a clear process, with safeguards against misinformation, inadequate information, and problems with advertising. However, some fears were expressed to us during interviews with industry stakeholders concerning the future governance of the Payforit scheme, in particular whether it is appropriate for the scheme rules to be devised, reviewed (in the future), and enforced by the mobile network operators alone and not by some wider industry grouping or by an independent body.

Regulation

3.74 Ofcom regards Payforit as PRS and, as a result, Payforit will be regulated by ICSTIS under the ICSTIS Code. The mobile network operators have expressed disagreement with this assessment, arguing that Payforit falls outside the legal definition of PRS in the Communications Act and that many of the elements of the ICSTIS Code would be irrelevant to Payforit or duplicative of the inherent safeguards of the Payforit scheme rules.

Future Payment Mechanisms

3.75 In this section, we briefly discuss two other payment mechanisms: mobile couponing and mobile ticketing.

Mobile Coupons

3.76 Mobile coupons are emerging as a popular alternative to traditional direct marketing strategies. Mobile coupons are used in a number of different ways, including to increase customer loyalty or to create an extra interactive communication moment with clients, and for sales promotions, gift vouchers or other loyalty programmes. Clients can show their interest in a certain product or retail chain by opting in to the coupon programme (a one-off transaction). Subsequently, they would receive a text message with a unique numerical code, which entitles them to a discount for that product or at that store. The mobile coupon can be redeemed directly at the store concerned. As well as discount coupons, mobile coupons can also be used to give away extra premiums for a selected group of loyal clients, eg. night club members might receive a free drink in exchange for their mobile coupon.

Mobile Ticketing

3.77 Mobile ticketing allows mobile phone users to purchase tickets for events, transportation, and parking. Customers are able to order and receive tickets using their mobile phone. Such ticketing services have been widely adopted, with applications including the use of mobile phones to transact with parking meters, and to obtain cinema and train tickets.

3.78 Generally, these applications have involved users providing their credit card or bank details in order to pay for the tickets in question and thus, in these cases, the mobile is used as a communications and delivery medium and not as a payment mechanism. However, in future, it is possible that such ticketing services could also be provided using a mobile "wallet", whereby transactional capabilities are added to mobile phones so that funds stored "on" the mobile phone can be used to make payments. This can be done physically by adding a small device on mobile phones which can then be read by a wireless scanner when it comes into close proximity with it or by extending the use (by software downloads) of the existing capabilities of mobile devices.

Summary

3.79 Reviewing the different e-commerce payment mechanism, we note that there are some distinct features which differ in importance and relevance for the different kinds of mechanisms available:

a) Account-based systems, such as PayPal, normally require that their users be adults (18 or over) and have an existing credit card or UK bank account;

b) Account-based systems are also subject to financial regulations, such as the e-money and money laundering regulations;

c) Systems based purely or predominantly on mobile phones have fewer access restrictions because the operation of prepaid mobile phone accounts are designed to remove the problem of credit risk and therefore allow access to consumers who are under 18 and adults who may not have a good credit rating;

d) For mobile phone systems, there has historically been a close link between the payment system provider (the mobile phone network) and the provider of services and goods; this being reflected in the Communications Act definition of PRS;

e) As a result of this link, mobile phone networks have become more closely involved in providing safeguards for consumers in respect of the promotion of and the sales process for e-commerce goods and services delivered using their networks; and

f) Consumers of all e-commerce payment mechanisms face similar risks in respect of the protection of their personal data, and the need for adequate complaint and redress mechanisms.

3.80 The extent to which the different e-commerce payment mechanisms studied in this report are captured by regulations addressing consumer protection issues varies. Where a service is designated as PRS, the ICSTIS Code applies, setting out detailed rules on the interaction between service providers and consumers. For other payment mechanisms, such interaction is governed by general consumer legislation and, in some cases, by individual proprietary customer protection policies.

3.81 The e-commerce payment mechanisms studied in this report are designed to be

particularly suitable for small value or micro payments. For such payment mechanisms to be successful, the average cost associated with transactions needs to be very low otherwise there is a risk that the total transaction cost becomes expensive relative to the value of the good or service purchased. As the e-commerce market develops, one can expect significant competition between the providers of different e-commerce micro payment mechanisms. It is therefore increasingly important to strike the appropriate balance between:

a) The need for increased regulation to protect consumers (which will generate increased transaction costs);

b) The need to develop and maintain a level playing field between the providers of different e-commerce micro payment mechanisms; and

c) The need to maintain consumer confidence in e-commerce micro payment mechanisms.

4 REGULATORY FRAMEWORK

Introduction

4.1 In this section, we describe the various forms of legislation and regulation which govern e-commerce payment mechanisms, including PRS. We summarise relevant general consumer protection legislation, rules on advertising, the specific regulations for PRS established by ICSTIS (and emanating ultimately from the Communications Act), and financial regulation, including the forthcoming Payments Directive.

4.2 For the sake of clarity, it is important to confirm that the legislative and regulatory measures that we consider in this study are those that target the protection of consumers in a collective sense. We do not directly consider the rights of redress for individual consumers, ie. the redress that might be sought by an individual consumer through court action or some alternative means of dispute resolution (eg. through arbitration proceedings or a complaint to a sector Ombudsman).

General Consumer Protection

4.3 Consumer protection legislation and its enforcement was significantly reformed by the provisions of the Enterprise Act 2002, which granted general enforcement powers to the OFT and Trading Standards, as well as sector-specific enforcement powers to a number of industry regulators, including Ofcom. The powers to enforce consumer protection legislation are designed to prevent businesses from breaching consumer legislation where this would result in harm to the collective interests of consumers, ie. the purpose of the enforcement action is to prevent harm from occurring or continuing and not specifically to provide redress for individual consumers.

4.4 There is a very large amount of relevant consumer legislation to which the enforcement powers introduced by the Enterprise Act apply (section 211 of the Act lists 52 pieces of UK consumer legislation, while section 212 of the Act lists a further 12 areas of UK consumer legislation derived from European Community Directives), including:

a) ***Business Names Act:*** The Act requires businesses which trade under a name other than the proprietor's true name to prominently display the names and addresses of the proprietor or proprietors at business premises, to clearly state them on business stationery and documentation and to provide them in writing to any person dealing with the business who asks for them.

b) ***Consumer Credit Act:*** The Act regulates the full scope of consumer credit activities and includes detailed requirements on a range of matters such as documentation, advertising, and the calculation of the cost of credit and rebates which apply on early settlement of credit agreements. The Act also includes a licensing regime under which the OFT licenses those who are fit to engage in a credit business; a licence is required to engage in a range of credit activities. The Act sets out rules, not just for credit providers, but also for others involved in the credit industry.

c) ***Consumer Protection Act:*** Part III of the Act prohibits misleading price indications in relation to any goods, services, accommodation or facilities. A trader commits an offence if, in the course of any business, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons).

d) ***Consumer Protection (Distance Selling) Regulations:*** The Regulations implement Directive 97/7/EC. Subject to some exceptions, they apply to all contracts for goods and services supplied to consumers where the contract is made exclusively by means of distance communication and pursuant to an organised distance supply scheme. Under the Regulations, consumers are entitled to specified information before entering a contract, they are also entitled to confirmation of certain information together with additional information in a durable form, and to a cancellation period of seven working days beginning with the day after that on which the goods are received or the service contract is concluded. The business must perform the contract within 30 days beginning with the day following that on which the consumer sent the order to the business, or within such other period as the parties agree. If the business is unable to do so owing to unavailability of the goods or services, it must inform the consumer of that fact and provide a full refund of all charges. If the consumer exercises his right of cancellation, the business must reimburse the cost of the goods or services together with most other charges payable in connection with the contract as soon as possible and in any case within 30 days of the day of notice of cancellation. Notice of cancellation has the effect of also cancelling any related credit agreement as defined under the Regulations. Provided that the consumer repays the credit within a month of cancellation or before the first instalment is due, no interest is payable. The Regulations also provide the consumer with extra protection from unauthorised use of his payment card in connection with a distance contract in that he is entitled to cancel such payments or be re-credited or repaid the sum in question. In defined circumstances where a consumer is sent unsolicited goods, he may treat them as an unconditional gift. It is an offence for any business to demand payment from a consumer in respect of unsolicited goods or services or to otherwise threaten or take certain enforcement action against him.

e) ***Control of Misleading Advertisements Regulations:*** The Regulations provide protection against misleading and unacceptable comparative advertisements.

f) ***Electronic Commerce Regulations:*** These Regulations implement the main requirements of Directive 2000/31/EC on electronic commerce. The Regulations govern the provision of Information Society Services, a term that covers any service normally provided for payment, at a distance, by means of electronic equipment at the individual request of a recipient of a service. This means any business which: sells goods or services to consumers (and business) on the internet, by email or text message (the goods and/or services do not have to be provided electronically); advertises on the internet, by email or text message; or conveys or stores electronic information for customers or provides access to a communications network. The

Regulations do not apply to: online activities which are not of a commercial nature; to the goods themselves, or the delivery of the goods or services not provided online; or the offline elements (e.g. the conclusion of a hardcopy contract) of any transaction that began online (e.g. in response to an advert on a website). Regulation 6 states that, where a business refers to prices of goods and/or services, these have to be clearly shown, including whether this is inclusive of any tax and/or delivery costs. In addition, a business has to clearly identify itself to consumers. Obviously, some forms of communication (text messages for example) have limited space. The criteria may be regarded as met if the information is provided by alternative means, such as referring to a website. Regulations 7 & 8 govern commercial communications or advertising. Such communications of goods and/or services have to be clearly identifiable as such, indicating the business they have come from and stating any promotional offers and the terms clearly. Regulations 9 & 11 state that, when concluding a contract online, the business has to inform the consumer of the technical steps needed to conclude the contract; whether the contract will be filed (and if it will be accessible); how the consumer can correct input errors; and what language the contract will be in. This information must be provided clearly and prior to the placing of the order. The business must also state any codes of conduct they adhere to; if they provide terms and conditions, to do so in a way that allows the consumers to store and reproduce them; and acknowledge receipt of orders without undue delay.

g) ***Lotteries and Amusements Act:*** The Act provides that all lotteries and raffles, except as authorized by the Act itself or the National Lottery Act 1993, are unlawful and involvement in any such lottery in any of a number of specified ways is prohibited.

h) ***Malicious Communications Act:*** The Act creates an offence for anyone to send to another person a letter, electronic communication or article of any description which conveys a message which is indecent, grossly offensive (or of an indecent or grossly offensive nature), a threat or containing information which is false and known or believed to be false by the sender. A person is guilty of an offence under the Act if their purpose, or one of their purposes, in sending the communication was to cause distress or anxiety to the recipient or to any other person to whom it is intended that its contents or nature should be communicated.

i) ***Misrepresentation Act:*** The Act extends the legal remedies to which consumers are entitled where they have entered into a contract after a misrepresentation has been made. The Act widens the circumstances in which a consumer may cancel a contract for an innocent or negligent misrepresentation and provides the remedy of damages where a consumer enters a contract following a negligent misrepresentation. Under the Act, the consumer has a damages claim for loss caused by any misstatement inducing him to enter a contract, unless the maker of the statement is able to prove that he had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true.

j) ***Prices Act:*** Under the Prices Act, the Secretary of State has the power to make Orders to control the display of pricing information of goods and services. Price

Marking Orders made under the Act can require how and where the prices of products, from tins of food to cars, and of food and drink bought in pubs and restaurants should be displayed.

k) ***Sale of Goods Act:*** The Act sets out the law governing contracts for the sale of goods and governs a wide range of matters such as formation of contract, implied terms, the parties' rights including remedies for breach of implied terms and other breaches of contract, transfer of ownership in the goods, and performance of the contract. The following conditions are implied into such contracts: that the goods will correspond with the description; that the goods are reasonably fit for purpose; in a contract for sale by sample, that the bulk will correspond with the sample in quality; and that the goods will be of satisfactory quality, taking account of all relevant circumstances. Relevant circumstances include the price of the goods, any description and, in a consumer sale, any public statements on the specific characteristics of the goods made by the seller, producer or his representative, particularly in advertising or on labelling. Where goods are supplied to a consumer in breach of an implied term, he is entitled to reject them and claim a refund of the price, if he acts before he is deemed to have accepted them. Where a consumer has lost his right to reject goods, he may claim damages in respect of the non-conformity of the goods with the implied terms. The Act provides additional remedies to consumers where goods do not conform to the contract of sale at the time of delivery. This occurs when there is a breach of an express contractual term or of one of the implied terms listed above. In most circumstances, goods which do not conform to the contract at any time up to six months after delivery will be presumed not to have conformed to it on the delivery date, unless the seller can show otherwise. The additional remedies are that the consumer has a right to require the seller to repair or replace the goods. Where that would be impossible or disproportionate in comparison to the other remedies, the seller must give a full or appropriate partial refund. Where the consumer requests repair or replacement, the seller must comply within a reasonable time and without causing significant inconvenience to the buyer. The seller bears any costs incurred in doing so. If the seller fails to do so, the consumer is entitled to a full or appropriate partial refund.

l) ***Supply of Goods and Services Act:*** This Act requires a supplier of a service acting in the course of a business to carry out that service with reasonable care and skill and, unless agreed otherwise, within a reasonable time and for a reasonable charge;

m) ***Trade Descriptions Act:*** This Act makes it an offence for a trader to: apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied; and knowingly or recklessly make a false statement about certain aspects of any services, accommodation or facilities provided in the course of a business.

n) ***Unfair Contract Terms Act:*** Under the Act, certain contract clauses and other notices excluding or restricting liability are made unenforceable whilst others are subject to a reasonableness test. A trader dealing with a consumer cannot exclude or

restrict his liability for breach of contract or allow himself to provide a substantially different service or to not provide full service unless he can show that the clause satisfies the test of reasonableness. Nor can a trader require a consumer to indemnify him or any other party against any loss that he or the other party may incur through their negligence or breach of contract unless the trader can show that the clause satisfies the same test.

o) ***Unfair Terms in Consumer Contracts Regulations:*** These Regulations implement Council Directive 93/13/EEC. They apply, with certain exceptions, to terms which have not been individually negotiated in any contract concluded between a consumer and a person who is acting for purposes relating to his trade, business or profession. They therefore apply in particular to standard form contracts used with consumers but may also apply to verbal terms which have not been individually negotiated. An unfair term is one which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. No assessment of fairness is to be made in relation to any term insofar as it defines the main subject matter of the contract, nor as to the adequacy of the price or remuneration payable for the goods or services supplied. Any term that is found to be unfair is not binding on the consumer. This means that a consumer may himself allege that a term is unfair and therefore not binding on him. If the business disagrees and enforces the term against the consumer, the consumer may raise the issue for determination by the Court in any proceedings involving the term, whether instituted by the consumer or the business. The remainder of the contract, however, shall continue to bind the parties if it is capable of continuing in existence without the unfair term. In contracts to which they apply, the Regulations additionally impose an obligation on businesses to express any written contract terms in plain and intelligible language.

4.5 From the above, one can see that there is no shortage of consumer protection legislation. While there may be areas where gaps still exist (for example, because of technological developments), most of the general consumer concerns likely to arise from e-commerce payment transactions are covered, including issues such as:

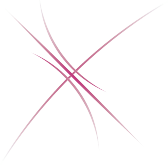
a) Providing clear information to the consumer as to the nature and costs of the transaction and the consumer's responsibilities;

b) Providing a clear process whereby the consumer positively authorises a transaction to take place;

c) Providing a clear and straightforward process whereby the consumer can cancel ongoing (subscription) services;

d) Providing clear and easily accessible billing records; and

e) Providing measures for redress and complaint handling in case of problems.



4.6 However, from a practical perspective, one must also consider that the remit for the OFT and for Trading Standards is an extremely broad one and stretches the resources of these regulatory authorities. Inevitably, these authorities must prioritise the issues that they deal with actively and the types of complaints that they choose to handle, focusing rightly on those areas where there is the most consumer harm.[4] In terms of payment mechanisms, this is likely to mean that regulatory attention and enforcement action will tend to focus much more on those payment mechanisms used for larger value payments and much less so on systems designed for micro payments.

4.7 In conclusion, while there may be no (or few) legislative gaps in terms of the consumer protection afforded by general consumer legislation in respect of e-commerce payment mechanisms, there is likely to be a very significant difference between the practical enforcement of those consumer protection measures between systems catering for larger value payments and those schemes designed for micro payments.

Advertising

4.8 Given certain features of e-commerce transactions, notably the instant consumption of many electronic products and services, the provision of information about the available goods and services is a particularly critical part of the transaction and thus an important element of consumer protection. While some aspects of the information provided to consumers is governed by general consumer legislation, eg. the Distance Selling Regulations, advertising is also regulated in the UK by the Advertising Standards Authority (ASA).

4.9 The ASA is an independent body established by the advertising industry to enforce the rules set down in the Advertising Codes. There are three Codes, governing: TV commercials; radio commercials; and advertisements, sales promotions and direct marketing in all other media. The basic principles of the Advertising Codes are that advertisements should be:

a) Legal;

b) Decent;

c) Honest;

d) Truthful;

e) Socially responsible; and

f) Respectful of the principles of fair competition.

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[4] This is highlighted by the first objective listed in the OFT's draft 2007-08 Annual Plan: "We want to make the most effective use of all of our resources by focusing on those areas of work which will achieve the highest gains, either directly or indirectly."

4.10 In our interviews with stakeholders, we were told that the ASA does not often intervene in PRS or other areas relevant to e-commerce payment mechanisms. However, we did find an online advice statement from the Committee of Advertising Practice, an industry body responsible for the Advertising Codes, on PRS. This advice statement noted that the public is not always fully aware of the costs of PRS via telephony and, as a result, problems of cost are often brought to the attention of the ASA. Accordingly, the following general advice is offered to marketers on PRS:

a) To be transparent when advertising and bring to the attention of consumers the common pitfalls in PRS;

b) Advertising should not be misleading by omission;

c) Make apparent the distinction between a one-off PRS service and a subscription based service;

d) Particular care must be taken in advertising PRS to children;

e) PRS mechanisms should not be used to access services or promotions advertised as "free"; and

f) Where a prize draw is advertised as "no purchase necessary", the only entrance to the draw should not solely be via PRS (ie. non-PRS mechanisms must also be advertised), and the prize value should not be overstated in relation to the cost of the PRS.

PRS

4.11 The Communications Act defines PRS and sets out certain roles and responsibilities of the telecommunications sector regulator, Ofcom, in respect of PRS in sections 120 to 124 of the Act. Under the Communications Act, Ofcom has the responsibility and power to regulate the provision, content, promotion and marketing of PRS and may do so through the approval of a code for premium rate services. Ofcom has approved the ICSTIS Code for the regulation of premium rate services in the UK.

4.12 The Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS) is the industry-funded regulatory body for PRS and publishes and enforces the ICSTIS Code. The relationship between Ofcom and ICSTIS is formalised in a Memorandum of Understanding which was signed in August 2005. Ofcom's role is to provide statutory support to the work of ICSTIS, underpinning ICSTIS' regulatory regime for all services that meet the definition of Controlled PRS (CPRS).[5] As

[5] The definition of Controlled PRS is narrower than that of PRS. Controlled PRS refers to premium rate services which, by costing over a certain amount determined by Ofcom (currently 10 pence per call or per minute), are regulated, i.e. services which cost less than the specified amount are not included in the definition of Controlled PRS.

CPRS providers are required under the conditions of the Communication Act to comply with directions given by ICSTIS under its Code of Practice, Ofcom acts in essence as a backstop regulator (e.g. having the ability to fine a network operator which fails to comply with the ICSTIS Code).

4.13 The definition of PRS is set out in sub-sections (7) and (8) of section 120 of the Act (relevant extracts from the Act are included in Appendix A of this report). The wording of these sub-sections is somewhat opaque and therefore agreement on a single clear definition of PRS can be difficult to achieve. Nevertheless, the Act's definition of PRS can be seen to possess four key features:

a) The service is delivered or accessed by means of an electronic communications service;

b) There is a charge for the service;

c) The charge appears on the electronic communications service bill; and

d) The charge appears on the bill as a charge for an electronic communications service.

4.14 As the PRS market and the market for value-added communications services has developed, ICSTIS' remit, framed by the definition of PRS in the Act, has expanded beyond the traditional view of PRS as 09xxx information services and chatlines. PRS now encompass services accessed on different number ranges (such as 08xxx and short codes) and include a very wide range of different service types, including fund raising, voting, competitions and downloads. However, as the communications market continues to develop and to extend its reach into an even wider range of services, there is a growing tension between the role of ICSTIS, based on the Act's definition of PRS, and the desire of communications providers to expand their service range rapidly and without the level of regulatory oversight that is imposed by the ICSTIS Code.

The ICSTIS Code

4.15 The eleventh edition of the ICSTIS Code of Practice was published in November 2006 and is supplemented by a set of help-notes and Statements of Expectations. The Code sets out the regulatory framework for CPRS, setting out the rules governing the content and promotion of premium rate services. The Code seeks to adhere to the principles of good regulation (transparency, accountability, proportionality, consistency and targeting).

4.16 The Code's geographic scope applies to all CPRS which are accessed by a user in the UK or are provided by a service provider located within the UK. The Code also applies to providers of Information Society Services (ISS) when the service provider for such services is:

a) Established in the UK;

b) Established in the European Economic Area, but only where the services are being

accessed or may be accessed from within the UK; and

c) The conditions set out in Article 3.4 of the E-commerce Directive are satisfied (these relate to instances of derogation such as the protection of public health, minors, public security and consumers).

4.17 The Code contains a section detailing network operators' due diligence requirements, in particular requiring network operators, before they make their networks and services available to service providers for PRS, to:

a) Collect and maintain such information as ICSTIS may require in respect of their service providers in order to ensure effective identification of and communication with service providers, including some minimum information requirements;

b) Obtain satisfactory evidence that their service providers have sufficient financial and other resources necessary to discharge their obligations under the Code in the light of their intended PRS;

c) Make sufficient inquiries to satisfy themselves that the information supplied to them by service providers is accurate;

d) Retain the information collected and any associated records, and to make these available to ICSTIS;

e) Bring the Code of Practice to the attention of service providers; and

f) Satisfy themselves that the service providers have in place adequate customer service and refund mechanisms, including a non-premium rate UK customer service line.

4.18 Service providers are obligated to ensure that all users of PRS are "fully informed, clearly and straightforwardly" of the costs of accessing PRS, including any prior charges.

4.19 The Code sets out the process that will be followed by ICSTIS in the event of an investigation caused by a complaint. Throughout these procedures, ICSTIS deals directly with the service providers and network operators and, in some cases, also with the relevant information providers.

4.20 Sanctions for breaches of the Code can include:

a) Requiring the service provider to remedy the breach;

b) Issuing a formal reprimand;

c) Requiring the service provider to submit certain or all categories of service and / or promotional material to ICSTIS for copy advice and / or prior permission for a defined period;

d) Imposing an appropriate fine on the service provider to be collected by ICSTIS;

e) Requiring that access to some or all of the service provider's services and / or numbers be barred for a defined period and directing the relevant network operator(s) accordingly;

f) Prohibiting a service provider, information provider and / or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of a particular type of service for a defined period; and

g) Requiring, in circumstances where there has been a serious breach of the Code and / or where an intent to mislead or defraud has been demonstrated, that the service provider pays all claims made by users for refunds of the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.

4.21 ICSTIS investigates all complaints received about premium rate services, including complaints about:

a) The promotion of PRS;

b) The content of PRS; and

c) The overall operation of PRS.

4.22 ICSTIS does not investigate complaints about:

a) Why companies use premium rate numbers as opposed to other numbers; and

b) The revenue share arrangements that exist between telephone companies and service providers.

4.23 Many of the issues dealt with by the ICSTIS Code will also be covered by existing general consumer protection legislation, as discussed above. However, ICSTIS' role is justified by important concerns about the practicalities of enforcement in the context of PRS and the desire to ensure continuing consumer confidence in PRS services.

4.24 ICSTIS' role is important because it deals with transactions which typically involve relatively small amounts of money (per transaction). In such cases, consumers may be less concerned with recovering the money paid than with ensuring that the problem does not recur and that the perpetrator is reprimanded. The ICSTIS Code is primarily designed to handle these kinds of issues, ie. to resolve the service problem rather than to provide refunds to customers. As discussed above, other cross-sector regulators, such as the OFT, are much less likely to become involved in such lower value consumer transactions because of the small sums of money involved.

Financial

4.25 This section discusses financial regulations in the UK and the likely impact of the proposed European Payments Services Directive, currently being negotiated in Brussels.

Financial Services Authority

4.26 The current framework for financial regulation in the UK was set out in the Financial Services and Markets Act, which established the industry regulator, the Financial Services Authority (FSA). The four statutory objectives of the FSA are:

a) Maintaining market confidence in the financial system;

b) Promoting public understanding of the financial system;

c) Securing the appropriate degree of protection for consumers; and

d) Reducing the extent to which it is possible to use a regulated business for a purpose connected with financial crime.

4.27 The FSA's regulatory approach is "risk-based" and "principles-based". Under the risk-based approach, the FSA seeks to assess the risks that a firm or a particular issue arising in the financial sector poses to the four statutory objectives (listed above), including the impact of the problem (if it were to occur) and the probability of the risk occurring. Firms and issues are ranked in order of importance (ie. risk level) so that the FSA can prioritise any required regulatory intervention and ensure that such intervention is at the appropriate level. Under the principles-based approach, the FSA seeks to provide firms in the financial sector with the flexibility to decide for themselves what business processes and controls they should operate, whilst continuing to meet regulatory requirements. Thus, the focus of the principles-based approach is not on the means but the end, with the intention being to create incentives for firms to do the right thing in return for less regulatory supervision.

4.28 The FSA has a particularly wide remit, covering many different financial products and services, including banking, investments, insurance and mortgages. As regards payment mechanisms, the FSA has focused on ensuring the prudential soundness of firms' systems, protecting customers against excessive financial exposure, and compliance with money laundering rules. Therefore, in regard to e-commerce payment mechanisms used predominantly for micro payments, the FSA does not play a major role since it is not in the nature of such payment mechanisms (for low value transactions) to give rise to major risks in any of the areas of significant concern for the FSA.

4.29 The FSA's role in respect of e-commerce is based on the EU Directives on E-money and on E-commerce. These EU Directives were transposed into UK law in 2002.

E-commerce

4.30 The purpose of the E-commerce Directive is to remove specific legal barriers to the free movement of "information society services" across the European Community and to encourage greater use of e-commerce by improving legal certainty for businesses and consumers, thereby boosting consumer confidence and trust. "Information society services" are defined, broadly, as services provided for remuneration, at a distance, by electronic means and at the individual request of the recipient. They are primarily services provided over the internet. Under the Directive, information society services benefit from the internal market principles of free movement of services and freedom of establishment, in particular through the principle that they can trade throughout the European Community unrestricted or what is known as the "Country of Origin" rule:

a) Online selling and advertising is subject to the laws of the UK, if the trader is established in the UK, and online services provided from other Member States may not be restricted (there are exceptions, particularly for contracts with consumers and the freedom of parties to choose the applicable law);

b) Recipients of online services must be given clearly defined information about the trader, the nature of commercial communications (i.e. e-mails) and how to complete an online transaction.

c) Online service providers are exempt from liability for the content that they convey or store in specified circumstances; and

d) In relation to financial services, the territorial scope of the FSA's regulation is be extended to cover outgoing information society services so that a person carrying on an activity consisting of the provision of an information society service from an establishment in the UK to a person in another EU Member State will be regarded as carrying on that activity in the UK.

4.31 Virtually all websites are covered by the E-commerce Regulations since the Regulations do not apply specifically to e-commerce but to websites offering online information or commercial communications (e.g. advertisements), or providing search and data gathering tools.

4.32 While the Regulations are primarily based on the country of origin principle, this is subject to a number of derogations. Most significantly, the country of origin principle does not apply to the terms of consumer contracts. Practically, this means that a UK based e-commerce site's terms and conditions should comply with each and every EU Member State in which consumers can purchase products. Other exceptions to the country of origin principle include copyright and intellectual property rights.

4.33 Service providers (whether involved in e-commerce or not) must also provide minimum information details, as well as complying with any relevant provisions of the Distance Selling Directive.

E-money

4.34 The E-money Directive mandated the establishment of a new prudential supervisory regime for electronic money institutions (EMIs). The main objectives of the Directive are:

a) to create a regulatory framework to ensure the stability and soundness of EMIs in order to increase business and consumer confidence in this developing means of payment;

b) to eliminate legal uncertainty created by the lack of harmonisation in this field; and

c) to facilitate access by EMIs from one EU Member State into another.

4.35 Under the UK transposition of the E-money Directive, the issuing of e-money became an activity regulated by the FSA. This ensures that persons not authorised by the FSA to carry on the business of issuing e-money are prohibited from doing so (unless they have been granted a waiver). In addition, the FSA imposes the other requirements of the Directive on authorised EMIs.

4.36 "E-money" is defined as monetary value, which is stored on an electronic device, issued on receipt of funds and is accepted as means of payment by undertakings other than the issuer. The FSA is responsible for interpreting this definition of e-money and for producing guidelines on how it will be applied in practice, although the definition is considered to include both e-money schemes in which value is stored on a card that is used by the bearer to make purchases, and account-based e-money schemes where value is stored in an electronic account that the user can access remotely.

4.37 The FSA regime seeks to ensure that there is a level playing field between prospective issuers of e-money, whether it is the traditional banks or new firms. The regulatory framework revolves around e-money issues being financially sound:

a) E-money issuers must only undertake e-money issuance or closely related activities;

b) Issuers will need to "ring fence" their e-money activities from other areas of business risk;

c) Funds held in exchange for the issue of e-money must be invested in high quality liquid assets;

d) E-money issuers must have sound and prudent systems and adequate internal control mechanisms;

e) E-money issuers must comply with the FSA's money laundering requirements;

f) There will be a minimum capital requirement for issuers' at least 2 per cent of outstanding e-money liabilities or €1 million (whichever is higher); and

g) The FSA will be empowered to grant waivers from regulation to small or locally based firms, although these will still have to submit periodic information about their businesses.

4.38 It should be noted that e-money issuers are not covered in the Financial Services Compensation Scheme. Consequently, customers of such institutions will have no access to compensation should an e-money issuer become insolvent.

4.39 Nonetheless, the e-money regime includes a number of features to help protect consumers:

a) E-money issuers must set a limit on the amounts of money that may be held in individual e-money "purses" in order to protect holders of e-money by restricting their individual loss should they lose their purses or should the issuer fail;

b) Customers must have access to relevant and comprehensible information and guidance on information about redemption rights including any fees payable on redemption;

c) Full disclosure of the risks associated with the product must also be made, including the liability of holders for any loss arising from misuse, loss, malfunction, theft of, or damage to, their e-money purses or any electronic device on which e-money may be held; and

d) E-money issuers will be included within the scope of the Financial Ombudsman Service and must also have their own procedures for dealing with customer complaints.

PRS and e-money

4.40 During the transposition of the E-money Directive in 2002, there was much discussion about whether mobile prepaid PRS constituted e-money. In its Consultation Paper (CP172), the FSA adopted a pragmatic view which argued that only under very special circumstances would PRS constitute e-money. This view was further clarified by the European Commission in 2005 in a guidance note, the effect of which is now incorporated within the FSA Handbook:[6]

> "In January 2005, the European Commission issued a guidance note explaining how, in their view; the Electronic Money Directive (2000/46/EC) should be applied to Premium Rate Services (PRS) delivered by Mobile Network Operators (MNOs) to customers' prepaid phones. An increasing range of goods and services (known as "content") is now supplied by the MNOs by way of PRS to their customers' phones, of which we understand more than two-thirds are now prepaid. The Commission noted that the

[6] FSA (18 November 2005), "Handbook Notice 49"

primary purpose of e-money is to be used "as legal tender in a payment transaction with a third party". So when considering whether the MNO is issuing e-money, Member States' competent authorities should consider whether there is a direct payment relationship between the MNO's prepaid customer and the third party content vendor. Such a relationship would indicate the use of e-money and might be established where either:

(1) there is a direct transfer of electronic value between MNO customer and third party merchant; or

(2) the MNO acts as a facilitator or intermediary in the payment mechanism in such a way that customer and merchant would also have a direct debtor-creditor relationship.

The Commission believes that at present there are few instances where the e-money directive would apply to PRS transactions."

4.41 The FSA further notes in its guidance on e-money that prepaid airtime that may only be used to buy services provided by the telephone company which issues the airtime does not constitute e-money. This is because it does not satisfy a critical part of the e-money definition.[7] It also believes that prepaid airtime used to call PRS numbers does not constitute e-money where:

a) The supply of telecoms services by the phone operator and the supply of services by the PRS provider can be seen as a single service; and

b) The supply of the airtime and the supply of the PRS takes place in the same action.

Payments Directive

4.42 On 1 December 2005, the Commission issued a proposed EU Directive on payment services in the internal market. It was introduced for the purpose of creating a Single European Payments Area (SEPA) where "improved economies of scale and competition would help to reduce the cost of the payment system".[8] A key step towards the creation of SEPA is transitioning away from a cash-based economy.[9] Given that the proposal defines payment services as "business activities…consisting in the execution of payment transactions on behalf of a natural or legal person," if implemented, it would apply to e-commerce payment services. Moreover, the Annex to the Directive specifically cites "execution of payment transactions by any means of communication at a distance such as mobile telephones or other digital or IT devices" as included within the definition of a

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7 E-money is defined in UK law as "monetary value…which is (a) stored on an electronic device, (b) issued on receipt of funds, and (c) accepted as a means of payment by persons other than the issuer".

8 Commission of the European Communities (2005) "Implementing the Lisbon programme: proposal for a directive of the European Parliament and of the council on payment services in the internal market and amending directives 97/7/EC and 2002/65/EC" Brussels: European Commission.

9 According to the European Community, if the use of cash were reduced to the level of countries with the lowest usage, this would generate a surplus of €5.3 billion.

payment service.

4.43 The three fundamental objectives of the proposed Directive are:

a) to enhance competition between national markets;

b) to increase market transparency; and

c) to harmonise the regulations on the rights of users and providers of payment services.

4.44 The new legal framework that would assist the EU to achieve these objectives operates in three areas: the depth of the market; transparency measures; and legal certainty and the liability regime. Ideally, the legal framework would enable the EU to realise the goal of SEPA and thus achieve the objectives of the Directive.

4.45 Legislation relating to the "depth of the market" provides for the creation of "payment institutions," which are defined as authorised payment service firms other than authorised credit institutions, electronic money institutions or post offices. The proposed Directive mandates that there should be no minimum capital requirement for such institutions, which should (in theory) reduce barriers to market entry and enhance competition. Furthermore, once payment institutions are created, they may be "passported" into any other Member State (in a manner analogous to bank mobility under the Banking Consolidation Directive).

4.46 The transparency provisions of the Directive seek to protect the user of payment services by establishing minimum levels of transaction information to facilitate the user's active choice of the least costly service offered; thereby minimising market failures caused by asymmetric information. The Directive distinguishes the "one-off" transaction from a framework contract, eg. a subscription service. The Directive includes provisions setting out the terms and conditions for both types of exchanges, related to payer and payee rights, transaction time limits, termination fees, and exchange rates (where the Euro is not the unique currency).

4.47 The regulations governing legal certainty and the relevant liability regime are designed to enable true harmonisation of payment services, covering issues such as: parties' rights and obligations; disputed transactions; unauthorised transactions; liability; and refunds.

4.48 It should be noted that the draft Directive contains an exemption in Article 3(j) for certain types of mobile transactions which would therefore not fall within the remit of Directive. However, the wording of the exemption is such that it does not exactly match the definition of PRS used in the UK, seeming to exclude some forms of PRS but not all:

> "payment transactions executed by means of a mobile telephone or any other digital or IT device, where all the following conditions are met:
>
> (i) the service provider operating the telecommunication or IT system or network is closely involved in the development of the digital goods or electronic communication service provided;

(ii) the goods and services cannot be delivered in the absence of the service provider;

(iii) there is no alternative for remuneration."

4.49 The Directive is currently being considered by the European Parliament and the Council as part of the European inter-institutional co-decision procedure.

4.50 In the UK, the Treasury has taken the lead role in considering the impact of the Payments Directive. As noted in its partial regulatory impact assessment on the Directive, the provisions of the Directive will apply to the regulation of e-commerce payment mechanisms (including PRS) and will require an extension of regulators' powers and resources. However, it is not clear at present how this requirement will be managed, ie. whether the powers of a number of existing regulators (eg. FSA, ICSTIS, Ofcom and Revenue and Customs) will be extended, whether there would be some consolidation of powers to one or more of the existing regulators, or whether an entirely new institution would be created. Therefore, the enforcement of the new regulations created by the Directive is not yet known, either in respect of who the enforcement body will be or the extent to which that responsible body will be resourced to implement future enforcement action.

5 RISKS

Introduction

5.1 We have identified the following possible consumer risks when using the e-commerce payment mechanisms covered in this study:

a) Loss of deposit;

b) Fraud and security risks;

c) Problems with advertisements and promotional material;

d) Inaccurate or inadequate information; and

e) Unclear or inadequate redress and complaint process.

5.2 For all of these risk areas, different issues and forms of regulation apply, including prudential risk requiring financial regulation, general consumer protection regulation, and sector-specific regulation (eg. PRS regulation or the Advertising Codes).

5.3 These risks can only be adequately managed and controlled if there is both a means of regulation (ie. the appropriate legislative measures are in place) and if there is an effective means of enforcement of that regulation (ie. a regulatory authority with sufficient focus on the relevant issue). As discussed above, the very wide scope of responsibilities placed on certain of the authorities responsible for enforcement of relevant regulations, perhaps particularly in the general consumer protection areas, may mean that the practical enforcement of such regulations in the context of e-commerce micro payments is necessarily reduced in effectiveness. As a result, there may be an increased need for sector-specific controls in some form to protect customers and to provide continued consumer confidence in the micro payments sector.

5.4 A further point to note is that the risks described in this section only cover the impact on consumers. We do not assess the impact of reputational or commercial risk on industry players. However, such factors could be highly relevant in considering any proposed revision to or extension of the current regulatory regime. There might be strong incentives for industry participants to introduce controls and consumer protection to prevent problems if these problems were to impact their corporate reputation significantly (and if this then had a substantial effect on their future profitability). In these cases, there might not be such a strong case to introduce formal regulation at all or one might prefer an alternative lighter touch approach to regulation.

Loss of Deposit

5.5 There are two types of deposit risks:

a) Where funds or e-money stored in an account are lost because of an administrative

error or because of the failure of the payment mechanism provider; and

b) Where there is a failure of fulfilment, ie. where a payment or part-payment is made but the correct goods or services are not supplied.

5.6 With regard to the loss of funds stored in an account, where there has been an administrative error, the funds should be recoverable under normal contractual obligations between the payment provider and the consumer. E-money issuers are required under financial regulations to have their own procedures in place to resolve customer complaints. In the case of any unresolved disputes, consumer will also be able to seek the assistance of the Financial Ombudsman Service, which covers e-money issuers and offers an alternative dispute resolution service for individual disputes between businesses providing financial services and their customers.

5.7 Where the payment mechanism provider fails and this results in a loss of deposit for individual customers of that provider, there is no specific regulation to compensate customers. The Financial Services Compensation Scheme[10], which is able to provide some compensation for lost bank deposits, does not extend to cover e-money institutions. However, one must bear in mind that the financial regulations governing e-money institutions have been designed carefully to manage and reduce the risk of such failures, including restricting how deposited funds can be invested by the e-money institution.

5.8 Cases of failure of fulfilment are covered by general consumer protection legislation, in particular the Distance Selling Directive, as well as by the ICSTIS Code in the case of PRS. However, there may be practical issues for consumers in relying on the general consumer protection legislation where the transactions in question are for very low values and where, as a result, enforcement action may not be prioritised.

Fraud and Security

5.9 Fraud risks extend beyond the e-commerce payment mechanisms analysed in this report. However, such risks are of particular concern to e-commerce payment mechanisms because of the relative novelty of these systems and the general fragility of consumer confidence around using the internet and wireless technologies as a medium for commercial transactions. For example, an OECD report in 2006 identified continuing consumer concerns over the fraud risks associated with online payments as one of the

[10] The FSCS is an independent body, set up under the Financial Services and Markets Act 2000 (FSMA). FSCS is the UK's statutory fund of last resort for customers of authorised financial services firms that take deposits, such as banks, building societies and credit unions. Deposits covered by the scheme are the following:
- UK banks authorised by the FSA, including their branches in the European Economic Area (EEA);
- EEA banks if they have joined the UK scheme in order to top up the cover available from their home state compensation scheme for deposits taken by their UK branches;
- Non-EEA banks for deposits taken by their UK branches;
- Building societies; and
- Credit unions (but not in Northern Ireland).

main reasons for consumers not buying online.[11]

5.10 Some of the more significant risks due to fraud and security issues include:

a) Unauthorised use of credit card and bank account information, and (in the case of PRS) unauthorised use of the phone;

b) Identity theft;

c) Potential breaches of system security (including hacker attacks);

d) Potential employee fraud; and

e) Use of payment systems by customers to make or accept payment for illegal or improper purposes.

5.11 While payment systems providers have introduced numerous safeguards to protect consumers against fraud (and continue to do so), there are also significant formal legislative and regulatory measures in place to counter fraud.

Fraud Act 2006

5.12 In criminal law, the UK had no specific offence of "fraud" until 2006. Cases involving fraud were therefore prosecuted using the common law crime of conspiracy to defraud or relying upon specific statutory offences involving fraud, most of which are set out in the Theft Acts 1968-96. However, prompted by a number of high-profile and costly fraud prosecutions, the Government introduced the Fraud Act in 2006, which modernises the existing statutory offences of deception (which had often been used in the past to tackle fraud) and which is particularly important in the light of developments in modern technology and electronic commerce.

5.13 The Act creates a new general offence of fraud which is committed by:

a) the making of false representations;

b) abuse of a position; or

c) failing to disclose information.

5.14 The Act also creates new offences, such as fraudulent trading by non corporate traders.

[11] Online Payment Systems for E-Commerce, 18 April 2006, DSTI/ICCP/IE(2004)18/FINAL

PRS Fraud

5.15 In the context of PRS, ICSTIS states that there are three specific types of fraud risk of particular concern for consumers. These are:

a) premium rate scams;

b) rogue dialers; and

c) content standards issues.

5.16 Fraudulent behaviour from PRS providers is a very significant problem and had previously seen worryingly high growth rates (ICSTIS registered just under 80,000 complaints in 2004/05). The issue was serious enough to have been raised as the subject of a Parliamentary debate in early 2005. However, subsequent action by ICSTIS and the PRS industry has resulted in a 75 per cent reduction in complaints being registered in 2005/06.

5.17 The threat of rogue dialling is likely to diminish in the future as this is an issue which is more related to dial-up internet connections and can be expected to reduce in importance as levels of broadband connection increase. However, risks of involuntary dialling will continue to exist for mobile handsets, digital television set-top boxes and VOIP services.

Advertisements and Promotional Material

5.18 As e-commerce is a new and developing market, there is a significant level of advertising to attract consumers:

a) to consider the new types of goods and services on offer;

b) to consider new means of access to those goods and services; and

c) to consider new e-commerce payment mechanisms.

5.19 Advertising for e-commerce products and services is now also delivered in many different forms, including traditional advertisements in the print and broadcasting media and internet-based approaches, such as banner advertisements and pop-ups.

5.20 The risks to consumers arising from advertisements and promotional material include:

a) Where the advertising material over-promotes a product or service, eg. states that it will be of a certain quality when it is not;

b) Where key contractual terms and conditions or qualifications are not stated (or are stated in a form which is practically illegible);

c) Where it is not made clear that content is not recommended or is unsuitable for children;

d) Where users can incur costs simply by opening the website advertisements;

e) Where the level of unsolicited advertisements becomes a nuisance to consumers (spam);

f) Where advertisements mislead consumers, eg. in respect of "free" offers or price promotions; and

g) Where advertisements are used fraudulently, eg. to encourage consumers to call a number to win a prize or enter a competition, without making clear what costs will be incurred.

5.21 The primary source of regulation in respect of advertising is the Advertising Standards Authority (ASA) and its three Codes of Practice. The basic principles underlying the ASA's Codes are that advertisements must be legal, truthful, decent and honest.

5.22 For direct marketing and for advertisements in newspapers, magazines, posters, and the internet, the relevant ASA Code is the British Code of Advertising, Sales Promotion and Direct Marketing. Separate Codes exist for radio and broadcasting advertisements, for which the ultimate regulatory authority is Ofcom. However, in practice, the enforcement of all three ASA Codes is performed by the Committee of Advertising Practice (CAP) which is the self-regulatory body, established by the advertising industry.

5.23 For PRS, the ICSTIS Code also covers issues related to the promotion of PRS. The Code, for example, sets out rules governing inappropriate promotion, the use of the word "free" in promotional material, and the need for service providers to be able to substantiate any factual claims which they might make in promotional material. While to a large extent, these rules merely mirror those set out in the ASA Codes, their inclusion in the ICSTIS Code may be useful both in bringing these rules to the attention specifically of PRS providers and also in providing a means of enforcement (through ICSTIS) which, by being closer to the PRS industry, may prove to be more immediately effective than the more general remit of the CAP.

5.24 Beyond the ICSTIS and ASA Codes of Practice, there is also backstop legislation which applies to advertisements. The Trade Descriptions Act, which is enforced by Trading Standards, prohibits the use of false or misleading description of goods. In addition, under the Control of Misleading Advertisements Regulations, the OFT has powers to prevent advertisements which either mislead or which make unacceptable comparisons. In its own guidance, however, the OFT states that the bulk of complaints about advertising will continue to be handled by the existing channels (ie. the ASA, ICSTIS and Trading Standards).

Inaccurate or Inadequate Information

5.25 There are a range of risks for consumers arising from the failure to provide them with accurate and adequate information in relation to an e-commerce transaction, including:

a) Failure to understand clearly the full terms and conditions of the agreement (and therefore the consumer's rights and responsibilities), for example:

- Lack of clarity as to the precise moment when the transaction is completed so that there is risk of an unintended commitment;
- Unclear pricing information;
- Not being informed whether or how to terminate a subscription service, eg. by texting "stop" to a PRS provider; or
- Not understanding how one's personal data could be used;

b) Failure to understand the nature of the service purchased, for example:

- Unintentionally signing up for a subscription service when the consumer believes they are buying a one-off service or product; or
- Being unsure of the duration of the subscription or the precise number of texts or downloads one is entitled to;

c) Failure to understand the level of commitment or financial exposure involved, such that the consumer could incur unaffordably high bills;

d) Failure to appreciate the exact content of a service, for example, where this content might contain harmful or offensive content without a clear warning; and

e) Not receiving clear and detailed records of any transactions made so that these can be tracked and (potentially) disputed.

5.26 In general, these different risk areas arising from the provision of inaccurate or inadequate information are governed by general consumer protection legislation, such as the Consumer Protection Act, the Sale of Goods Act, the Distance Selling Directive and the E-commerce Directive.

5.27 In the case of PRS, general consumer legislation is supplemented by the provisions of the ICSTIS Code and certain relevant Ofcom regulations, notably in the area of numbering. The ICSTIS Code contains specific conditions governing information provision, including information on pricing and how it should be presented, the inclusion of a "stop" command for subscription services, and the clear description of certain types of services which either might generate significant costs for consumers or which might be considered harmful or offensive. Ofcom's numbering plan is designed to provide consumers with some degree of information about both the kinds of services and the level of pricing applicable to different PRS, and similar information is provided to consumers by the self-UK Code of Practice for Common Mobile Short Codes (developed by the mobile industry).

Redress and Complaint Procedures

5.28 With any transaction involving a number of different parties, there is a concern that aggrieved customers may suffer from a lack of clarity as to the appropriate process for raising complaints or even as to whom they should address their complaints. In the case of e-commerce payment mechanisms, the consumer could feasibly address a complaint to the merchant (or information provider in the PRS context) or to the payment provider (originating network), and there may also be other parties involved. As commonly occurs in complaint situations, there may be a tendency to "pass the buck" between the different parties involved, with the result that the consumer's complaint is not resolved and no-one takes responsibility for the issue. Thus, it is important that there should be a clear means of escalating such problem complaints, providing reassurance to consumers that there is an effective process in place to resolve any complaints and to provide redress, if necessary.

5.29 As can be observed from the analysis in this report, there is a significant level of legislation and regulation in place to protect individuals both against financial risks and against general consumer protection concerns. However, it has also been noted that the enforcement burden on the authorities charged with the responsibility for these regulations is such that they must prioritise their resources very carefully, with the risk that problems arising from very low value transactions could be neglected. Moreover, from a consumer perspective, the benefits to be gained from pursuing a complaint concerning a very low value transaction may not be justified by the cost of the complaint process (which is generally designed for more significant larger value transactions). Nevertheless, the development of the e-commerce market, even for low value transactions, is very important and providing reassurance to consumers that there is a simple rapid means by which any problems and complaints can be resolved is critical for continued consumer confidence in the sector.

5.30 In the PRS market, ICSTIS provides a single point of contact, and a simple and rapid means by which consumer complaints can be resolved. While many of the rules in the ICSTIS Code duplicate or supplement those contained in general consumer protection legislation, there seems to be considerable value both for consumers and for the PRS industry in having an independent regulatory process, designed specifically to manage the kinds of issues that are particular to the PRS sector.

6 CONCLUSIONS AND RECOMMENDATIONS

6.1 This section summarises our main findings and presents our recommendations.

Conclusions

6.2 Having reviewed the different e-commerce payment mechanisms, including PRS, we find that the consumer risks and regulatory issues arising can more clearly be compared for the different payment mechanisms when distinguishing between micro payments and larger payments. While there is no universally accepted definition of the dividing line between micro payments and larger payments (we note, for example, that Article 38 of the draft Payments Directive sets the threshold level for micro payments as €50 while a response from the European Parliament suggests a threshold level of only €10), in the context of this study, we feel that there are important differences between the consumer risks and regulatory treatment of payments (and payment systems) designed for small value transactions compared with those established to handle larger value transactions. In particular, we feel that the existing well-established consumer protection measures governing issues related to payment systems transactions are considerably more likely to be well-enforced in the context of more significant larger value payments.

6.3 There are many different e-commerce payment mechanisms available for micro payments. The payment mechanisms we have studied for the purposes of this report are all designed specifically to handle micro payments (even if some of the payment mechanisms can also be used for larger payments). In addition, we anticipate that more e-commerce payment mechanisms will emerge, as the market for micro payments and for digital goods and services continues to expand.

6.4 All of the e-commerce payment mechanisms studied in this report face the same or very similar risk issues, particularly as regards consumer protection concerns. While the design and nature of the payment mechanism creates some important differences (for instance, a deposit based scheme, such as PayPal, will need to consider e-money related issues), all of the payment scheme providers need to consider consumer issues, such as:

a) Providing clear information to the consumer as to the nature and cost of the transaction and the consumer's responsibilities;

b) Providing a clear process whereby the consumer positively authorises a transaction to take place;

c) Providing a clear and straightforward process whereby the consumer can cancel ongoing (subscription) services;

d) Providing clear and easily accessible billing records; and

e) Providing measures for redress and complaint handling in case of problems.

6.5 Legislative measures and regulations governing financial prudence are generally clearly

set out, well understood and widely enforced. The FSA framework for e-money issuers includes the following key characteristics:

a) Issuers must ring fence their e-money activities from other areas of business risk;

b) Funds held in exchange for the issue of e-money must be invested in high quality liquid assets;

c) There is a minimum capital requirement for issuers of at least 2% of outstanding e-money liabilities or €1 million, whichever is the higher; and

d) E-money issuers must have sound and prudent systems and adequate internal control mechanisms and must comply with the FSA's money laundering requirements.

6.6 However, the regulation and practical enforcement of consumer protection issues vary considerably for the different e-commerce payment mechanisms. Whereas PRS are regulated under the ICSTIS Code, with specific requirements in terms of the consumer information to be provided and establishing complaint mechanisms, in practice other e-commerce payment mechanisms have no specific regulatory supervision in respect of consumer protection issues. While it is true that, in many cases where there is a potential cause for complaint, general consumer protection legislation could ultimately provide a means for redress, in the context of the e-commerce micro payments market, such forms of redress are unlikely to be effective, not least because the relevant regulatory authorities would tend naturally to prioritise complaints about higher value issues and complaints where evidence of harm can more easily be obtained.

6.7 The current lack of consistency in the different regulatory requirements applying to different e-commerce micro payment systems may provide cause for concern in a number of areas:

a) There may be gaps in the consumer protection measures which exist, either because there are no consumer protection measures covering a certain situation or because, even when there are such measures, they may not be enforced in practice;

b) There are disputes about the remit of some regulators to apply consumer protection measures in certain situations;

c) Some payment mechanism providers feel that some regulations are disproportionate, particularly where they feel that they have already addressed consumer protection issues adequately in their system design;

d) Some payment mechanism providers may face more regulation and higher compliance costs than other providers, thus placing them at an unfair competitive disadvantage; and

e) Consumers can not be clear of the areas where they enjoy regulatory protection and where they do not, nor is it always clear to which regulatory authority (if any) they can

address complaints.

6.8 There would clearly be some value in standardising (at least to some extent) the scope and degree of protection offered to consumers when using micro payment mechanisms for e-commerce. Such standardisation would provide consumers with confidence that they enjoy at least the basic levels of consumer protection, regardless of which payment mechanism they select for e-commerce transactions (higher levels of protection may of course be offered to consumers by individual providers as a means of competitive advantage). Moreover, requiring payment mechanism providers all to offer a standardised level of consumer protection would ensure that all of the e-commerce payment systems could compete on a relatively level playing field, with broadly similar compliance costs.

6.9 If there is value to be derived from standardising consumer protection measures for e-commerce micro payment mechanisms, one must consider which approach to regulation is most appropriate. Clearly, as one increases the formality of consumer protection measures in order to provide the strongest possible protection and the most stringent enforcement, one also increases compliance costs and reduces operational flexibility for the industry. We also note that the nature of the e-commerce micro payments market should be an important consideration: because transactions are relatively low value, the need for intrusive measures should be harder to justify; and because the market is in the early stages of development, one should be careful not to take any steps which might stifle future innovation and growth.

6.10 We note that the future transposition and implementation of the EU Payments Directive may compel a rationalisation of consumer protection regulation in this area, although it is not clear how the UK Government will implement the Directive, particularly which regulatory authority (or authorities) the Government will choose to enforce the Directive's provisions. We also note that the current Commission draft of the Directive includes certain derogations for transactions for digital content and services, and for micro payments.

Recommendations

6.11 We believe that there are good reasons to distinguish between the type and level of protection offered to consumers for content and services delivered electronically. Such content and services have particular features which are important when considering the need for and implementation of regulatory protection, notably, the fact that such content and services tend to be instantly consumed and intangible in nature

6.12 Any regulations to be imposed should also take account of practical considerations, such as the remote nature of the transaction (ie. there is no face to face contact) and issues such as screen size (for transactions over mobile phones and PDAs).

6.13 The approach to consumer protection regulation for e-commerce micro payments must also consider market factors, which include the extent and effectiveness of competition in

the market, and the importance of brands and brand reputation in the market.

6.14 Based on our review of the market, we believe that there is a prima facie case for some form of light touch regulation in the e-commerce micro payments market. While there is a developing competitive market, most of the payment mechanisms are not well developed or very widely used by the majority of consumers. Many of the providers of such payment mechanisms do not have established brands and reputations in the area of payment services. This means that many consumers may not have the level of confidence in e-commerce micro payment mechanisms which is required to encourage more widespread use. Any consumer protection problems that may arise in the future and which are not (or can not be) resolved could give rise to further significant concerns about the robustness of such payment mechanisms and substantially dampen consumer trust and demand. We note that PRS, which is the most widely used e-commerce micro payment mechanism, is subject to regulation via the co-regulatory approach of the ICSTIS Code.

6.15 We do not believe that company-specific or scheme-specific rules provide sufficient protection for consumers in the absence of a strong brand protection driver and while the e-commerce micro payment market is still in its formative stages. Such rules do not amount to an effective form of "self-regulation" since:

a) they can be changed at short notice and without consultation;

b) there is potential for the rules to be applied arbitrarily or in a fragmented manner (by different providers within the same payment scheme);

c) there is a lack of independence and transparency in the manner in which the rules are drawn up and enforced; and

d) there is no (or at best very limited) means of enforcement or redress by outside parties against the scheme members.

6.16 We believe that it may be disproportionate to apply the full terms of the current ICSTIS Code to e-commerce micro payment mechanisms. Many of the rules of the ICSTIS Code may not be relevant to the payment mechanisms, depending on their individual design. Some of the rules may not be required since many payment mechanism providers remain fully independent of the goods or service being supplied (unlike a traditional PRS). More importantly, the ICSTIS Code may be too slow to adapt to the fast-moving requirements of the sector because of its remit to govern PRS (and not e-commerce payment mechanisms, as such).

6.17 We would therefore recommend that an alternative model should be adopted to provide consumer protection for users of e-commerce micro payment systems. The model we recommend would essentially be a self-regulatory model but with important controls to address the concerns listed above with regard to company-specific and scheme-specific rules. The design of this regulatory approach would provide flexibility so that the rules could be amended rapidly to adapt to the fast developing market but would also

incorporate independent oversight and transparency to ensure that the rules remained fair and open, and were appropriately enforced. We note that a similar self-regulatory approach has been taken with regard to the Banking Code, where the Banking Code Standards Board's (BCSB) role is to ensure banks' compliance with the Banking Code. The BCSB has a majority of independent directors and the Banking Code is published and reviewed regularly, after public consultation.

6.18 We agree with the concerns of those payment mechanism providers who argue that it would be unfair to impose regulations on some providers and not on all (or to impose different requirements on different providers). Ideally, all providers of e-commerce micro payment mechanisms should face the same (or very similar) requirements in terms of consumer protection measures. However, we note that achieving a uniform regime may be very difficult, given that:

a) The only authority currently regulating such consumer protection issues in detail for the e-commerce micro payments market is ICSTIS but that ICSTIS' remit is derived from the Communications Act and is clearly linked to the definition of PRS contained within the Act;

b) Other regulatory authorities which could address such consumer protection issues are either not resourced to do so and / or are focused on other issues more central to their remit; and

c) The possibility of devising and implementing a uniform regime offered by the transposition of the Payments Directive may be a number of years away.

6.19 While it is outside the scope of our terms of reference, we therefore would recommend that there is a need for a cross-sectoral governmental and regulatory review to consider the consumer protection requirements of e-commerce micro payment systems and how such consumer protection measures could be enforced in a uniform manner.

APPENDIX A: DEFINITION OF PRS

Extract from Section 120 of Communications Act 2003

Conditions regulating premium rate services

(7) A service is a premium rate service for the purposes of this Chapter if-

- it is a service falling within subsection (8);
- there is a charge for the provision of the service;
- the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
- that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.

(8) A service falls within this subsection if its provision consists in-

- the provision of the contents of communications transmitted by means of an electronic communications network; or
- allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service.

(9) For the purposes of this Chapter a person provides a premium rate service ("the relevant service") if-

(a) he provides the contents of the relevant service;

(b) he exercises editorial control over the contents of the relevant service;

(c) he is a person who packages together the contents of the relevant service for the purpose of facilitating its provision;

(d) he makes available a facility comprised in the relevant service; or

(e) he falls within subsection (10), (11) or (12).

(10) A person falls within this subsection if-

(a) he is the provider of an electronic communications service used for the provision of the relevant service; and

(b) under arrangements made with a person who is a provider of the relevant service falling within subsection (9)(a) to (d), he is entitled to retain some or all of the charges received by him in respect of the provision of the relevant

service or of the use of his electronic communications service for the purposes of the relevant service.

(11) A person falls within this subsection if-

(a) he is the provider of an electronic communications network used for the provision of the relevant service; and

(b) an agreement relating to the use of the network for the provision of that service subsists between the provider of the network and a person who is a provider of the relevant service falling within subsection (9)(a) to (d).

(12) A person falls within this subsection if-

(a) he is the provider of an electronic communications network used for the provision of the relevant service; and

(b) the use of that network for the provision of premium rate services, or of services that include or may include premium rate services, is authorised by an agreement subsisting between that person and either an intermediary service provider or a person who is a provider of the relevant service by virtue of subsection (10) or (11).

(13) Where one or more persons are employed or engaged under the direction of another to do any of the things mentioned in subsection (9)(a) to (d), only that other person shall be a provider of the relevant service for the purposes of this Chapter.

(14) References in this section to a facility include, in particular, references to-

(a) a facility for making a payment for goods or services;

(b) a facility for entering a competition or claiming a prize; and

(c) a facility for registering a vote or recording a preference.

Appendix 2

Strategic Review of Regulation of PRS services in Ireland – Europe Economics
(Released under FOI, following successful appeal)

Strategic Review of the Regulation of Premium Rate Services in Ireland

Report to RegTel

DRAFT – CONFIDENTIAL

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30 May 2008

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1 SUMMARY

We regard this document as confidential to RegTel. It is for RegTel to decide what further circulation, if any, it should be given.

1.1 In brief, our terms of reference are "to evaluate the strategic options that are available to RegTel and the industry, and make recommendations".

1.2 In order to gather essential input from industry players, regulatory agencies and other policy-influencers, we began by undertaking an intensive programme of interviewing. In all, we interviewed 38 representatives of 21 organisations, including, of course, RegTel itself. We are most grateful to all those who agreed to speak to us – some on more than one occasion.

1.3 Among industry players – network operators and service providers – the general perception is that RegTel is not easily able to cope with the complexity of pace of development in the PRS market. It has too little policy-making and technical expertise, the legal underpinning for its activities is regarded as unreliable, and the Board is felt to be out of touch with the dynamics of the market. RegTel's willingness to consult meaningfully is widely criticised. Above all, RegTel is regarded as not having taken sufficiently vigorous action against rogue operators, who have undermined consumer confidence in PRS in Ireland, with the result that the industry has lagged behind developments that have benefited other economies. The industry is keen to see change in the way RegTel operates, but there is no single industry view as to the right way forward.

1.4 RegTel itself accepts some but not all of these criticisms. The Board in general accepts that it is in need of new members to succeed those who have been in position for many years. They accept particularly that appointments of indefinite duration are not only out of line with current best practice in corporate governance but that they are especially inappropriate for a Board which is effectively accountable only to itself. A number of Board members have signified their willingness to step down. We acknowledge that it was the Board which took the initiative leading to this study, and we were impressed with their open-mindedness about finding a new way forward.

1.5 The RegTel Executive argued that the industry itself could have done more to weed out those industry players who are known regularly to breach the Code of Practice. In particular it believes that network operators could have done more to drive out service providers who did not behave fairly towards consumers.

1.6 The two other major regulatory agencies involved in issues dealt with by RegTel – namely the National Consumer Agency and the Data Protection Commissioner – have told us that they are willing to take action whenever necessary, and that they have both done so.

1.7 We considered whether the regulation of PRS is necessary, and are persuaded that it is. The paramount requirement is consumer protection. From the evidence we have been given in interviews it is too easy for miscreant operators to set up in business, to mislead

and defraud consumers and to remain in the market before action is taken against them. We agree with RegTel and the industry that the need in the short term is more vigorous enforcement of the existing Code of Practice, not necessarily more or more draconian regulation.

1.8 We have taken levels of consumer complaint as the main proxy for effectiveness in assessing how well or badly PRS regulation in Ireland has worked. The evidence does not point unambiguously in one direction. RegTel argues that of the 30,000 or so calls, texts, e-mails and letters made annually by consumers in relation to PRS, only 2,000 or so are complaints, with most of the rest queries. We accept that not all 30,000 approaches are complaints, and that it may often be difficult to distinguish between queries and complaints, but we think the real level of complaint could be higher than 2,000.

1.9 As part of this study we were asked to make some comparisons with the UK. To do so is not straightforward, given a number of important differences in the make-up of PRS markets in each country. PRS industry revenue per capita in Ireland is currently 17 per cent below that of the UK although Ireland has a GDP per capita some 24 per cent higher. It is arguable that greater consumer confidence in Irish PRS would go some way to reducing the differential.

1.10 We emphasise that this does not necessarily point to shortcomings only in RegTel: the industry as a whole, not just the regulator and the regulatory regime, has to be held accountable.

1.11 What, then, needs to be done? Our belief is that wholesale restructuring of the regulatory regime for PRS is not essential. It is possible – and arguably quicker – to leave the existing structure of regulation as it is and to enhance the resources available to RegTel (as the Board itself accepts is necessary). The regulatory system, relying as it does on contracts between RegTel and network operators, and between network operators and service providers, may be somewhat cumbersome but it is far from unworkable. We argue that it could be worked more vigorously.

1.12 If, however, the government is determined upon major structural change (and we understand that as this report is finalised it may already have done so), one of its two favoured options is clearly better in our view than the other.

1.13 We have reservations about the first option, namely to fold RegTel into Comreg. It is not unworkable, but it is likely to be problematic, primarily because of the differing characteristics of PRS regulation and those of Comreg's other functions. PRS regulation requires expertise and capacity to deal with large numbers of small issues quickly. Comreg by contrast is required to deal with a smaller number of larger issues, at a pace reasonably determined by itself. An additional problem is that Comreg has no powers to regulate service content, and no experience in the field.

1.14 The second structural option, which is in effect to transplant the UK model to Ireland, is in our view somewhat more workable. Effectively, Comreg would stand in the shoes of Ofcom, the UK principal regulator of communications, and RegTel would become the equivalent of PhonepayPlus (formerly ICSTIS). Comreg would acquire appropriate powers under new primary legislation, and would delegate PRS regulation to a designated body, which we term New RegTel. In this way the operational separation of Comreg and RegTel, which we believe to be vitally important, would be preserved.

1.15 Adopting the UK model in Ireland will inevitably take some time while new primary and secondary legislation is drawn up and while current contractual arrangements are replaced. With this in mind we suggest that the "non-structural" option we have described may be a useful interim arrangement on the way to structural change.

1.16 Among restructuring options, we believe that establishing RegTel as an independent regulator, with its own statutory powers derived from new primary legislation, is a perfectly viable proposition. The effort involved in re-establishing RegTel on this basis is little different from the effort required to provide Comreg and RegTel with new powers along the lines of the UK's Ofcom/PhonepayPlus model. The operational costs involved are unlikely to be different from those of the non-structural changes we have outlined or of adopting the UK model. In any event, the costs of PRS regulation are borne ultimately by users through a levy on operators, not by a charge upon the public purse. Whether or not to re-establish RegTel as an independent regulator is a matter of political judgement rather than of efficacy.

1.17 Under any future arrangement, greater and more systematic consultation with the industry and more effective liaison with other regulators is necessary.

2 INTRODUCTION

Terms of Reference

2.1 On December 27th 2007, Europe Economics (henceforth "we" or "us" in this document) received an invitation from Mr. Pat Breen, the Regulator of Premium Rate Services (PRS), to submit a proposal to his board covering ***A Strategic Review of the Regulation of Premium Rate Services in Ireland***.

2.2 We submitted our proposal to Mr. Breen on the due date of January 25th 2008 and were invited to present and discuss it in more detail at a meeting held at RegTel's offices on February 13th 2008. During that meeting we were advised verbally that RegTel intended to place the contract with us, and our appointment was confirmed in writing on February 26th.

2.3 At the start of the project, RegTel explained to us a new Government initiative which would to some extent affect the process we had proposed.

2.4 We were advised that a new broadcasting bill was in course of preparation, that it would be useful to append changes concerning RegTel to that bill, and that our report would be of interest to those involved in its drafting. We were further advised by officials in the Department of Communications, Energy and Natural Resources that the Department would prefer us to concentrate our structural and governance analysis on two "models".

2.5 The structural options favoured were:

- either to fold RegTel into the main communications regulator, Comreg;
- or to adopt the so-called "UK model", in which the main communications regulator, Ofcom, is entitled under primary legislation to delegate PRS regulation to a specialist body (formerly ICSTIS, now PhonepayPlus) which nevertheless remains subject to oversight and policies set by Ofcom.

2.6 We do not regard either of these two models as necessarily offering the one right solution that makes all others wrong, nor are we persuaded that structural change is essential.

2.7 Furthermore, our client for this study is RegTel, and RegTel's requirement was that we should look at a broader range of possibilities. We also, therefore, suggest another way forward that does not rely on structural change.

2.8 Our original terms of reference required us to consider PRS regulation in a number of other jurisdictions within and beyond the EU. We had completed a study on this subject for Ofcom in the UK shortly before we were awarded the current contract with RegTel, and we have made the Ofcom study available to them (with Ofcom's blessing). This report does not therefore attempt a replication of that work.

Structure of this document

2.9 The remainder of this document is structured as follows:

- Section 3 suggests how PRS should be defined for legislative and regulatory purposes.
- Section 4 explains why PRS is thought to need regulation, what regulatory arrangements currently apply in Ireland, and how these have worked.
- Section 5 summarises our interviews with participants in the PRS market.
- Section 6 summarises our interviews with RegTel.
- In Section 7 we review the options for change in PRS regulation.
- Finally, we provide five appendices covering (1) the PRS markets in Ireland and the UK, (2) legislation underpinning the current PRS regulatory regime in Ireland, (3) appeals mechanisms in Ireland and the UK, (4) the PRS complaints procedure operating in the UK, and (5) a list of interviewees. For reasons stated in the main body of the report, we have given some prominence in the appendices to comparisons between Ireland and the UK.

3 DEFINING PRS

Key characteristics

3.1 Premium Rate Services (PRS) are defined differently in different countries. In general terms, PRS provide information or entertainment via a telephone handset, where the money paid by the user for the PRS call is shared between the telephone company and the organisation responsible for providing the content.

3.2 We believe, however, that there are some key characteristics which may better describe such services, and we list these below. In summary, these characteristics are related to charges, types of service, identifying codes, the "value chain" by which PRS are devised and delivered, and billing mechanisms to consumers.

3.3 We then conclude this section with a definition which aims to be of use to those drafting the possible new legislation referred to in paragraph 2.5.

Premium charges

3.4 Premium Rate Services are charged to the consumer at a rate higher – and often substantially higher – than the standard set by the network operator.

3.5 The charge may be per minute, per call or flat rate and appears on the consumer's phone bill.

Types of services

3.6 There are three broad categories which include both basic telecoms services and value added services. These are:

- Information services, such as technical help-lines, directory enquiry services, news, and information (for example weather forecasts and traffic reports)
- Entertainment services, for example: adult entertainment, chat lines, horoscopes, TV vote-lines, interactive TV games, sports news and commentary.
- Other services, which may be a combination of the two categories above, such as competitions, mobile ring-tone and logo downloads, wall papers, scratch-cards and charitable fund-raising.

3.7 PRS are most frequently accessed by fixed line telephone, mobile telephone (often through short messaging services, usually referred to as SMS or text). Less often they may be accessed by fax, PC (through the internet), or interactive digital TV.

PRS identifying codes

3.8 PRS are accessed using specific prefixes or codes which vary across types of service and countries. The codes are generally allocated in a national numbering plan to make

PRS numbers easily recognisable to consumers and distinguishable from other numbers. PRS are often known as "XXX services" rather than as PRS by name. PRS numbers are not linked to a geographic area.

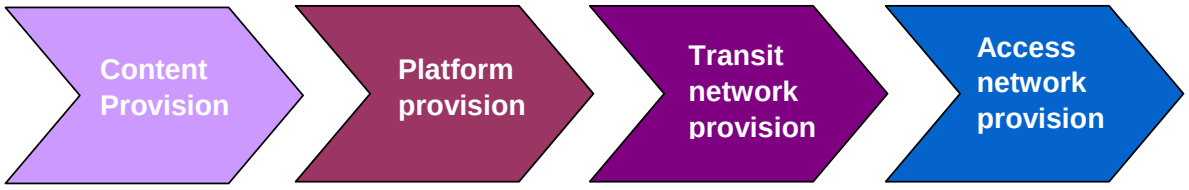
3.9 Because PRS charges can be very high, network operators generally provide their customers with the opportunity to block access to PRS number ranges.

Value chain

3.10 The provision of PRS includes a several players in the value chain, which is interlinked through sometimes complex agreements. Typically, the end user is unaware of such arrangements in that he/she pays only one party, namely the telephone network provider. There are different business models, generally depending on the level of integration between the stakeholders within the value chain.

3.11 The value chain follows the scheme depicted in Figure 3.1 below.

Figure 3.1: Functional Value chain for PRS



Adapted from Wik Consult Gmbh and Cullen International Report for the European Commission – Study on pan-European market for premium rate services, June, 2005

3.12 Figure 3.1 should be read from left to right. Content provision, which is carried out by service providers, or suppliers to service providers, means the creation and/or packaging of content to be supplied via PRS. The conveyance of calls between trunk and local exchanges takes place on the transit network. Platform provision relates to the technology whereby PRS are delivered (e.g. by mobile phone or fixed line phone). Finally, access network provision, sometimes referred to as the last mile, is a wired or wireless connection linking the end user to a telecommunications network, usually to a local exchange or base station.

3.13 There is almost always a revenue sharing agreement between the network operator(s) and service provider(s). Effectively, the network operator collects money from the consumer (the person making the call) on behalf of the content provider and passes an agreed part of the revenue to him.

Billing mechanisms

3.14 The premium rate charges can be either included in the phone bill and collected by the telephone company "online" or billed "offline".

3.15 Online billing means that the access network provider calculates the price for the PRS on the basis of information supplied by the service provider. The network provider then bills and collects the money from the end user. There is no delay in the process.

3.16 Offline billing means that the service provider himself has to bill the services to the network provider, who will then bill the PRS to the customer. We understand that offline billing is non-existent in Ireland.

Other considerations

3.17 The definition of PRS is important not only for measuring and classifying the market but, in the context of this study, a vital factor in assessing the need for and scope of regulation, and above all a basis for legislation. With this in mind, we suggest there are two additional factors to consider:

- PRS are subject to ceaseless technological change, especially increasing **convergence**; and
- PRS can also be defined as **a form of micro-payment** for content, data services and other value-added services that are subsequently charged to a user's telephone bill.

Convergence

3.18 The term "convergence" is used to describe the carriage of more than one type of traffic across a given network or networks.[1] Traffic carried over what were once thought of as voice networks can now be voice, data, video or multimedia, or a mix of several.

3.19 Convergence itself is visible in several forms:

- Device convergence: consumers can increasingly use the same device to send or receive different types of content. For example, mobile phones are used not only to send and receive voice calls and text messages, but also to download data or access internet-based material. Conversely, the internet can be used (via Voice over Internet Protocol – VoIP) to make voice calls much more cheaply than over established telephone networks.
- Infrastructure convergence: the dividing line is becoming blurred between mobile, wireless and fixed networks. Third generation technology is likely to blur the dividing line even further.

[1] In the UK, Ofcom defines convergence as "the ability of consumers to obtain multiple services on a single platform or device or obtain any given service on multiple platforms or devices". See Ofcom, ***What is convergence?*** 2008.

- Usage/application convergence: mobile usage is beginning to overtake fixed line usage; ring-tones and music content are increasingly often downloaded to mobile devices rather than bought as CDs; and gambling in several forms is moving on-line and is thus becoming available over mobile handsets. All in all the internet is taking market share from traditional media in an increasing range of applications.

3.20 The impact of convergence is not easily predictable, but there are structural and business model changes that legislators and regulators need to recognise:

- new patterns of demand amongst consumers
- bundled services
- the possibility of alliances and mergers from companies intent on providing "full service" (possibly with a negative impact on competition)
- risks arising from services provided from abroad
- choice for consumers becoming more difficult as the complexity of technology increases.

PRS as micro-payment mechanisms

3.21 There are two main types of micro-payment mechanisms:

- **Account-based** systems, such as PayPal. These normally require that users be adults (18 or over) and have a credit card or bank account. Account-based systems are also subject to financial regulation, such as those relating to e-money and money laundering.
- **Systems based wholly or mainly on mobile phones**. These generally have fewer access restrictions because services over mobile phones can be pre-paid and thus remove the problem of credit risk. They thereby allow transaction possibilities to consumers who are under 18 and to adults who may lack a credit rating sufficiently good to justify a bank account or a credit card.

3.22 With each type of payment mechanism consumers face similar risks, but the way in which the legislative framework is established will determine whether micro-payments are defined as PRS or not.

3.23 In the UK, where a payment mechanism is designated as PRS, the PhonepayPlus Code applies (PhonepayPlus is the UK regulator of PRS), setting out detailed rules on the interaction between service providers and consumers. Payment mechanisms not designated as PRS are governed by general or specific consumer legislation. Technology may make the difference between the two an arbitrary matter, raising the question of whether PRS scams are a matter for the financial regulator (which he may not be geared to deal with) or whether transactions which debit a phone bill or prepaid card should be

dealt with as PRS, in which case micro-payments present PRS regulators with a whole new area of responsibility.

3.24 Given the lack of a European harmonized framework on PRS regulation, there are difficulties in interpreting which if any payment mechanism should be defined as PRS. EU Directives which legislators need to bear in mind (and which we do not develop here) include :

- Directive 98/48/EC on Information Society Services
- Directive 2000/46/EC on e-money
- Draft Directive on Payment services
- Directive 2005/29/EC on Unfair Commercial Practices.[2]

EC and IARN definitions of PRS

3.25 DG INFOSOC of the European Commission defines PRS thus:

> "Premium rate services" refers to services, provided by an Information Service Provider (ISP), that are accessed by the use of a premium rate telephone number in which the caller pays a special premium rate that is above the normal tariff for voice calls. Examples of services are sports information services, games, popular voting (as opposed to electoral voting), chat lines and business information services."[3]

3.26 IARN (the International Audiotex Regulators Network, of which RegTel is a member) suggests that the characteristics by which a premium rate service may be recognised are generally as follows:[4]

> "Premium rate services are provided by means of calls using the electronic communications network. The definition of premium rate calls can extend to reverse text messages where the 'caller' pays for content and a premium rate charge is applied.
>
> Callers pay more for a premium rate call than for a simple (carriage) call to the same destination. Payment for the call is related to the content of the call or other product or service delivered in the course of, or as a direct consequence of, the call. This additional value is provided by a 'service provider '.
>
> The caller's telephone company bills the caller for the premium rate telephone calls and collects the relevant revenues. The additional revenue (over and above the simple

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2 The Consumer Protection Act 2007 gives effect to the Unfair Commercial Practices Directive in Ireland.

3 Quoted in ***Study on pan-European market for premium rate services*** by Cullen International SA and WIK Consult GmbH, published June 2005.

4 IARN Handbook for Premium Rate Services, 2002

> carriage cost and network charges) is passed on by the telephone company to the service provider. This is known as 'revenue sharing'.
>
> The service provider may, in turn, sub-contract all or part of the job of providing and promoting the premium rate service to other parties, generally known as content providers or information providers. However, the service provider continues to be responsible to the regulatory body for adherence to the relevant standards for content and promotion of the service."

PRS definition in Ireland

3.27 RegTel provides a description of PRS on its own website:

> "Premium Rate Services are provided by companies or individuals on premium rate telephone numbers. These are sometimes referred to as Information Services. […]. The range of services on offer includes general information such as Weather Forecasting, Traffic News, Stock Exchange Reports and Sports Results, as well as Advice and Entertainment services. These services are accessed either through landline telephones, mobile phones, the Internet or through auto-diallers on PCs. They are promoted in print media and on television, radio and the Internet.
>
> Calls to Premium Rate Services cost more than ordinary telephone calls and each [telephone number] prefix carries a specific call cost. Call charges from mobile phones generally cost more and the surcharge varies according to the Mobile Network Operator. Premium Rate call charges are billed to consumers' telephone accounts and are usually listed separately. The overall charge to the consumer is shared between the telephone company (Network Operator), the Service Provider, and others who contribute to the provision of the service".

3.28 An indicative list of the categories of services provided in Ireland are specified in the RegTel Code of Practice (CoP) and include children's services, competitions, advice and information, services of a sexual nature, virtual chat, contact and dating, and the promotion of virtual chat, contact and dating.

Practical limits

3.29 We have already shown that some services are pushing at the established boundaries of PRS. More specifically:

- It is possible to use a telephone handset (fixed or mobile) via a premium rate number or code to purchase services or products for which payment is then charged to a debit or credit card, not to the telephone account.
- It is also possible to order, through mobile internet services, products or services which are then charged to the consumer's telephone account or pre-pay card even though the goods or services are entirely unrelated to any form of telecoms or other communications service. To the best of our knowledge, such services have not yet been launched in Ireland, but in the UK such a services does exist

under the name "Payforit" (see http://www.payforituk.com). It is easily conceivable that Payforit could be transplanted to Ireland.

- A third example is that it is possible to download internet content to a mobile handset over either a premium rate or a non-premium rate number, with the download charge applied either to the user's debit or credit card, or to the phone card or account.

3.30 It seems to us infeasible – even if it were consistent with other legislation – for the PRS regulator to take responsibility for the content and promotion of all such transactions. He cannot in our view be held responsible for the regulation of:

(a) Disputes between consumers, their credit/debit card issuers and the providers of goods and services.

(b) The content of material downloaded from the internet.

3.31 Services such as Payforit present a particular problem and we are unable to reach a view as to whether such services – if or when they are launched in Ireland – should fall within the scope of Irish PRS regulation. The UK has not yet made up its mind on this matter: the intermediaries[5] involved in Payforit (we looked at MXTelecom and Bango as examples) make no reference on their websites to their being authorised or regulated by any regulatory body. Ofcom says that it has Payforit under review with PhonepayPlus in a current scoping exercise, the results of which will not be available for some months yet. Payforit has not yet gained widespread consumer acceptance in the UK.

3.32 Our suggestion is that RegTel (and other Irish regulators) keep Payforit and like services under review pending publication of the Ofcom/PhonepayPlus scoping study. At the very least the Financial Services Regulatory Authority of Ireland, the National Consumer Agency and the Data Protection Commissioner all have legitimate interests in where regulatory responsibility lies or how it may be shared. In the meantime, if the "Accredited Payment Intermediaries" which connect the merchant with the Mobile Network Operators do not fall under the aegis of the FSRAI or any other licensing or authorisation agency, it is difficult to see how such micro-payment services as Payforit could be debarred from Ireland.

3.33 If micro-payment systems do eventually fall within the responsibility of the PRS regulator, the number of transactions involved could be immense: conceivably far greater than the number of PRS calls made now (estimated by RegTel at about 112 million), and representing revenues far in excess of the €94 million currently accounted for by PRS.[6] It seems highly likely to us that, if PRS became well accepted as a form of micro-payment

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[5] The intermediaries provide a connection between the merchants selling goods or services and the billing systems of the mobile network operators.

[6] See RegTel's Annual Report 2006/07. RegTel records 32 million fixed line PRS calls and at least 80 million mobile.

in Ireland, the current average expenditure per call of €0.84 (i.e. €94m/112m) could rise rapidly. The current expenditure limit per transaction with Payforit is £10, or roughly €13.

3.34 Leaving aside the particular problems arising from micro-payment services, we consider it reasonable for PRS regulation to cover:

(a) Services charged at a premium rate to the user's phone card or account, even if initial access to that service was carried over a non-premium rate number.

(b) Services charged at a premium rate to the user's phone card or account in which services or goods purchased are then charged to a user's debit or credit card. In this situation the PRS regulator would have responsibility only for the premium rate service, not for the charge to the user's debit or credit card.

(c) Services charged at a premium rate to the user's phone card or account in order to provide internet access.

Summary of scope of regulation

3.35 In Table 3.1 below we summarise those aspects of PRS activity which, ***at the current state of market development***, we think should fall within the remit of the PRS regulator.

Table 3.1: scope of PRS regulation

Type of call	Examples	How charged	Regulation of promotion?	Regulation of content?
PRS	Information, voting, competitions, horoscopes, adult entertainment	To a phone account or to a pre-pay phone	Yes	Yes
PRS	Purchase of goods or services, e.g. gambling, ticket purchase	Call charged to a phone account or pre-pay phone Product or service charged to a credit or debit card	Yes No	Yes No
Non-PRS	Access to premium rate code or number	To a phone account or pre-pay phone	No to non-PRS element Yes to PRS element	No to non-PRS element Yes to PRS element
PRS	Internet access	To a phone account or pre-pay phone	Yes to call element No to internet content	Yes to call element No to internet content
PRS or non-PRS	Access to micro-payment site	To a phone account or pre-pay phone	To be reviewed	To be reviewed

Proposed definition

3.36 We now bring together the characteristics of PRS into a definition for Ireland which we hope will assist the task of legislative drafting.

3.37 In our view it is likely – and highly desirable – that, whatever statutory underpinning is provided for the future regulation of PRS in Ireland, it will rely on both primary and secondary legislation.

Primary legislation

3.38 For primary legislation, our suggestion is that the definition of PRS be made a broad and as flexible as possible in order to allow secondary legislation (regulation) to keep pace with developments in technology.

3.39 To qualify as a Premium Rate Service, a service must satisfy at least three of the following five conditions:

(a) The service must be carried over a public communications network.

(b) The service must be accessed by means of a number or code allocated by the relevant communications authority and identified by that authority as applicable only to a Premium Rate Service.

(c) There must be a charge for the service over and above the call charge made by the communications network operator.

(d) The charge to the consumer for the service must be made in whole or part by the communications network operator.

3.40 Our view is that while at this stage of market development the definition of PRS should be as above, it should be kept under review. With that in mind we suggest that wording in primary legislation should enable the Minister to order periodic reviews of the definition. It may then be a matter not merely of redefining PRS but may involve specifying regulatory primacy or allowing concurrent powers.

3.41 We do not think that PRS secondary legislation inevitably has to specify device types. If it were felt prudent to do so, we envisage that, for the present, such devices would include fixed and mobile telephone handsets, fax machines, personal computers, personal digital assistants (PDAs or sometimes "handhelds"), and interactive television sets. But all these, in their present forms and terminology, may be overtaken by technological developments. The primary legislation should thus empower the Minister, or alternatively the regulator subject to Ministerial approval, to add devices to or remove them from the scope of legislation from time to time.

Secondary legislation

3.42 Secondary legislation would provide, most importantly, for a Code of Practice which would determine the behaviour required of network operators and service providers, and for a review mechanism whereby the Code could be amended from time to time.

3.43 Depending on the regulatory structure chosen (which we turn to later) the secondary legislation might also need to encompass one or more Memoranda of Understanding between the PRS regulator and other regulators.

4 WHY DO PRS NEED REGULATION?

4.1 In some respects PRS are just another telecoms service – merely voice calls or text messages sent over switched public networks – and on that basis it can be argued that they need no more regulatory intervention than the general run of non-PRS activities.

4.2 But in other respects PRS are distinctively different, and in Ireland as in most other jurisdictions, they have been regarded so since they were first launched. When PRS regulation in Ireland was first established in the mid-1990s, the size and nature of the market (in Ireland and elsewhere) was very different from what it is today. But in all developed economies PRS have remained subject to specific regulatory arrangements and indeed increasing resources have generally been devoted to them.

4.3 The principal features of PRS that set them apart from non-PRS telephony are as follows seem to us to be four in number:

- supply chain
- content
- price
- transparency

4.4 We suggest that transaction size, and possibly type of consumer, may pose additional reasons for regulation.

Supply chain

4.5 Since the PRS consumer (the telephone user) is in contract only with his/her network provider, he has to pay that network provider for a premium rate service which may originate with another supplier and/or may be delivered through intermediaries. The contractual "invisibility" of the originator to the consumer, and the length of the supply chain between content originator and consumer, can pose particular problems that regulation has to deal with.

Content

4.6 While many services supplied as PRS are harmless, some are deemed potentially harmful.

4.7 Few would object to (say) weather forecasts, traffic reports or sports results being made available over a phone connection. If such calls are typically more expensive than ordinary person-to-person communications, that in itself is not objectionable because the cost of providing the content has to be recovered in addition to the network operator's own costs.

4.8 However, society may object to certain other types of content being offered on phone networks. One example is sex chat lines. Here – apart from the general issue of morality, on which opinions may vary – the problem can arise of minors accessing material deemed unsuitable for them. Regulation is required to deal with that.

4.9 In some jurisdictions, closer content regulation is mandated. For example interactive sex chat is permitted in some countries while in others the consumer is allowed only to listen. Ireland falls into the latter category. Other potentially harmful services include gambling and psychic services.

4.10 It is ultimately for Ministers rather than regulators to determine, or at least give guidance on, what is morally objectionable; on what types of material should or should not be accessible to minors; and how a minor should be defined. Even where regulators do not themselves enjoy explicit powers to regulate content and/or accessibility, it generally falls to them to find ways of enforcing the decisions of politicians, so that regulatory intervention of some kind becomes inevitable.

Pricing

4.11 In Ireland, PRS are priced (depending on the basis of charging) at between €0.15 and €4.33 per minute, or between €0.25 and €4.46 per call – very substantially above non-PRS rates for voice calls or text messages.[7] Such price spreads are normal in PRS round the world.

4.12 On the face of it, the PRS market appears to be competitive: there is network competition between at least eight major operators, and there is service competition between an estimated 370 service providers or aggregators.[8] However, among the four mobile network operators one has almost 50 per cent of the market; and service providers complain that network operators keep too high a share of total PRS revenue. There may be an issue here for Comreg or the Competition Authority to explore, but it goes beyond our terms of reference.

4.13 Whether PRS charges are competitively set or not, some tariffs can produce very substantial charges on a monthly phone bill or pre-pay card if the user does not keep a close watch on usage – or if the phone is accessed by some other user who neither knows nor cares about the charges being accumulated.

4.14 Thus the capacity of PRS to generate bills which cause consumers surprise and distress provides a third reason why regulation exists.

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[7] Sources: eircom, Vodafone and Meteor. The lowest figures shown are the lowest tariffs of eircom, and the highest are the highest tariffs of Meteor. Vodafone indicates that where a charge per call is made, the call may last no more than 90 seconds, at which point a second call is deemed to have started. Meteor says that "A once off advance payment of €60 may be required to call these numbers."

[8] Aggregators are service providers which purchase content from a number of content providers but supply services under the aggregator's name. RegTel does not recognise aggregators as different from service providers.

Transparency

4.15 Although there is no reason why PRS should inevitably become problematic for users, the fact is that in a number of jurisdictions, including Ireland, consumers who thought they were engaging in a one-off transaction have found that they had inadvertently agreed to subscribe to a PRS activity – i.e. to be charged a regular amount of money. This form of problem has been most prevalent where consumers enter competitions of some sort – for example, to vote for a winner in a TV contest, or to enter a or draw in order to win money.

4.16 In Ireland, RegTel requires (as do regulators in other jurisdictions) that PRS service providers:

- explicitly warn consumers that they are about to agree to a subscription service before they do so; and
- tell them how they can terminate the subscription as soon as they wish to do so.

4.17 Nevertheless, it does happen that the requirement is ignored, or that warnings intended to protect consumers from subscribing unintentionally are not sufficiently clear. For example, consumers complain that the messages on a mobile phone screen use lettering too small to be read and/or that the message flashes past too quickly. Some consumers may not realise that they have signed up to a subscription service for quite some time: those who pay a monthly bill for their mobile phone and those who use a fixed line phone for PRS are likely to fall into this category.

4.18 In Ireland subscriptions represent the most frequent source of complaint lodged with RegTel.[9] Consequently it is the form of abuse which consumes most regulatory resource: when a rogue service is reported RegTel has to manage a flood of consumer complaints, to communicate with all the network operators (since PRS are generally carried on all networks) and to ensure that they take action. It should be added that the network operators also have to cope with these complaints.

4.19 Persistent lack of transparency has thus proved to be a fourth reason why regulatory intervention is needed.

4.20 Taken together these four problems, characteristic of PRS, make for a substantial regulatory workload. In addition we see two other characteristics which may make matters worse for regulators: transaction size and types of PRS consumer.

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[9] See RegTel's Annual Report 2007, page 8. Complaints about subscriptions and competitions accounted for 89 per cent of all complaints made to RegTel. In fact it is not always RegTel to which consumers complain, so that the real level of complaints may be higher than RegTel is aware of.

Transaction size

4.21 Even where consumers are paying a high rate per minute or per call for PRS, the amount per transaction is characteristically small relative to (say) regular household outgoings. PRS revenues are thus characterised by large numbers of consumers spending or committing relatively small sums of money. For regulators, problems among large numbers of small transactions are more demanding than dealing with small numbers of large transactions.

4.22 At the margin, some consumers may feel that making a complaint is not worthwhile for the amount of money involved. If this is so, the extent of consumer abuse may be greater than published statistics suggest.

Types of PRS consumer

4.23 We have been able to find no demographic breakdown of PRS users. But we have a concern that among them there may substantial numbers of people who are in the less affluent groupings. Our reasoning, tentative though it is, is that if the people who use PRS to enter quizzes and competitions in order to win money are broadly comparable in profile with those who gamble, they are likely to include a substantial mix of people who would fall into socio-economic groups C2DE in the UK.[10] Our substantial 2006/2007 study on consumer detriment for DG SANCO of the European Commission suggested that C2DEs and equivalent groups are much less confident and knowledgeable about complaining than more affluent groups, and if that is so among PRS users in Ireland the extent of consumer detriment may for this additional reason be greater than comes to the attention of the regulator.

4.24 All the foregoing strongly suggests to us that PRS regulation is a specialism in its own right, distinct from the regulation of conventional voice telephony. The existence of multiple participants involved in delivering PRS, the potential length of the supply chain from service provider to consumer, the relatively high charges for some services, the scope for error and abuse, and the need for rapid action to protect the interests of consumers who have been mistreated are persuasive arguments for a distinct from of regulation for PRS.

PRS regulation in Ireland

4.25 In summary, we have identified four, and arguably six, reasons why there is a continuing need for PRS regulation and arguments why it is advantageous for this to be carried out by a specialist regulator. We now turn to the regulatory arrangements that currently operate in Ireland

[10] C2DE groups include skilled, semi-skilled, unskilled and casual manual workers, and those dependent entirely on state benefits.

PRS regulators and the regulatory framework

4.26 **RegTel** is the principal body responsible for PRS regulation in Ireland. However, several other participants appear in PRS regulation, and we first identify them before proceeding to a closer examination of what RegTel is and does.

4.27 Using a broad definition of the term regulation, the **Department of Communications, Energy and Natural Resources** stands at the apex of regulatory agencies in the PRS sector. Stakeholders view much of the current impetus to the reform of regulation of PRS as emanating from a political imperative: ministerial concern that the scale and seriousness of complaints about PRS is significantly out of line with the rate of complaints experienced in other domains.

4.28 **Comreg** (strictly speaking the Commission for Communications Regulation, and formerly the Office of the Director of Telecommunications Regulation) is the primary regulator of telecommunications services. ComReg assigns the short codes which permit service providers to operate PRS, but it does so with the approval of RegTel and thus exercises no regulatory oversight of its own on that score. However, by virtue of its size, resources and legal standing, mediated through its representation on the Board of RegTel, ComReg is also regarded as exercising a general influence. We were told during our interview programme that consumers and industry players take complaints to Comreg as well as to RegTel (and sometimes to Comreg instead of RegTel).

4.29 The **Competition Authority**, responsible for competition in the wider economy, maintains relations with Comreg, but we are aware of no relationship, formal or informal, between the Authority and RegTel.

4.30 The **Data Protection Commissioner** (DPC), a post established under the 1988 Data Protection Act is responsible for upholding the rights to privacy of individuals and seeing that data controllers honour their obligations. The Commissioner is appointed by Government but is independent in the exercise of his/her functions. The Commissioner has an important role to play in the enforcement of Electronic Communications Data Protection and Privacy Regulations.

4.31 Among other things DPC is responsible for protecting consumers from unwanted direct marketing, a remit given it by the Data Protection Acts of 1998 and 2003 and regulations made under them. This responsibility stretches into the realm of PRS and thus overlaps with RegTel's remit. Unsolicited messages are against the RegTel Code of Practice but the DPC has a duty to prevent unsolicited direct communications (generally known as spam) for marketing purposes, and can prosecute where offences are committed.

4.32 Data protection legislation requires that:

- Service providers must comply fully with all legislation relating to data protection in force at any time with regard to the collection, processing, keeping, use and disposal of personal data and the promotion and content of PRS.

- The collection of personal information must make clear to the consumer the purpose for which the information is required and must provide an opt-out from such use.

- Consumer data may be used for promotional purposes and for the delivery of subscription services only if the consumer has opted in or subscribed, and it can only be used in a manner compatible with the purpose or purposes to which the consumer originally agreed.

4.33 The **National Consumer Agency (NCA)** is a statutory body established by the Government in May 2007. Its purpose is to defend consumer interests and to "embed a robust consumer culture in Ireland" (http://www.nationalconsumeragency.ie/eng/About). The Government has given the NCA a mandate to defend and promote consumer rights through forceful advocacy, targeted research, programmes of consumer information, education and awareness, and the enforcement of consumer law. One of its duties is to engage in constructive dialogue with regulators, including RegTel. The goals of RegTel and the NCA thus have much in common, but the NCA's remit is larger. The NCA is not precluded from intervention in PRS and the Director of NCA has stated her intention of using her powers in the PRS sector if the powers of the other agencies prove not to be effective.

4.34 NCA does not engage in individual dispute resolution. In PRS this is therefore an area in which RegTel has exclusive responsibility.

4.35 The **Advertising Standards Authority for Ireland (ASAI)** is an independent self-regulatory body set up and financed by the advertising industry and "committed, in the public interest, to promoting the highest standards of marketing communications that is, advertising, promotional marketing and direct marketing" (http://www.asai.ie/about.asp). ASAI does not compete with RegTel for responsibility. Rather, RegTel reinforces the benefits provided by ASAI by focusing attention on PRS service providers considered to be a source of misleading or unacceptable marketing campaigns.

4.36 The **Irish Financial Services Regulatory Authority (IFSRA).** RegTel itself has no formal role in regulating institutions that issue electronic money. Rather, an electronic money institution in Ireland is authorised by and is subject to the regulations of the Irish Financial Services Regulatory Authority, and must meet certain principal requirements (included for convenience in Appendix 2.) However, increasing use of mobile telephony for financial transactions does mean that the future may bring some overlap between RegTel and the IFSRA.

RegTel

4.37 RegTel was incorporated as a limited company in 1995 and was recognised by Telecom Eireann (now eircom), then the only Network Operator in Ireland, as the regulatory body for PRS in 1995 under Statutory Instrument no. 194/1995. In 2001 a corporate restructuring took place under which a company limited by guarantee, RegTel (Holdings)

Limited, was formed to become the holding company for RegTel. That is the structure which remains in place today.

4.38 RegTel is currently supervised by a board of seven directors, among whom the Chairman, Mr Fred Hayden, was the Regulator from 1996 to 2001. The current Regulator is Mr. Pat Breen, under whom there is a budgeted staff of six. In addition, RegTel uses the services of a third party call centre in Cork to provide a first point of contact for members of the public who have queries or complaints about PRS.

4.39 The Annual Reports published by RegTel routinely make mention of the good working relationship it has with all the other regulatory bodies mentioned above, and with Comreg in particular. We understand that Memoranda of Understanding between RegTel and the NCA were provided for in the National Consumer Agency Act 2007. Consideration might now be given to formalising further Memoranda of Understanding with other bodies.

4.40 RegTel maintains international connections too, through its membership of the International Audiotex Regulators' Network (IARN). The IARN's 13 members are all involved in the setting of standards and/or the regulation of PRS in their home states.[11]

4.41 IARN too has a Code of Practice but this, essentially, does no more than require members to uphold the Codes of Practice adopted in their home states. The IARN forum meets twice a year, usually in May and November, the purpose being to advise members on technological developments and the most efficient and successful methods of regulation. (Ireland has hosted two such meetings, in 1995 and 2000.)

4.42 IARN also publishes guidebooks to advise members, consumers and service providers on consumer protection in relation to national or international PRS, and procedures to deal with consumer problems arising from them. IARN itself does not deal with consumer complaints.

Relevant legislation

Statutory Instrument no. 194/1995

4.43 Statutory Instrument no.194/1995: Telecommunications (Premium Rate Telephone Service) Scheme is the original document that determines the legal framework for PRS in Ireland. At that time (1995) the SI envisaged only Bord Telecom Eireann (now eircom) as the carrier of Premium Rate Services, and was drafted accordingly.

4.44 It specified that RegTel is responsible for monitoring the content and promotion of PRS, that service providers must comply with the Code of Practice issued by RegTel and that

[11] The members as at the date of this report are: Australia, Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Japan, the Netherlands, Norway, Poland, Slovenia, Spain, South Africa, Sweden, Switzerland and the United Kingdom. See http://www.iarn.org.

they must abide by any instruction, direction and recommendation, opinion or advice the RegTel gives with regard to PRS.[12] The main requirements of SI 194/1995 are summarised in Appendix 2. RegTel's relationships with Network Operators are set out in contracts between them, and Network Operators are required to enter into substantially similar contracts with Service Providers. The provisions of these other (later) contracts are developed from the SI.

Later provisions

4.45 Other important documents which affect the PRS market are:

- ODTR Decision Notice D5/98 of Nov 1998, to the effect that information on charges needs to be included in all promotions; and additionally reserves the 15xx codes for PRS services.
- ODTR Consultation Response Document 02/14 of 28 January 2002, which establishes an operational framework for Premium Short Message Services (PSMS) – i.e. premium rate texts.
- ComReg Consultation Response Document 03/54r of 27 May 2003, which reserves the 1599 number range for "adult" (sex) services, establishes the price band-based scheme for PRS, and expands the scheme for per call charged services under the number ranges 1512 to 1519.
- The Communications Regulation Act of 2002, which specifies that ComReg is responsible for managing the national numbering resource.

Premium Rate Telecommunications Services regulation agreements

Obligations on RegTel

4.46 RegTel must first consider a formal application from a service provider.[13] The application must specify, as a minimum, the type of service to be supplied, the names of network operators who will carry the service, the code range provisionally allocated, and the name, address, telephone/fax number and e-mail address of the person nominated to receive communications. Having reviewed an application, RegTel may either authorise or decline to authorise the application. When it approves an application the process is then that:

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[12] A service provider in the original document means a person, other than Bord Telecom Eireann, which participates with Bord Telecom Eireann (or with another telecommunications network operator within or outside the State) in the provision of a Premium Rate Telephone Service

[13] The term "aggregator" is sometimes used to describe an organisation which handles services offered by multiple service providers. RegTel maintains that, from a regulatory perspective, an aggregator is simply a service provider.

- RegTel enters into a contract with each network operator that will carry that particular service. The contract requires the network operator to apply the Code of Practice in their dealings with that service provider for that service.

- To give effect to RegTel's requirements, each network operator that carries the service must then put in place contracts with the service provider which in turn require the provider to apply the Code of Practice.

4.47 Applications and authorisations are applied to specific services, not to groups of services nor to service providers who may than add services to an earlier authorisation. Comreg will not authorise a code or number for any premium rate service until RegTel advises that its own contract is in place with the network operator(s) for that service.[14]

4.48 The contractual agreement between network operators and the regulator provides that, in return for granting authorisation, RegTel will regulate the operation and promotion of the service. The obligations of RegTel include:

- Setting the standards that PRS must comply with and supervising these standards (including the supervision of content and promotion).

- Publishing compliance standards in Codes of Practice and making these Codes available in print and electronic formats.

- Reviewing the Codes of Practice from time to time in consultation with the industry in order, when necessary, to reflect changes in public opinion and technological developments.

- Receiving and investigating complaints made by individuals or organisations concerning the content and promotion of any premium rate telecommunications service.

- Monitoring samples of premium rate telecommunications services in order to check that they comply with successive Codes of Practice.

- When breaches of the Code of Practice are found, advising the network operator(s) and the service provider of the breach and taking action designed to achieve compliance with the Code of Practice. Where appropriate, RegTel can impose sanctions.

- Publicising the existence, function and power of the Regulator.

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[14] However, during our interview programme, it was said that some service providers were in fact "piggy backing" unauthorised services on authorised numbers and that Comreg occasionally issues numbers without evidence of RegTel authorisation. Thus there are alleged to be unauthorised services in existence. No names were mentioned, and RegTel says that it is aware of no such services currently on offer.

- Liaising with Comreg and the Directors of Consumer Affairs, the Advertising Standards Authority of Ireland and any other bodies of like nature as appropriate.

- Reporting to network operators at least once every six months on the activities of RegTel and review with network operators RegTel's expenditure against budget during such period and any significant future expenditure that it anticipates making.

- Publishing a regular report and statistics on complaints and the relative percentage attributable to service providers and the services provided by them.

- Appointing a Secretariat at its own expense and within the budget.

Obligations on network operators

4.49 As we have reported, network operators must also make arrangements in respect of content and promotion regulation with their respective Service Providers.

4.50 Network operators are required to act upon any direction of the Regulator requiring that (in escalating order):

- access to some or all of the telecommunications numbers allocated to a service provider should be barred for such period or periods as he requires;

- an offending service provider should be prohibited from providing a particular type or category of PRS for such period or periods as the Regulator requires; and

- the service provider should no longer be permitted to provide PRS.

4.51 However, RegTel must first consult the network operator and service provider in order to secure compliance with the Code. Provided that has been done, the Network Operator is required to act on any direction determined by the Regulator. Certain sanctions, such as barring access to a service, can for technical reasons be imposed only with Network Operator co-operation, although in practice no difficulty has arisen.

4.52 Each network operator is required to pay monthly to RegTel:

- the levy on service providers (withheld by the network operator from payments to Service providers in that month);

- the levy on the network operator in respect of that month.

4.53 These levies must be fixed at such rates as to be sufficient (and only sufficient) to pay salaries, working expenses and other outgoings chargeable in that year, together with other sums that RegTel may set aside, e.g. for depreciation and reserves. In practice, any surplus received over and above the operating cost of running RegTel is refunded to Network Operators and Service Providers on a 50:50 basis.

The Code of Practice

4.54 RegTel's activities are based on the Code of Practice, which can be seen in full at http://www.RegTel.ie/codeofpractice.htm. The Code consists of fifteen parts extending to 38 pages, and we provide a summary in Appendix 2.[15]

4.55 On a day-by-day basis no regulatory intervention is envisaged. But it may be helpful to summarise what RegTel may do when where breaches of the Code appear to have taken place, or when complaints are made, and what penalties RegTel may impose.

Breaches of the Code

4.56 As regards breaches, RegTel's powers and duties are:

- To require the service provider to remedy the breach by taking such steps as RegTel deems appropriate.
- To require assurances from the service provider relating to future behaviour in terms determined by RegTel.
- To require the service provider to submit certain or all categories of service and/or promotional material to RegTel for prior approval for a defined period.
- To require the service provider to provide refunds to the complainant and all other callers to the service.
- To require the relevant network operator(s) to bar access to some or all of the numbers allocated to the service provider for a defined period.
- To recommend to the relevant network operator(s) that the service provider should be prohibited from providing a particular type or category of service for a defined period.
- To recommend to the relevant network operator(s) that the service provider should no longer be permitted to provide PRS.

Complaints

4.57 Complaints regarding PRS issues are required to be addressed to RegTel, including PRS-related complaints received by other authorities.

4.58 RegTel investigates complaints provided that they are received within three months from the date of the alleged breach. The complainant needs to demonstrate that the matter

[15] We have seen that RegTel's Code of Practice is fully consistent with the general principles promulgated by IARN.

has already been raised by way of a written complaint to the network operator and service provider concerned, and that the dispute remains unresolved on the expiration of 60 days from the date of the complaint. RegTel also maintains the right to initiate its own investigations where there appears to be a breach of the Code of Practice.

4.59 Where an investigation has been initiated, whether originating in a consumer complaint or not, RegTel may, pending adjudication by RegTel, direct the network operator to withhold some or all outstanding payments due to the service provider.

4.60 In urgent cases RegTel can adopt an emergency procedure, under which it attempts to contact the service provider (not the network operator) to advise that the service appears to be in breach of the Code of Practice and that, unless the service is immediately removed, the network operator will be requested to bar access to the service forthwith. If RegTel is unable to make contact with the service provider, it requests the network operator(s) to bar access to the numbers forthwith.

4.61 Once the service has been barred under the emergency rule, the standard procedure for investigating the complaint is followed.

Other consumer protection activities

STOP: the campaign against unwanted premium rate texts

4.62 In August 2007 RegTel started a national advertising campaign to increase public awareness on how to unsubscribe from subscription PRS. By way of background, the Regulator said that:

> "An analysis of the calls made to our helpline 1850 741741 shows unsubscribing from recurring services is the most pressing issue for mobile phone users. We know that some people signed up for services without reading the initial message on their phone, while others now simply wish to quit a service they were happy to use for a while".
>
> "Just over 80 million Premium Rate text messages were sent in the last 12 months and the purpose of this campaign is to make it easier for people to unsubscribe from unwanted services."

4.63 The campaign simply advised consumers that in order to unsubscribe from unwanted PRS text messages they needed only to reply to the text message with the word STOP. The STOP message is not to be charged at a premium rates.

Penalties

4.64 RegTel is not itself entitled to impose fines. However, where it decides that there has been a breach of the Code, it may invoice service providers for the administrative and legal costs of the work undertaken in investigating the complaint and making the adjudication. Non-payment is a breach of the Code of Practice and can result in further sanctions being imposed.

4.65 RegTel may direct refunds to be made to consumers who have been wrongfully charged. In 2005/06 total refunds issued amounted to just under €104,000 and three quarters of all refunds were accounted for by 17 cases, equivalent to an average refund of almost €4,600 per case. In 2006/07 the value of refunds dropped to €21,000, representing an average of about €3,500. RegTel told us that in 2007/08 €179,000 was ordered to be refunded to 14,000 affected consumers.

A mobile network operator initiative: the Yellow Card/Red Card Process

4.66 In January 2008, and after consulting RegTel, the mobile network operators collectively drew up a new procedure to address consumer concerns more efficiently and rapidly. The procedure is known as the "Mobile Network Operator Yellow/Red Card Process". It is based on a procedure in use among operators in the UK.

4.67 When network operators themselves consider there has been a breach of RegTel's Code of Practice, they act on their own initiative. What happens is, essentially, that the other mobile operators assess whether, depending on severity, the breach merits a Yellow or a Red Card:

- A Yellow Card notice gives the operator 48 hours to resolve the issue(s) while ensuring full compliance with the guidelines. However, service is not suspended.
- A Red Card notice involves an immediate suspension of the service until the operator can demonstrate compliance.

4.68 RegTel says that "it is incumbent upon network operators" to participate in the Red Card/Yellow Card Process. RegTel must be notified of any Yellow or Red Card issued, and it may object. If it does object, RegTel has 48 hours to contact the network operators to discuss the reasons for its objection.

How well has regulation in Ireland worked?

Complaints as a measure of regulatory achievement

4.69 In this part of our report we use levels of complaint as the principal proxy for success or otherwise in regulation. Complaints clearly provide some indication of where consumers feel that they have suffered some significant personal detriment. We acknowledge that this is an incomplete way of judging the situation, but if the primary aim of regulation needs to be, as we have seen, consumer protection, measuring consumer complaint has some merit.[16] At the end of this subsection we refer to criticisms of a different kind, made

16 Other relevant indicators for measuring the level of consumer detriment might include: civic voice indicators (which track expressions of consumer concerns by civil society bodies and identify emerging consumer problems on web logs); information deficit (using responses to the consumer survey); and market power indicators.

by the industry itself, which bear upon the success or otherwise of regulation, but we start with consumer complaints.

4.70 Accompanying PRS market growth in Ireland has been a substantial increase in the number of complaints received from consumers. What consumers complain about varies over time. Their current ***bête noire*** appears to be lack of transparency over subscription services. In the past, other problems that RegTel has had to deal with have included:

- Rogue diallers, which concealed premium rate numbers.
- Rerouting by internet diallers to adult content sites at very high charges.
- Lack of warnings to consumers once they had spent €20 on virtual chat and dating services.
- Complaints from parents that children were gaining access to certain types of unsuitable service.

Written complaints

4.71 For the past three years, levels of written complaints[17] have been as in Table 4.1 below:

Table 4.1: Categories of written complaints

Category	2004-05	2005-06	2006-07
Subscription issues	59	461	271
Promotions/Competitions	131	172	93
Pricing/Expenditure limits	14	-	16
Long duration calls	17	36	7
Refunds	-	-	15
Unauthorized Services	702	360	5
Non relevant	91	63	-
Others	89	48	-
Total	**1,103**	**1,140**	**407**

Source: RegTel Annual Reports, 2005, 2006 and 2007

4.72 In 2004/05, the biggest source of complaint by far, accounting for 64 per cent of all complaints, was unauthorised service, which essentially covers the rogue dialler and rerouting problems mentioned above. It is notable that by the following year the volume of complaints about unauthorised service had almost halved (to 360, or 32 per cent, making it the second largest cause of complaint) and that by 2006/07 the number had dwindled to 5.

[17] The term "written" here includes complaints sent by e-mail and fax as well as by post.

4.73 In 2005/06, the principal source of complaint was subscriptions, accounting for 40 per cent of the total. In 2006/07, complaints about subscription issues accounted for almost 67 per cent of the total and complaints about promotions and competitions accounted for a further 22 per cent.

4.74 Over the past three years RegTel's achievement in relation to written complaints has thus been to have reduced the total by over 60 per cent, and to have virtually eliminated the rogue dialler and rerouting problems.

4.75 Problems associated with subscriptions and competitions and/or promotions persist. These two categories together accounted for 190 complaints in 2004/05 (17 per cent of the total) and for 364 (89 per cent) in 2006/07, a substantial increase in both absolute and relative terms, although one that was accompanies by an increase in market growth. RegTel believes that the revised Code of Practice will do much to reduce the incidence of complaints in this area.

Telephone complaints

4.76 In May 2006 RegTel entered into arrangements with a third party call centre in Cork to handle telephone queries and complaints. RegTel believes that the call centre has proved to be effective in providing an improved speed of response and a quicker resolution of complaints. The call centre is required to distinguish between queries and complaints in making its weekly returns to RegTel, and it is on that basis that RegTel provides the analysis set out in its 2006/07 Annual Report.

4.77 In that year there were roughly four times as many telephone complaints as written complaints – 1,704 to 407. RegTel told us that it has conducted further investigation of a random sample of these complaints, and established that in some cases no justified complaint existed, the most common problem being that consumers denied that they had made PRS calls in the first place.

4.77 The analysis of telephone complaints does not correspond precisely with that used for written complaints. One small suggestion we make for the future is that RegTel present its analysis of written and telephone complaints on the same basis.

Queries

4.78 Before 2006/07 RegTel did not distinguish between queries and complaints. In 2004/05 it reported 5,534 communications, and in 2005/06 it reported 13,321 – all categorised as complaints. In 2006/07, it recorded over 30,000 – a hefty increase from the preceding years and disproportionate to industry revenue growth.

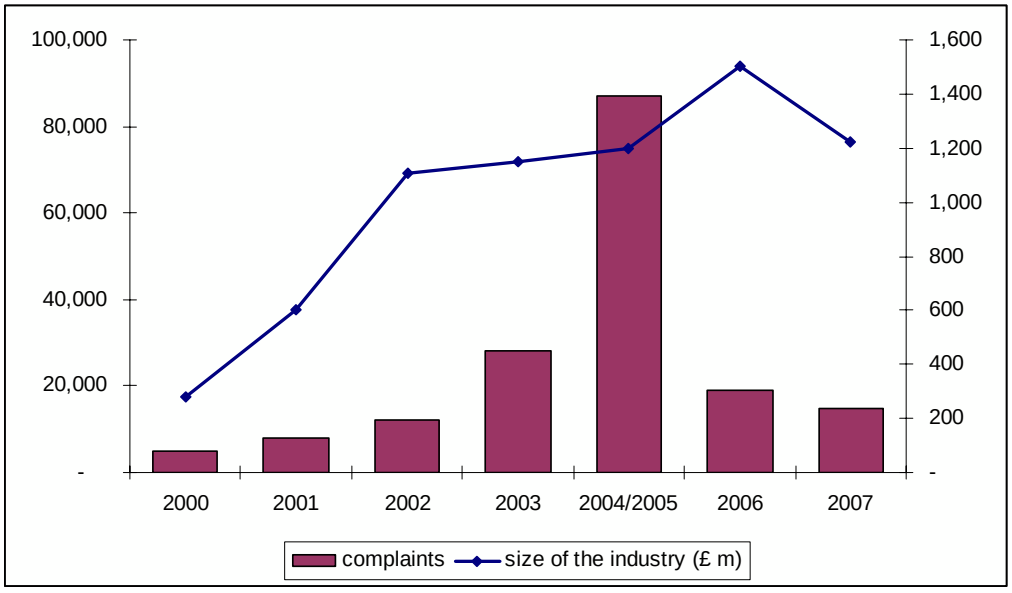
4.79 It is, of course, often not easy objectively to distinguish a query from a complaint. If a consumer's problem is purely a billing issue, that is for resolution with the Network operator, not a matter for RegTel.[18] If the problem concerns promotion or content, however, then it is a matter for RegTel. To be blunt, the PRS regulator's role is to prevent consumers from being misled or defrauded, not to protect them from their own ineptitude.

4.80 The STOP campaign referred to in paragraph 4.62 above had the effect of raising RegTel's public profile. For that reason, RegTel suggests, it may now be receiving more calls; and that it is picking up calls which should properly have gone (or at least gone first) to Network Operators. In this way the dividing line between calls and complaints is further blurred. All we can say for certain is that in 2006/07 the number of complaints was not less than 2,111 (the number recognised by RegTel) and not more than 30,227 (the total number of incoming communications from consumers).

Complaints comparison with the UK

4.81 Because we were asked to consider the potential applicability of the UK model of PRS regulation to Ireland, we carried out some basic statistical comparisons between the two. Figure 4.1 below shows that in the UK, and except for 2004/05, the number of consumer complaints has broadly followed the size (measured as revenue) of the market.

Figure 4.1: PRS consumer complaints in the UK
(left hand scale is number of complaints, right hand scale is industry revenue in £m.)



Source: PhonepayPlus Annual Report, 2007

[18] Such situations can arose where, for example, a consumer may not have realised that a call was a premium rate call; or may deny that he/she made the call until shown the call records; or may have allowed the phone to be used by a third party who then made premium rate calls.

4.82 In the UK 2004/05 was characterised by a rash of complaints concerning rogue dialler activity in which consumers were switched without their knowledge (through their PC modems) to "adult entertainment" sites – the same problem as occurred in Ireland. Following action by ICSTIS (as it then was) the number of complaints fell sharply and has declined in each of the following two years.

4.83 We asked PhonepayPlus and Ofcom how they distinguish between queries and complaints and both said that they do not. They take the view that, if consumers have already spoken to their network providers and have then gone on to call PhonepayPlus or Ofcom, the calls should be regarded as complaints.

4.84 It is difficult to find a secure basis of comparison for Irish and UK statistics. The UK facts are that in 2006/07 PhonepayPlus reported a total of 11,128 complaints, a decrease of 43 per cent from 2005/6 and of almost 75 per cent from 2004/5.[19] But it also recorded a total of over 131,000 "contacts" from consumers, about half of which went (erroneously) to BT. Thus, on the face of it the UK currently produces relatively fewer complaints than does Ireland: with PRS industry revenues some seventeen times larger than those of Ireland [20] the UK recorded just over five times as many complaints. And four times as many "contacts", which we take as broadly comparable with "queries" in Ireland.

4.85 However, in the UK, some services (particularly directory enquiries) are treated as PRS, whereas they are no so treated in Ireland; and some services available in the UK, such as live adult chat and gambling, are prohibited in Ireland. We do not have a breakdown of contacts and complaints relating to these three categories of service, so a like-for-like comparison is for the moment impossible. But it is clear that adjusting for them would reduce the apparent differences between the UK and Ireland.

4.86 In any event, and for the avoidance of doubt, we do not ascribe the difference entirely to differences in the PRS regulatory régimes.

Other measures of regulatory effectiveness

4.87 While RegTel has no mandate to develop the industry it regulates, it is the regulator's job to protect and promote the consumer interest; and if consumers have confidence in PRS, they are likely to use them. Services will emerge to respond to and stimulate consumer expectation, innovation will follow, and in this way the industry and the wider economy will benefit.

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[19] The two services most complained about in 2006/07 were for Channel 4's TV voting programme ***Big Brother*** (2,635) and complaints concerning the dialler service operated by Global Access Limited (1,003).

[20] In 2006/07 PRS industry revenues in the UK were £1.2 billion, which we converted to €1.6 billion using €1.33 = £1. In the same year, RegTel reported Irish PRS industry revenues of €94 million.

4.88 At first glance, this has not happened in Ireland. To pursue comparisons with the UK again, Ireland's GDP per capita is about 24 per cent higher than that of the UK[21] ; and while mobile penetration is at about the same level in both countries, Irish mobile revenue per capita is much higher.[22] All of which would lead one to expect that Irish expenditure per capita on PRS would be at least as high as that of the UK, or possibly higher.

4.89 It is not: Irish PRS revenues in 2006/07 were €94 million for a population of 4.1 million, equivalent to just under €23 per capita. In the UK PRS revenues were €1.6 billion for a population of almost exactly 60 million, equivalent to just over €27 per capita. Irish expenditure per capita on PRS was thus 17 per cent lower than in the UK.

4.90 Demographic and other differences may well affect the comparison, but on the face of it PRS development in Ireland appears have lagged that of the UK.

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[21] Eurostat, ***General Economic Background***. Irish GDP is indexed at 146.6 compared with the UK's 118.4. (EU average = 100)..

[22] In 2006, UK mobile revenues were just under £14 billion for a population of just under 60 million, giving a per capita expenditure of £233, or €310. In Ireland, mobile revenues were just under €2.1 billion for a population of 4.1 million, giving a per capita expenditure of just over €500.

5 FINDINGS FROM OUR INTERVIEW PROGRAMME

5.1 An important element in the methodology of this study was a series of discussions with participants in the PRS industry. These included official and regulatory agencies, network operators and service providers. In all, we held discussions with representatives of 21 organisations. A full list of the entities consulted is included at Appendix 5.

5.2 We gave assurances to all the interviewees that no specific comment would be attributed to any specific interviewee.

5.3 **We emphasise that in this section we first record what was said. The responses of RegTel appear grouped together at the end of the section.**

5.4 Our discussions with members of the RegTel board and staff are set out in Section 6.

The evolution of PRS in Ireland

5.5 It is widely agreed that, in respect of services provided, PRS coverage in Ireland has tended to evolve more or less as in other countries. Products in demand cover the usual range of ring tones, wallpapers, competitions, voting and competition opportunities, information services, horoscopes and so on.

5.6 However, whereas a few years ago Ireland might have been ahead of the curve, the general view of service providers was that PRS in Ireland was now lagging behind: a market which had been dynamic and was rapidly growing in other countries, had ground to a halt in Ireland. Consequently, whatever the latent tendencies might be, there were now some differences between Ireland and elsewhere.

5.7 Service providers assigned some of the blame for this to lack of investment by network operators in equipment and software. They considered the network operators to be conservative or complacent, and their lack of investment made it difficult to bring new services to stimulate the market.

5.8 Development of multimedia messaging (MMS), by which consumers can access combined video and sound messages, was also believed to be slowing down as the result of inadequate investment by the network operators, which inhibits its deployment on short codes.

5.9 Service providers go on to say that a potential for increased demand lies in the development of the mobile phone as a means of payment.

5.10 Network operators for their part attributed problems in the market to consumer antipathy as a result of publicity surrounding abuses by service providers. Even publicity for the STOP facility (to enable consumers to unsubscribe from unwanted services) had had the unintended effect of deterring PRS usage. Network operators frequently find themselves the first to receive complaints about PRS and have incurred costs in dealing with them.

5.11 More serious is the concern among network operators that abuses by service providers are having adverse effects on network operators' own reputations since it is they who have recognisable brands, whereas the service providers are virtually unknown to the public. Concern for reputation may be a factor inhibiting network operator involvement in PRS in general.

5.12 According to network operators, micro-payments over mobile phones could generate even more consumer concerns about the integrity of the billing process, and thus cause further damage to operators' reputations.[23]

5.13 Finally, network operators point out that, whatever the growth prospects, the fact is that PRS are still small in relation to the telecoms industry as a whole.[24]

5.14 As regards micro-payments (if and when they develop in Ireland) short codes and charges to phone accounts or pre-pay cards are seen to be the likely dominant pattern for some time to come. Nevertheless, the mobile phone is seen by the service providers and network operators alike as increasingly approximating to the computer as another tool for accessing the internet. Many of the services provided over the internet via short codes could transfer to long codes (i.e. as non-PRS) with payment provided by access to bank accounts, credit cards or PayPal.

Regulatory framework

The RegTel Code of Practice

5.15 Although some service providers and network operators considered the Code of Practice to be adequate, and saw the main problem as a lack of effective enforcement, most stakeholders had reservations about its contents.

5.16 Some of the shortcomings arose from what the industry considered to be inadequate consultation, which in turn was linked to a perception that RegTel is not adequately staffed with qualified personnel. As a result, some stakeholders considered the Code of Practice difficult to follow, ambiguous and in some areas impractical.

5.17 A near-universal comment was that RegTel's powers of enforcement were weak and inconsistently applied. It is acknowledged that RegTel can and has required network operators to close down the codes of miscreant service providers. It also requires reimbursement to be made if there are abuses. But it was underlined by many that an absence of powers to impose fines is a major weakness in RegTel's effectiveness

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[23] Greater use of "WAP push" led to situations in which consumers found that they had inadvertently subscribed to a service.

[24] In 2007 telecoms revenues in Ireland amounted to €4.5 billion, of which mobile accounted for slightly less than half. PRS revenues by contrast were €94 million, or just over 2 per cent. Even adding another 50% for estimated data download charges, it is clear that PRS is a relatively small business.

(reference was made here to the powers of PhonepayPlus to impose fines of up to £250,000).

5.18 There is a perception that RegTel may be hesitant to use the powers it has because it is uncertain about whether these would stand up to a challenge in court. Regulation through a network of contracts, and the nature of the founding Statutory Instrument, are not viewed as a firm legal basis for effective action. Realm's legal challenge to one of Regtel's decisions, which was settled out of Court, is seen, rightly or wrongly as demonstrating that the effectiveness of Regtel's legal powers is limited. The argument runs that if Regtel had the power to defeat Realm, publicly and unambiguously, in court, then it would not have settled out of court. But it did so settle, and industry participants feel entitled to conclude that there is a weakness.

5.19 It was also suggested that RegTel authorises some services which seem to be at variance with the Code of Practice and that the Code is frequently infringed without sanction. It was asserted that breaches are known to be fairly common but are also known not to attract intervention by RegTel unless there are complaints from the public.

5.20 It was suggested too that RegTel is sometimes slow to act. Several interviewees pointed out that a good deal of consumer damage can be done in PRS between the time attention is drawn to an abuse and the time the service is halted at the regulator's request.

Governance of RegTel

5.21 Stakeholders focused much criticism on the Board[25], for the manner of members' appointment, the absence of industry representatives and, generally, the Board's lack of industry knowledge and understanding. The fact that some members have been on the Board for an extended period of time (in some cases since its inception) reinforces the industry view that the Board is not well equipped to deal with issues in such a complex and rapidly moving area as PRS.

5.22 A second oft-mentioned criticism was lack of accountability. Although some of its members are the nominees of other organisations, the Board is formally answerable to no political or administrative authority. Although it supposedly represents a form of self-regulation and is funded by the industry, the Board has no interface with industry representatives. Nor has it developed a published and accepted set of performance indicators.

5.23 A less well-defined but persistent criticism is that a mind-set has evolved in RegTel which is inconsistent with modern principles of independent regulation. It is suggested that this

[25] RegTel is constituted as a company limited by guarantee. Appointments to the Board comprise three transferred from RegTel in its initial status and four subsequent appointees. The Board includes members drawn from the Department for Health and Children, the NCA and ComReg as well as two former Regulators.

mind-set may derive from the specifics of RegTel's origin in eircom when that was a public monopoly, from the contracting procedure used to complement the Code of Practice, from the system of industry financing, or from all three. Whatever the causes, RegTel is seen to operate outside the mainstream of regulation, to all intents and purposes in a world of its own.

RegTel's resources

5.24 RegTel has six employees, including the Regulator himself, and five personnel in a third party contracted call centre, dedicated to handling complaints to RegTel from the general public. Several stakeholders believe that what they perceive to be weak regulation is attributable to insufficient resources and/or lack of technical expertise. None of the stakeholders complained that the levy, which is imposed on the industry (and thus effectively on consumers) to defray the costs of regulation, was excessive. Indeed, several asserted that it ought to be higher, the better to ensure that the right number and type of personnel are available.

Industry initiatives in regulation

5.25 In addition to RegTel's Code of Practice, the mobile network operators, through their trade association the ICIA, have adopted their own Code of Practice since 2006. Among other things, this Code of Practice undertakes to develop an age verification process to be put in place by each mobile network operator to prevent under-age access to PRS and to protect minors from some of the services available.

5.26 More recently, as we reported above, the network operators have adopted a Mobile Network Red Card/Yellow Card process. The network operators have also proposed to RegTel that a body be set up to develop an Adult Classification Framework similar to that which obtains in relation to the cinema and DVDs, though this appears not to have been progressed in recent months.

5.27 The network operators argue that they cannot control the PRS content supplied over their networks any more than internet service providers (ISPs) can control internet content. Aggregators maintain the same position.[26] Both they and network operators say they feel under obligation to provide services for service providers who have been approved by RegTel. That said, some network operators will not support certain adult services; and all network operators adhere to the Red Card/Yellow Card system and apply both types of sanction.

5.28 Although network operators and service providers both have an interest in effective regulation, a conflict of interest can arise between them. On the one hand PRS generates revenue for both. On the other hand, PRS also generate complaints, many of

which arrive first on the help desks of the network operators, making demands on the time of network operator personnel and, as we have reported, inflicting damage on the reputations of network operators. Service providers are less exposed in this way but they point out that they have clients for other services (e.g. mobile advertising) who might have some sensitivity to dealing with companies subject to prosecution for abuse of privacy or consumer laws. The PRS business is more important to service providers than to the network operators.

5.29 A universal belief among those we spoke to is that the industry is suffering from regulatory inadequacy, with a particular weakness in enforcement. While opinions as to the remedy vary, the view of all stakeholders is that regulation must be made more effective if the industry is to move on.

The outcome of regulation

5.30 The emerging Mobile Marketing Association of Ireland (MMAI), which was happy to be publicly quoted, suggested that regulation should be judged at least in part by its effect on growth and development – and that in Ireland regulation has so far stifled both.[27]

5.31 An MMAI presentation which we have seen and which we understand has been given to a number of policy makers and influencers suggests that:

> "Ireland is already lagging significantly behind other countries in mobile marketing (e.g. 'Payforit' mobile Internet billing, MMS, location based services)
>
> "Significant problems as per RegTel Annual Report 2007 [have led] to lack of consumer trust in ALL mobile services (not just premium)…Absence of consumer trust in mobile services is a direct threat to development of the mobile marketing sector overall in Ireland
>
> "Lack of proper consultation and engagement with industry by all regulatory bodies…Codes of Practice not in tune with technology and market developments and therefore not properly addressing the specific problem areas…Significant grey areas, vagueness in roles and responsibilities
>
> "A regulatory environment which does not have proper industry representation and input will fail to effectively and speedily address problems as they occur…Industry representation should be through a reputable and properly structured organisation such as Mobile Marketing Association rather than 'ad hoc'…"

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[26] RegTel does not formally recognise aggregators, but here we need to acknowledge the distinction between aggregators and service providers.

[27] A Mobile Marketing Association has existed for some years in the United States. Affiliated organisations are emerging elsewhere in the developed world, with organisations already established for Asia and Europe. The MMAI has been formed and is currently headed by Mr. Eamon Hession, who is also the CEO of PRS service provider PUCA. For more details please see http://mmaglobal.com/modules/article/view.article.php/1838.

Stakeholders' recommendations

Scope of PRS Regulation

5.32 Stakeholders did not express strong reservations about the scope of what should be subject to regulation under the rubric of PRS. PRS should include services provided over the phone, or as a result of a phone call, which result in charges to the consumers' phone bill which are higher than standard.

5.33 Most aggregators/service providers referred to a lack of competition in the market for carriage of PRS. They complained that network operator charges were high (i.e. that payout rates were low), that the network operators did not invest in infrastructure, and that they generally had little interest in the development of the PRS. One specific fact was that aggregators and service providers had to negotiate with each network operator individually in order to provide a national service and that this put the network operators in a strong position.

Regulatory Model

5.34 There was a division of opinion about the ideal structure for the regulation of PRS.

5.35 One view was that a stand-alone agency was appropriate because there is a need for specialisation in dealing with the peculiar features of PRS. It was considered that if RegTel were merged into ComReg, this specialisation would be lost. Lost too would be the potential for quick action, essential to control some types of abuse in PRS.

5.36 The other view is heavily influenced by what is considered to be the successful UK example of PhonepayPlus and its relationship with Ofcom. The network operators and many of the aggregators and service providers have direct experience of PhonepayPlus through parent companies or affiliates in the UK. They considered that a comparable relationship in Ireland between RegTel and ComReg would give RegTel status, effective legal powers and access to technical resources.

5.37 Neither view could be associated with one participant group rather than another.

5.38 Network operators and service providers felt that the technical weakness of RegTel, as they saw it, should be addressed by some form of formal interface between the industry and RegTel. Suggestions included industry representatives on the Board or a consultative industry committee (as in the UK).

5.39 Some parties believed that complete self-regulation was the way ahead, and cited the example of the Advertising Standards Authority for Ireland. This viewpoint stems from a belief that what is needed is more enforcement rather than more powers or more rules. But other stakeholders (and other regulators) believed that RegTel should be placed on a modern statutory basis, like ComReg, NCA, DPC and others, with unambiguous and extensive powers to seek information, to halt or amend services and to impose a range of sanctions up to and including significant fines.

Governance and Resources

5.40 Few specific suggestions were made by stakeholders about the form of governance of RegTel other than the suggestion by some that the Board (or whatever supervisory structure is created) should include industry representation. More generally, it was felt that the Board should be appointed on the same basis as other regulatory agencies, that is, by the Minister and answerable to him.

5.41 There were no specific suggestions about the scale of resources required to discharge effective regulation of PRS. But there was an industry willingness to accept a higher level of charges in the interests of recruiting more and appropriately qualified personnel. It was argued that resources should be adequate to deal promptly and comprehensively with problems. RegTel should also be in a position to be pro-active, to monitor, test, sample, inspect and undertake other routine surveillance so that problems could be anticipated.

The responses of Regtel to industry comments

5.42 RegTel told us that, while it notes the dissatisfaction expressed by Service Providers, it is in the nature of entities which are sometimes restricted in their activities by regulation to be dissatisfied with the Regulator. RegTel also noted that the six Service Providers interviewed (out of a total of some 250) include some who "have given rise to particular problems". We understand this to mean that some of the six are involved in investigations by the Data Protection Commissioner.[28]

5.43 RegTel also noted that critics did not distinguish between the executive team of RegTel and the RegTel board. (Our view is that this is unsurprising: the industry sees RegTel as a single entity, not as two distinguishable elements.)

5.44 RegTel's other responses are as follows:

Mobile Network Operators

5.45 RegTel asserts that Mobile Network Operators have not always applied the system to those service providers whom they know to be causing problems. They could generally be more active in preventing consumer harm. RegTel drew our attention to the fact that Mobile Network Operators in Ireland have – for example – declined to cooperate by sending out texts reminding consumers of the STOP facility when operators under the self-same parent company have done so in other jurisdictions.

5.46 RegTel went on to say that, if Mobile Network Operators are so concerned about the effects that rogue service providers have on their own reputations (see 5.11), they could

[28] It was RegTel that directed us towards the six service providers that we interviewed. As we understood it, these were identified as among the largest and thus able to give us a broad view of the PRS market.

be more vigorous in weeding out the rogues. RegTel also added that, if the operators fear the consequences of a sharp increase in the number of micro-payments made over mobile phones (5.12) they would need to invest to take care of the problems.

Consultation

5.47 Here, RegTel comments that, "The consultation [on the new draft Code] which took place over the last 18 months has been extensive by any standards. By its very nature, a consultation process will result in disappointment for many of those whose views were sought but not included in the final outcome."

5.48 RegTel adds that the Adult Classification Framework proposed by Network Operators (see paragraph 5.26) is still in the negotiation stages.

Out of court settlements.

5.49 Again we quote RegTel directly. "It is a fact of life that out of court settlements are often perceived as weak and unsatisfactory by those not directly involved. Regtel is satisfied that in this case [the dispute with Realm] the settlement agreed was a satisfactory outcome for RegTel."

Unauthorised services

5.50 RegTel says that no complaint has been made by any party about the existence of unauthorised services. It goes on to say that it has recently closed down two companies which were not authorised and compelled one company to refund €179,000 to 14,000 consumers without recourse to the Emergency Procedure. RegTel adds that "significant sums of money have been given to various charities arising from rogue dialler and unsolicited communications activities."

5.51 As regards the allegation that RegTel can be slow to act, it observes that, here as in other areas, Mobile Network Operators could do more.

Accountability

5.52 RegTel responds that its Service Quality Charter sets out the standards of service that Service Providers, Network Operators and members of the public can expect. This information is available on RegTel's website (Section 10) and appears as Appendix 1 to the 2004/5 Annual Report.

MMAI

5.53 The Regulator objected strongly to our giving coverage to MMAI, on the grounds that its main focus is global marketing rather than delivery of PRS, and that it is not representative of service providers. He added that a new organisation had been formed (for both fixed line and SMS) representing service providers with around 80 per cent of the market, and that he would meet them on a quarterly basis to discuss industry issues.

We do not know the identity of this new organisation, and it was not pointed out to us as one that we should interview. As regards MMAI itself, we acknowledge entirely that it may have its own commercial objectives, but we understand that its CEO, Mr. Hession, had given the presentation that we were shown to a number of policy makers and other interested parties, and we thought that its messages were of interest to this project.

6 THE VIEWS OF REGTEL

6.1 Our interviews with RegTel covered both the board members and the staff. We met the entire board with the exception of one member and all the staff without exception. We also spoke to staff in the call centre. We are grateful to them all for the generous amounts of time they gave us.

6.2 As with industry representatives, we gave assurances to all the RegTel interviewees that no specific comment would be attributed to any specific interviewee.

The board

The composition of the board

6.3 Since 2001 RegTel has been constituted as a company limited by guarantee, namely RegTel (Holdings) Limited, with a board currently consisting of seven directors. Four of the directors were directors of the predecessor body, which was established in 1995. Subsequently, the board requested the Minister for Health and Children, ComReg and the National Consumer Agency to make nominations to the board thus bringing the total to seven.

6.4 One of the board members was the founding Regulator, and the current Chairman was the Regulator from 1996 to 2001. The current Regulator, Mr. Pat Breen, is not a member of the board, nor is the Secretary, Mr. Seamus Given, who is a solicitor with a prominent Dublin law firm.

6.5 None of the directors retires by rotation (see RegTel's 2006/07 Annual Report, p.19). The longest-serving member of the board has thus been in post since RegTel was originally established, i.e. for some thirteen years, and the most recently appointed has been in place for six years.

6.6 The seven members of the board come from a diversity of backgrounds, have distinguished careers in other walks of life, and thus bring wide-ranging experience to RegTel's affairs. We have extracted their details from RegTel's 2006/07 Annual Report and have included them at Appendix 6.

The functions of the board

6.7 In commercial organisations and in regulatory bodies which incorporate a board, the functions of the board characteristically conform to one of two principal models:

(a) in the first, the board stands back from the day-to-day affairs of the organisation, gives policy guidance to the executive management team, approves or amends major strategic initiatives and monitors the performance of the executive team; or

(b) in the second, the board takes responsibility for the routine day-to-day functions of the organisation so that a board member in effect heads up each function.

6.8 The RegTel board told us that it adopts model (a), save only that it involves itself in the development of successive Codes of Practice. We have seen a copy of a Board minute dated January 19th 2005 which define the respective roles of the Board and of the Regulator, and confirm what we were told.

Views of the board

6.9 It was emphasised to us that the current review was an initiative of the board, not something imposed upon RegTel from without. The board's desire for an independent assessment is foreshadowed in RegTel's 2006/07 Annual Report (p.2), in which the Chairman records that:

> "Since the establishment of RegTel (Holdings) Limited in 2001 there have been fundamental changes within the overall Premium Rate Market and many of the practices in its operation. Many of these changes have been driven by technology while others are of a promotional nature and call for a rethink as to how best these changes may be accommodated by market regulation.
>
> There are many aspects that call for a re-evaluation of the structure and authorities of the current Board to meet the needs of the future. These include:
>
> 1 the need for robust authorities to underpin RegTel's work
>
> 2 the size and membership of the Board
>
> 3 the skills and experience of Board members
>
> 4 the terms of office of Board members
>
> These are fundamental questions that may well point the way towards a realigned structure better equipped to deal with a rapidly developing industry."

6.10 We encountered a refreshing frankness on the part of board members in talking to us, and we are very grateful to them for their openness. Every board member that we spoke to told us that the board would not stand in the way of soundly-argued change, and some board members told us explicitly that they would be willing to stand down without demur.

6.11 We summarise the views of board members broadly in the sequence of numbered points 1 to 4 in paragraph 6.9 above. First, as regards the legal underpinning of RegTel's activities, what had been reasonable and proportionate in 1995 was now inappropriate for the current PRS market, and that the one legal challenge that had been mounted (even though settled out of court) could possibly provoke others.

6.12 The size of the board, however, appeared not to be a matter of concern. Some felt that a board of seven looked rather large in relation to an executive team of seven, or arguably thirteen if the call centre staff were included, but the current size of the board was not objectionable.

6.13 On cost grounds this view seems to us entirely justified. Three of the members are full-time civil or public servants and thus receive no remuneration from RegTel. Directors' fees totalled €74,100 in 2006/07 (see p. 25 of the Annual Report), an average of just over

€10,000 per head overall or just under €15,000 per head for those who receive a fee. Thus, even if the size of the board were (say) halved, the absolute saving in relation to total annual expenditure of just under €1.4 million would be small.

6.14 A number of members of the board were particularly aware of the fast pace of technological development that now characterised PRS and were in no doubt that such change would continue indefinitely. There was a general feeling among those who felt less than comfortable in understanding technological change that it would be appropriate for them to give way to new and probably younger members who felt more at ease with it.

6.15 There was general concern among the board members that, given modern practice in corporate governance, it was no longer appropriate for their appointments to continue in perpetuity. RegTel, they pointed out, was answerable only to itself and did not feel the force of shareholder imperatives, as in a commercial organisations, or face obligations to a large and active membership, as in the case of many other not-for-profit organisations. Consequently, the methods by which board members were recruited were far removed from current good practice: either the board appointed its own members or Ministers appointed their own nominees. What was conspicuously absent was open competition for Board membership, the need to stand for re-election, and answerability.

6.16 In summary we found both an appetite for and an acceptance of substantial change at board level.

RegTel's staff

6.17 We spoke to every member of RegTel's staff in Dublin, and one of our team visited the third-party call centre in Cork which RegTel appointed in 2006 to handle consumer enquiries. As with the board members, we found RegTel's staff members unfailingly helpful and we are most grateful to them.

6.18 This section covers only what emerged from our interviews with RegTel staff as the organisation is structured and staffed now. Our thinking as to the future arrangement and resourcing of functions appears in Section 7.

6.19 RegTel's staff is headed by the Regulator, below whom there are the following functions (in alphabetical order):

- Accounting and statistical analysis
- Applications handling
- Auditing PRS advertising
- Complaint handling
- Office Manager (although we were told that this is a temporary position)

- Secretarial and administration

6.20 RegTel has appointed one staff member to each function.

Relationships with the call centre

6.21 In earlier sections of this report we indicated that in PRS we regard the level of consumer complaints as one indicator of regulatory achievement. Of prime importance therefore is the working relationship between the call centre in Cork and the RegTel office in Dublin.

6.22 The division of roles is that queries are dealt with by the call centre and complaints by RegTel in Dublin.

6.23 The call centre is consumers' first point of contact, and it is accessed on a national rate Callsave (1850) number. If a consumer has a query, and the query relates clearly and only to PRS, it is the responsibility of the call centre to deal with it. If the call centre has reason to think that the office of the Data Protection Commissioner or the National Consumer Agency should be involved, it will ask the consumer to contact one or both.

6.24 If, however, a consumer calls with a complaint, or the query turns into a complaint, the call centre then asks the consumer to contact RegTel in Dublin.

6.25 The call centre provides RegTel with a weekly analysis of incoming calls. We were particularly interested to learn how queries are distinguished from complaints, and we were told that the headings under which the centre analyses calls are as follows:

Main headings

1. SMS issues
2. Premium Rate Service issues in general
3. Promotion services
4. Queries
5. Not relevant
6. Blank voicemails (i.e. calls from people who get through to the answer machine out of hours but leave no message)
7. Dropped calls (i.e. calls that fail)

6.26 Some of the main headings are then sub-divided, and SMS issues (no. 1 above) are one such example. The subdivision of SMS issues is as follows, and in brackets we indicate whether each category is analysed as a query or a complaint:

Sub-divisions of SMS issues

1. Children's subscriptions (complaints)
2. Denial [by customers] of subscriptions (complaints)

3. General requests to unsubscribe (queries)
4. No short code known (queries)
5. Is this a subscription service? (queries)
6. Other SMS complaints (complaints)
7. Other SMS queries (queries)
8. Repeat problems with unsubscribing (complaints)
9. Unable to unsubscribe (complaints)
10. Other

6.27 In the opinion of one staff member the dividing line between queries and complaints is difficult to draw with any certainty.[29] As it was pointed out, a caller may not know if he/she has a complaint until a query has been answered.

Auditing the advertising of PRS

6.28 To the extent that it feels that resources allow, RegTel monitors the advertisements of PRS services carried in the Irish media. Newspapers, and particularly the weekend newspapers, receive systematic attention, but other media are scrutinised on a somewhat ***ad hoc*** basis.

6.29 We learned that on average between three and four service providers breach the Code each week, and that it tends to be the same providers who most regularly offend. Subscription services tend to be the category of PRS in which breaches of the Code most often occur.

6.30 RegTel staff felt that service providers know that RegTel deploys only limited audit resources and that it is possible for them to get away with flouting the Code for extended periods. The lead times on print media make it especially difficult for advertisements to be quickly corrected – or so it is alleged by offenders – so RegTel's only course of action is to ask for the offending material to be pulled, which does not always happen. It was also suggested – and again we agree – that the right solution was to find effective means of discouraging breaches rather than to devote ever more resources to auditing.

Other issues

6.31 Three other issues arose that need to be recorded but which we were unable to pursue in the time available.

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[29] In the UK Ofcom takes the view that, except in a small minority of cases where callers genuinely want no more than information, a call to the PhonepayPlus or Ofcom call centre should be classed as a complaint. Ofcom's reasoning is that, by the time callers contact PhonepayPlus or Ofcom, they have generally already spoken to network operators, so it is highly likely that they have worked up some degree of anxiety, if not a complaint. Such a view is consistent with the findings of a study (as yet unpublished) on consumer detriment that we carried out for the European Commission (DG SANCO). We concluded that the level of detriment that consumers experience is almost invariably higher than is implied by the number of formal complaints made.

6.32 The first is that services can be and are launched without prior authorisation from RegTel, sometimes in the form of additional services to those already authorised. The existence of an unauthorised service may not be noticed unless and until there is a complaint. What RegTel staff said is repeated by network operators, who told us they believe (although RegTel does not) that there are not just a few but several hundred such services in operation.

6.33 The second concerns consultation. RegTel staff are highly aware that the board consults with the PRS industry on successive drafts of the Code of Practice, but they contend that they (the staff) are not consulted. The Regulator said that he could not agree with this.

6.34 Finally, several members of staff drew our attention to the fragmented nature of the records that RegTel keeps. Applications documents, for example, are not easily followed through to documentation relating to complaints or breaches of the Code. A common database of information would be worthwhile for all concerned. The Regulator responded that this is already under discussion with staff.

7 OPTIONS FOR CHANGE

The need for change

7.1 It is often said that the overarching aim of regulation is to command public confidence – the term "public" embracing consumers, suppliers, policy influencers, policy makers and society in general. As we see it, confidence is lacking for the following reasons:

- The regulatory regime has not deterred rogue entry into the Irish PRS market.
- Although it is difficult to be precise about the number of consumer complaints that arise, the fact is that complaints are persistent.
- The PRS regulator is no longer adequately resourced to deal with the size or complexity of the PRS market.

7.2 What is surprising is not that the regulatory mechanism is creaking but that it has worked as long as it has.

7.3 There is agreement among all those to whom we spoke that material changes are needed in the regulation of PRS in Ireland if consumers are to be properly protected and the sector is to fulfil its economic potential. If Irish consumers are inadequately protected, they will desert PRS – or desert Irish-supplied PRS and go elsewhere. Conversely, if they feel suitably protected, they will reap the benefits of incentives on service providers and network operators to cater to consumer needs and to innovate.

7.4 PRS are a technology-driven phenomenon. It is vital for regulation to keep up with technological innovation and the changing consumer tastes that technology drives and is driven by. If it does not, PRS regulation is likely to be (and some say already is) too heavy-handed in some areas and too light in others.

7.5 There is thus both a need and an appetite for change to the regulation of PRS in Ireland. The government wants it, the industry wants it, the regulator wants it, and the evidence suggests that consumers need it.

7.6 The question is: what change or changes would be best? We now turn to an analysis of the options.

Options for change: non-structural change

7.7 We begin by considering whether the existing arrangements could be made to work better – and we then go on to consider structural change.

7.8 We do not see these two as mutually exclusive: as our analysis developed we came to the view that non-structural change could sensibly precede structural change, and that some of the actions that would be taken under the non-structural option would have to feature in the structural option too.

7.9 Our interview programme indicated clearly that neither industry players nor RegTel itself see structural change as a ***necessary*** development. Although they are all aware of the arrangements that apply in the UK and elsewhere, there was no general consensus that structural upheaval generally, or the UK model in particular, was what was needed for Ireland. The National Consumer Agency and the Office of the Data Protection Commissioner likewise offered no view on the need for restructuring.

7.10 There was general agreement among industry players that the principal need now was for more vigorous enforcement of the rules rather than for a new set of rules or complete new administrative and legislative arrangements. The aim of more vigorous enforcement would be to drive out the miscreant operators, to deter further rogue entry, and to re-establish consumer confidence in PRS. If that could be achieved, the PRS market would develop no less effectively in Ireland than in other jurisdictions. Furthermore, a determined effort to make the existing structure work well would arguably produce benefits more quickly than a root-and-branch restructuring.

The RegTel Board

7.11 As already noted, the members of the Board are open to change, including a restructuring of the Board itself. We are aware of correspondence between the Chairman and the Minister in relation to PRS generally and the structure and role of the Board in particular, and have been given to understand that the Minister suggested that the Board should stay its hand on changes until a wider review of PRS regulation had taken place.

7.12 Our own concept of the Board is that it should, as now, be largely independent of the Executive, i.e. should not appoint members to head specific regulatory functions. We suggest it be no bigger than the current Board. We favour also a mix of Board members that takes in public policy awareness, commercial experience, knowledge and understanding of consumer services markets, and an ability to comprehend the implications of technological change.

RegTel's staff and its functions

7.13 Having interviewed every RegTel staff member we take the view that the level of resources is too tight generally. It is especially so in two areas – service authorisation and compliance monitoring – and there is in our view inadequate recognition of the need for resources in policy capability and technical capability.

Service authorisation

7.14 It is in our view important, in the consumer interest, that all services should be positively authorised. We cannot say precisely what staffing would be required to do this but it seems to us essential that RegTel should go back and verify how many services are not positively authorised, vet them for compliance with the Code, authorise them if they comply and give notice that it will close them down if they do not.

7.15 We also suggest that "deemed authorised" provisions be revisited with a view to eliminating them, or, failing that, to define very tightly the circumstances in which "deemed authorised" might apply. The industry would need to be notified accordingly.

7.16 It would probably make sense for RegTel to concentrate first on subscription services, since it is these which are causing the overwhelming majority of consumer complaint. Having identified unauthorised subscription services, we suggest that RegTel take prompt and decisive action against the service providers involved, if possible by seeking the withdrawal of the relevant short codes.

7.17 We acknowledge that there are difficulties here. Comreg advises that it is legally much more difficult to withdraw a number or a code than to issue it. But it is the consumer interest which should be uppermost, and here there may be a balance to be struck: there should be no sympathy for service providers who have allowed unauthorised services to be launched under codes for which they are responsible, but it would be desirable to find means of not closing down perfectly legitimate services that consumers want.

7.18 It is foreseeable that action against unauthorised services may lead to a flood of new applications. If that happens, RegTel may need to reinforce its resources on an interim basis.

Monitoring compliance and taking action

7.19 We see a case for strengthening RegTel's capacity to audit PRS advertising and promotion. Current staff resources allocated to this function – a single person – cannot reasonably be expected to keep pace with the volume of advertising in all media types, yet, in the consumer interest, advertisements that breach the Code or are in other ways misleading need to be stopped.

7.20 There are services available which will screen newspapers, journals and TV broadcasts and supply relevant extracts (in this case advertisements) for a fee. There may be comparable services for radio. Our suggestion is that, at least for a period of time, RegTel subscribe to such services and engage additional assistance in screening the extracts. Thereafter it would need to reassess what resources were needed on a continuing basis, but our belief is that more than one person may well be needed.

Policy capability

7.21 At present policy determination in RegTel appears to be informally divided between the Regulator himself and the Board, with little or no input from the staff. In the absence of the former Assistant Regulator we are unable to say whether that role itself facilitated the development of policy, either by freeing up the Regulator from some of his day-to-day tasks or by developing policy initiatives on his behalf. Whatever the title applied we believe that the reinstatement of an Assistant Regulator or equivalent role has much to commend it in reinforcing RegTel's capability in policy formation.

7.22 In our view such a role is a substantial one: it involves, looking in one direction, liaison and consultation with other regulatory bodies, and, in the other direction, frequent contact with the industry. We have already referred to relationships with the National Consumer Agency and the Data Protection Commissioner, but for the future we also see a potential need for a closer relationship with the FSRAI, principally because of the latter's responsibility for the regulation of e-money and for that reason its need to be aware of PRS as a form of payment. We do not see the need for liaison as needing to be quite as frequent or as intensive as for PRS industry technical liaison, but we do suggest routine liaison, on a basis to be agreed between RegTel and the FSRAI.

Technological capability

7.23 The second area in which we suggest that RegTel's staffing needs to be strengthened is in its technological capability. Here there are two principal options: to recruit a technical staff member or to enter into a contract with a third party to provide technical input ***ad hoc.*** Of the two we think the latter makes more sense in the short term, principally because it is not clear whether a full time technical employee would be cost-justified by the workload. (We understand also that RegTel obtains legal services and public affairs services in this way.) Either way there is a need for additional resource.

Management information systems

7.24 We agree with the comments made by RegTel staff (which were supported by the Regulator) to the effect that RegTel needs to take its management information arrangements beyond a paper-based system. The creation of a common electronic database of information which specific staff functions can create but all staff functions can interrogate would seem to us to be the right way forward. The nature of RegTel's activities – dealing with a relatively large number of relatively small issues, whether consumer complaints or service applications – seems to us to be ripe for systematisation. Again, there is a resource cost here, probably of one person plus expenditure with a software provider.

Staffing for the future

7.25 To summarise, RegTel currently has a staff of six, all full time employees, under the management of the Regulator – seven people all told. We have already said that we regard this as too tight, that some existing functions need additional resources, and that some new functions need to be provided for. We have also noted that industry participants did not regard the small percentage levy applied by RegTel as excessive or unjustifiable – rather the reverse in two cases. In these circumstances we regard it as entirely appropriate that RegTel should plan on a higher headcount going forward, and recruit accordingly.

7.26 In the short term we see a need for a minimum of ten people (including the Regulator) and possibly twelve, depending on (a) the level of authorisations to be verified, (b) the need to raise monitoring activity (c) the need to develop new management information

systems and (d) to enhance policy formation, technical capability and liaison with other regulators and the industry.

7.27 It may be argued that some of these additional resources might be needed only on a temporary basis, and that may well prove to be the case. On the other hand, if consumer confidence grows as RegTel enhances its own performance, the PRS market will increase and higher volumes of traffic may justify a permanently higher headcount. And if micro-payments through PRS services become routinely accepted in Ireland (as they well might if consumer confidence in PRS grows) then that too will predictably reinforce RegTel's need for people.

7.28 PRS regulation is not a charge on the public purse, but is paid for by what is in effect a tiny increment on consumers' expenditure. There is thus no case for squeezing regulatory resources down to the minimum that RegTel feels it can get away with, and there is every case for staffing RegTel to deliver the best service that it can afford. On the assumption that PRS regulation continues to be paid for by PRS consumers (and we see no need to change that) our arguments in relation to staffing would hold good under any future structural option.

Consultation with network operators and service providers

7.29 One of the principal criticisms made of RegTel by industry players is the lack of a consistent and systematic approach to consultation with the industry. It seems to us that the Industry Liaison Panel (ILP) operated by PhonepayPlus in the UK has much to commend it in Ireland. The principal functions of the ILP are:[30]

> "To consider and advise PhonepayPlus on issues relating to the development of regulation of the premium rate industry, especially with regard to the role that the various commercial stakeholders have in the facilitation of PRS
>
> To advise PhonepayPlus on the general effectiveness of the Code of Practice. To provide comments on the effectiveness and workings of the Code of Practice with a view to strengthening trust and confidence in the provision of PRS
>
> To act as a forum for PhonepayPlus to raise and inform on matters relevant to all commercial stakeholders.
>
> ……
>
> Meetings will be open to one representative from each of the trade bodies accepted for membership by PhonepayPlus. The nominated trade body attendee should be in good standing with PhonepayPlus and should not have direct company association with any service provider or network whose breach record with PhonepayPlus is such that their

[30] Further detail can be found at http://www.phonepayplus.org.uk/about/PhonepayPlus/ilp.asp

> membership of the Industry Liaison Panel (ILP) would undermine its integrity. Such matters will be judged on their merits by the collective membership of the ILP and PhonepayPlus.
>
> PhonepayPlus may also at its discretion appoint up to four other associate industry members active in the delivery of PRS from amongst service or content providers where trade body representation does not sufficiently reach those particular sectors for example amongst broadcasters who are engaged in the use of PRS.
>
> The Chairman will be appointed by the membership and be from industry. The appointment shall be for a period of one year. The membership shall also include some representatives from PhonepayPlus' Board, including at least one from industry, and from the Executive."

7.30 The ILP normally meets four times per annum, and the minutes of its meetings are posted on the PhonepayPlus website.

7.31 The principal attractions of such an arrangement in Ireland seem to us to be that conflicts of interest between the industry and Board membership do not arise, that membership of the panel can be wider than would be possible through Board membership, and that the liaison process is transparent. Furthermore, the method of selection of members ought to command industry confidence.

The need for an appeals process

7.32 As a matter of principle we think it only reasonable that the decisions of regulators should be open to appeal. In Ireland, the decisions of economic regulators may generally be appealed only to the courts. In the UK, appeals against the decisions of economic regulators may generally be made only to the Competition Commission[31] and, beyond the Commission, to the Competition Appeal Tribunal and finally to the courts. A description of the mechanisms in use in Ireland and the UK appears at Appendix 3.

7.33 In general terms, we believe that appeals relating to PRS regulation need to be heard more quickly than these mechanisms allow. In fact PRS regulation in the UK takes a similar view and allows a different process to be adopted by the PRS regulator, i.e. by PhonepayPlus itself.

7.34 The essential ingredient of the PhonepayPlus appeals model is that appeals are heard by people independent of PhonepayPlus itself, even though the process is contained within the general orbit of PhonepayPlus' activities. In brief, a number of independent members are appointed to an Independent Appeals Body ahead of any specific appeal, and are then invited on to an Appeal Tribunal when a case arises.

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[31] Strictly speaking, such appeals are made by the regulators when a regulated entity cannot reach agreement with a regulator.

7.35 The Independent Appeals Body ("IAB") is defined as

> "…a body of persons, independent of PhonepayPlus, appointed to provide tribunals to hear appeals in respect of service providers and following oral hearings:
>
> against adjudications made by PhonepayPlus,
>
> against refusals by PhonepayPlus of applications for permission to provide services,
>
> against conditions imposed by PhonepayPlus upon such permission,
>
> in respect of network operators, against adjudications made by PhonepayPlus which direct that a sanction be imposed."

7.36 The IAB currently consists of a Judge (as Chairman) and four lay members.

7.37 The powers of a tribunal are explained in the Code of Practice. A tribunal may:

> "confirm, vary or rescind an adjudication or determination or any part of it made by ICSTIS [now PhonepayPlus] and substitute such other finding as it considers appropriate,
>
> confirm, vary or rescind any sanction imposed by ICSTIS pursuant to its adjudication made following the oral hearing. For the avoidance of doubt, the Appeal Tribunal may impose a greater sanction than that imposed by ICSTIS provided that such a sanction could have been imposed by ICSTIS.
>
> confirm, vary or rescind the imposition of an administrative charge made by ICSTIS."

7.38 The Code goes on to say that:

> "The Appeal Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. This written decision shall be published by ICSTIS."

7.39 There is no further appeal through PhonepayPlus' procedures or those of the IAB. Parties wishing to take their appeals further would need to apply to the courts for judicial review.

7.40 Although we recognise that such a procedure is not generally consistent with Irish practice, we see no reason why some broadly comparable mechanism should not be made to work in Ireland. Indeed, we understand that RegTEl is contemplating an arrangement whereby an Appeals Panel would be established and convened when necessary. The Panel would consist of three people: a Chairman (a lawyer), a representative of the PRS industry, and a representative of the consumer interest.

Options for change: structural change

7.41 As we explained in Section 2, we believe the Department has a preference for structural change based on new primary legislation. In that broad context we understand that it is prepared to contemplate only two options, which are:

- to wind up RegTel in its present form and add PRS regulation to the duties and powers of Comreg; or
- to transplant to Ireland what is known for convenience as "the UK model" (described below).[32]

7.42 Officials at the Department for Communications, Energy and Natural Resources indicated informally to us that their Minister believed it would be generally better if no further regulatory bodies were added; and that the Ministry of Finance might look unfavourably on the costs to which a wholly separate, independent regulator would give rise.

7.43 Cost concerns, we suggest, may not be a compelling reason for favouring one arrangement over another. First, RegTel is funded not by a charge on the public purse but by a levy on the industry, and thus ultimately by PRS consumers. Secondly, and for the regulatory functions that need to be fulfilled, we estimate that cost differences between different structural options are unlikely to be significant.

7.44 As regards the number of regulators, or possibly the number of regulators reporting in to the Department for Communications, we point out that RegTel in its present form does not report to the Department. Nor would it do so under the non-structural changes we have outlined or under the adoption of "the UK model".

7.45 Folding RegTel into Comreg would eliminate RegTel as an entity, but the need for PRS regulation would continue unabated, so that the burden of regulation would remain unchanged.

7.46 All this apart, we believe that a third viable option for restructuring Regtel would be to establish it as a stand-alone regulatory entity with its own statutory powers.

7.47 We first examine the possibility of folding RegTel into Comreg, then turn to the UK model, then finally (and briefly) consider RegTel as a stand-alone entity.

Putting PRS regulation into Comreg

7.48 As we have already said, PRS regulation is a specialism in its own right, distinct from conventional voice telephony and messaging. To repeat, the existence of multiple participants involved in delivering PRS, the potential length of the supply chain from service provider to consumer, the relatively high charges for some services, the scope for error and abuse, and the need for rapid action to protect the interests of consumers who have been mistreated, all suggest to us that the nature of and need for PRS regulation make it different from the regulation of conventional telephony.

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[32] Just before this report was finalised, we learned that the Minister announced that he had decided to transfer to Comreg powers and duties to regulate PRS. Nevertheless, we were asked by RegTel to complete this report on the basis on which we were originally contracted, i.e. to assess and comment on a range of options.

7.49 Primary communications regulators in Ireland (Comreg) and the UK (Ofcom) deal mainly with network operators, real or virtual, and not much with end-users or intermediaries. To put it simply, their regulatory activities lie largely at the wholesale level – the way in which network operators deal with each other – and are heavily influenced by competition law and by EC directives which are high-level and wide-ranging in application. PRS regulation is much more consumer and complaint-focused.

7.50 Furthermore, Comreg does not have powers, duties or experience relating to content regulation, whereas Ofcom does. (Though its experience comes from the absorption of the former Independent Television Commission.) PRS regulation, of course, does involve content regulation, in that the regulator is required to judge the suitability of services before he approves them.

7.51 Finally, network operators find that, while PRS account for a very small fraction of revenue, they take up a disproportionately high fraction of management time, and our belief is that the same would apply within Comreg. It is conceivable that when budgetary pressure is applied, PRS regulation would be squeezed by the larger organisation in a manner which could leave it precariously resourced. The Irish consumer could then be in the same position as applies now.

7.52 For these reasons we regard Comreg as an unpropitious environment in which to locate the day-to-day management of PRS regulation, let alone its longer-term development. We do not say that PRS regulation could not be managed in this way, but of the options available we believe it is the most difficult to implement. It seems to us that, given the peculiar character of PRS regulation, it would be necessary for Comreg to treat it as effectively a stand-alone body within the larger entity and to ring-fence its resources.

7.53 It may like to consider the adoption of certain principles and practices which characterise the UK mode, which we now consider.

The UK model

7.54 In the UK ultimate responsibility for PRS regulation resides with the regulator of communications, Ofcom. Its statutory duties in relation to PRS appear in primary legislation, principally in Section 120 of the Communications Act 2003. Ofcom is entitled under the Act to delegate some or all of its PRS responsibilities to a third party organisation, and it currently delegates such responsibilities to PhonepayPlus, originally ICSTIS (the Independent Committee for the Supervision of Standards of the Telephone Information Services).

7.55 The relationship between Ofcom and PhonepayPlus is formalised in a Memorandum of Understanding which was signed (originally with ICSTIS) in August 2005. The MoU is a 12-page document which can be viewed at:

http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/Ofcom_ICSTIS_MoU_Aug2005.pdf

7.56 It is divided into the following headings:

PRS description

The need for effective regulation

The regulatory authorities

Background and context

The need for an MoU

Mutual support

Effective communications

Efficiency and good value

Performance measurement and reporting

Plan, budget and levy setting

Governance

Review arrangements

7.57 Essentially, it is Ofcom which determines policy for the regulation of PRS and provides the ultimate authority for sanctions against miscreant operators. Ofcom reviews the performance of PhonepayPlus, appoints a member on its board, approves board appointments, reviews the strategy of PhonepayPlus and determines its budget. PhonepayPlus concentrates for the most part, though by no means wholly, on day-to-day regulation and enforcement.

7.58 Like ICSTIS before it, PhonepayPlus has in turn promulgated a Code of Practice to govern the behaviour of suppliers to the PRS market. The Code is now in its eleventh version. It can be found at http://www.phonepayplus.org.uk/pdfs_code/11th_edition.pdf. At 78 pages it is about twice as long as RegTel's current Code.

7.59 The contents of the Code are as follows. We reproduce the contents list in full because the issues covered in the UK would need to be dealt with in Ireland:

PART ONE

7.60 Were the UK model to be transposed to Ireland, we envisage that Comreg would be the equivalent of Ofcom, and that a body such as RegTel (though not necessarily named RegTel, and not necessarily a body with RegTel's current legal form and status) would be the equivalent of PhonepayPlus.

7.61 We do not say that the UK model is ideal in every respect. Our opinion, however, is that the model is robust and works well. The CEO of PhonepayPlus, Mr. George Kidd, commented favourably on the working relationship with Ofcom, particularly the regulatory horsepower (and if necessary additional resources) that he is able to draw on in dealing with compliance problems.

7.62 Interestingly, Mr. Kidd's comments in this regard are consistent with those of the ITV Adjudicator, a small-scale regulatory body whose activities we have considered in the context of UK client. Like PhonepayPlus, the ITV Adjudicator has delegated powers from Ofcom and has acquired skills and experience in a highly specialised field (disputes between advertisers and ITV) which Ofcom does not need day-to-day – but he too has commented favourably on the regulatory might that he can command when needs be.

7.63 Finally, there are also, we suggest, two "soft" advantages to the adoption of the UK model over (for want of a better phrase) absorbing RegTel into Comreg.

7.64 The first, and more compelling, is that Ireland can benefit from, and contribute to, improvements in this structural arrangement. There is already much commonality in PRS provision between Ireland and the UK, both at service provider level and at network level; and we are aware that RegTel and Comreg engage frequently in dialogue with Ofcom and PhonepayPlus.

7.65 The second is that the UK model would keep in place a specialist PRS regulatory body which could continue to be called RegTel. For all the problems (and criticisms) that it faces, RegTel is well known to consumers and to the PRS supply sector, and we think it helpful if that separate identity were perpetuated under a new regulatory regime.

7.66 We conclude that although restructuring is not essential, the better of the two restructuring options favoured by the Department is the adoption of the UK model.

7.67 We now go on to the implications of adopting the UK model for primary and secondary legislation.

Primary and secondary legislation

Definition of PRS

7.68 New legislation would require a robust definition of what constitutes PRS. For convenience we reproduce here the conclusions we reached under this heading in paragraph 3.32.

> "To qualify as a PRS service:
>
> The service must be carried over an authorised public electronic communications network
>
> The service must reach the end-user by means of a designated device defined in secondary legislation.
>
> There must be a charge for the service over and above the charge made by the communications network operator. [Optionally the charge made for the service must be at least a nominated charge per minute, per call or per subscription period. This would permit low-cost calls, such as those for directory enquiries or the speaking clock, not to be caught by PRS regulation.]
>
> The charge for the service must be made by the communications network provider or by the service provider to the end-user or by a combination of the two."

Technological developments

7.69 It is vitally important that the definition of PRS in any new legislation should be sufficiently flexible to accommodate technological and service developments. The development of different technologies (and devices) is increasing, and it is expected to grow even more in the next few years. This will change the way users have access to digital content, creating (or inhibiting) business opportunities for PRS providers.

- The expanding functionality of mobile networks and of mobile handsets, particularly as third generation (3G) capabilities are exploited.
- The increasing use of mobile phone systems as payment mechanisms, enabling consumers to access digital content via different portable devices and facilitating the transition of payment mechanisms from one platform to another.
- The convergence of telephony and internet protocols. The take-up of mobile internet and 3G technology will increase the use of mobile handsets and focus the marketing strategies of network operators, internet providers, search engines and

content producers more on internet usage. Regulating internet content is known to be fraught with difficulty. It remains to be seen whether and how internet content can be policed when it is transmitted to or from mobile handsets.

7.70 Cullen International and WIK Consult suggest (***op. cit.***) that "new sorts of content providers, mainly small and medium sized enterprises, will come to use PRS as an easily manageable distribution channel. Particularly in the segment of small and medium sized enterprises the penetration of PRS is still at a low level. These enterprises will increasingly demand PRS because it provides an easy-to-use micro-payment solution. The retail and services sectors are most affected by this trend."[33]

7.71 It may be sensible for new primary legislation to incorporate language that requires communications regulators, industry bodies and consumer bodies periodically to revisit technical definitions of PRS and make recommendations to Ministers for their revision.

Primary legislation

7.72 If the UK model is to be adopted in Ireland, primary legislation needs, at a minimum, to:

- define PRS in high-level terms
- require that the definition of PRS be periodically reviewed
- provide that PRS shall be subject to statutory regulation
- confer appropriate statutory duties upon Comreg
- establish the right of Comreg to delegate powers to regulate PRS to a third party
- establish those functions in which Comreg should give direction to the delegated body and those where Comreg should be consulted before the delegated body takes action
- establish the obligations in principle upon that third party as the delegated body
- define the sanctions which Comreg and/or the delegated body may apply
- provide for an appeals procedure

[33] While we agree with the principle of what Cullen and WIK are saying, we doubt that that micro-payment systems will be the preserve of SMEs: mobile phone-based payment systems already exist and are likely to become common in the next three to five years in the largest enterprises (e.g. transport companies). Some services do not result in debits to the phone bill or to the remaining credit in pre-paid accounts, but rather to bank accounts, credit cards or payment companies like Paypal. They thus escape the current definition of PRS yet they raise the same questions which have led to PRS meriting specific regulation.

- make clear in relation to PRS how the responsibilities of other regulatory bodies (particularly the NCA, DPC, FSA and the Competition Authority) should mesh with those of Comreg.

7.73 For the sake of simplicity we now refer to the third party delegated body above as "New RegTel".

Secondary legislation

7.74 The most important elements of secondary legislation would be a document defining the relationship between Comreg and New RegTel and a Code of Practice according to which PRS participants would be required to behave. In our view the MoU currently in force between Ofcom and PhonepayPlus in the UK provides an appropriate base document to be considered, ***mutatis mutandis***, for adoption in Ireland.

7.75 The MoU should:

- define the principal duties of New RegTel derived from primary legislation (making clear those duties which it may carry out without reference to Comreg and those where it must seek the prior approval of Comreg).
- require New RegTel to authorise all PRS services before they are launched.
- require New RegTel to devise and operate a Code of Practice which governs the behaviour of market participants; and to update the Code of Practice from time to time.
- entitle and require New RegTel to act ***directly*** in relation to any participant in PRS supply in the event of a suspected breach of the Code.
- require New RegTel to keep itself and Comreg fully briefed as to technical and other developments in the PRS market.
- require New RegTel to report routinely to Comreg and to publish an Annual Report.

The role of a Code of Practice

7.76 RegTel has operated through successive Codes of Practice since 1995, and a Code of Practice is the principal mechanism according to which PhonepayPlus regulates the PRS market in the UK. We see no reason to alter this basic mechanism.

7.77 RegTel is currently consulting on a new Code of Practice, and we suggest the process should continue while the new legislation and all that might follow from it is put in place.

7.78 The Irish and UK Codes of Practice overlap considerably in their principal points.

Technical and industry liaison

7.79 We suggest that liaison arrangements as between New RegTel, the PRS industry and other regulators be established as already proposed in paragraphs 7.31 and 7.34.

Regtel as a stand-alone entity

7.80 If the Government is prepared to spend time and effort in drafting new primary legislation in order to place Irish PRS regulation on broadly the same footing as applies in the UK, there is no reason why the powers conferred on Comreg and (by delegation) on RegTel should not be conferred on RegTel alone, so that RegTel becomes an independent regulator in its own right.

7.81 From the point of view of regulatory efficacy it would not much matter whether RegTel in this form were a public body or remained a not-for-profit company appointed by the Minister. The constitution of and appointments to the governing body (or Board, as the case may be) need be no different from those we have already recommended. The same would apply to RegTel's relationships with the industry and other regulators.

Conclusion

7.82 Our conclusion is that the right way forward is to pursue the non-structural changes we have outlined in paragraphs 7.7 to 7.39 above.

7.83 If, however, the government wishes to pursue one of the structural options but does not wish to create a new independent regulator, the best option is to adopt what is known as the UK model, with a new RegTel exercising new powers delegated to it by Comreg.

7.84 We recognise that implementing structural change will take time. This being so, we see no reason why the non-structural changes we have suggested should not be implemented as interim measures, pending the new primary and secondary legislation that would be necessary for structural change.

The need for consultation on new legislation

7.85 One of the most vocal criticisms made of RegTel, at least as put to us in the interview programme, is that RegTel's approach to consultation has been patchy and reluctant.

7.86 We have already made recommendations for effective liaison between RegTel and industry players on the one hand and with other regulators on the other. We suggest that these arrangements be adopted in any new structural model too.

7.87 If structural changes are to be pursued, we think it would be appropriate for policy-makers to allow time for consultation before new legislation comes into effect. It is for Government to determine the shape and content of primary legislation but there can be no harm (and there may well be substantial benefit) in providing time and a mechanism for consultation with the industry and with other regulators on secondary legislation.

APPENDIX 1: THE PRS MARKETS IN IRELAND AND THE UK

Ireland

Background: recent communications market activity in Ireland

A1.1 The communications market generally is important to the health of the PRS sector. For this reason and in light of convergence in the communication market we briefly report recent market activity in the Irish communications market.

A1.2 Table A1.1 indicates growth in all telecoms areas (except employment) though with much greater growth in some areas than in others. Mobile volumes (call minutes) grew by nearly 40 per cent over the four years 2003 to 2006, and mobile SMS by almost 90 per cent. By contrast, fixed line volumes and revenues grew by under ten per cent.

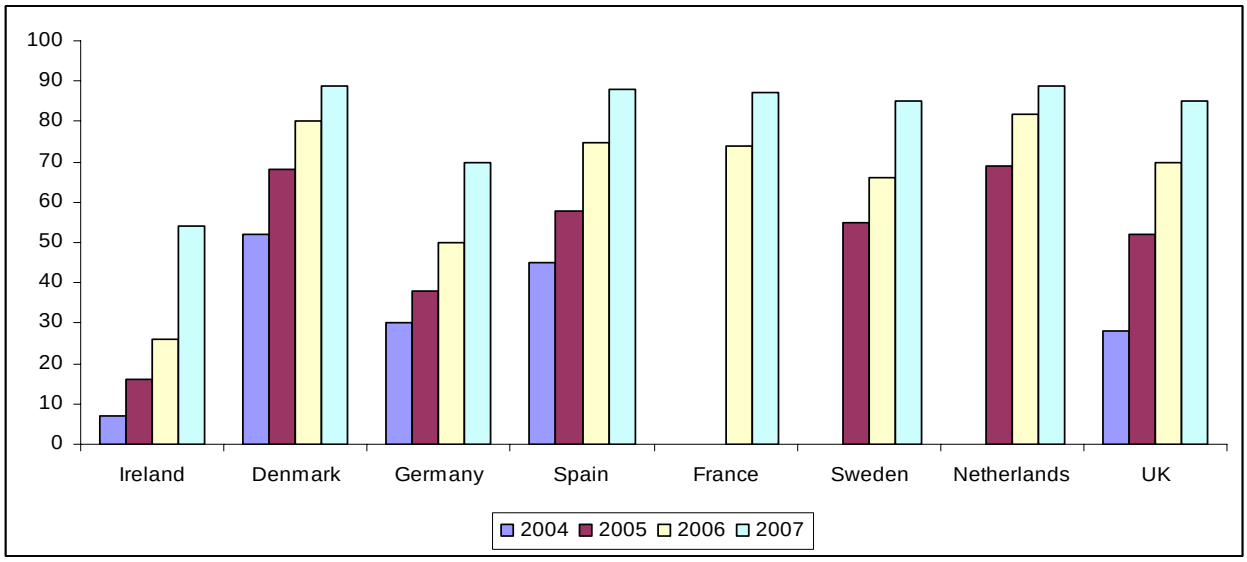
Table A1.1: Selected telecommunications data, 2003-2006

	Unit	2003	2004	2005	2006	% growth 2006/2003
Average employees		**14,688**	**14,494**	**13,229**	**13,038**	**-11.2**
Revenues	**€m**					
Fixed		2,031	1,979	1,925	2,176	7.1
Mobile		1,396	1,806	1,826	1,925	37.9
Cable		153	156	168	181	18.3
Total		**3,580**	**3,941**	**3,919**	**4,282**	**19.6**
Volumes	**000 mins**					
Fixed voice		9,302,701	9,659,809	9,758,858	10,099,000	8.6
Mobile voice		4,305,193	4,783,741	5,698,581	7,085,000	64.6
Total voice	**000 mins**	**13,607,894**	**14,443,550**	**15,457,439**	**17,184,000**	**26.3**
Mobile SMS	**millions**	3,035	3,624	4,351	5,744	89.3

Source: Comreg

A1.3 In Ireland, the number of households with a broadband connection as a percentage of households with internet access more than doubled from 26 per cent in 2006 to 54 per cent in 2007. But broadband penetration in Ireland remains below the EU average of 77 per cent, as Figure A1.1 shows.

Figure A.1.1: Household broadband connections as a percentage of households with internet connection (2004 – 2007)



Source: Central Statistic Office, 2008

PRS market size

A1.4 Background statistics relating to the Irish PRS market in 2006/07 are as in Table A2.2 below.

Table A1.2: Irish PRS market – background statistics 2006/07

Population	4.1 million
GDP per capita	€29,000
Fixed telephony penetration (fixed lines per 100 population)	40
Mobile telephony penetration (connections per 100 pop.)	>100
Network operators	eircom, BT, Energis, Budget Telecom, Access Telecom, MCI, Colt, Vodafone, O2, Meteor, Opera Telecom, Smart Telecom, Conduit, Swiftcall, Hutchison 3G, Finarea

Source: Population and GDP – CIA Factbook (2006 estimates), Penetration – ITU, PRS – RegTel

A1.5 Irish GDP per capita has grown rapidly in recent years and is currently the highest in the EU. By 2007 Irish consumers aged 14 years and over were spending on average €31 per person per annum on PRS. It is thus unsurprising that PRS industry revenues were three times higher in 2007 than in 2001, although, as Table A1.3 shows, the growth has not been at a uniform rate.

Table A1.3: Growth of PRS in Ireland

Year	PRS industry revenue (€ million)	Year on year growth (per cent)
2001	31	
2002	43	39
2003	48	12
2004	65	35
2005	81	25
2006	95	17
2007	94	-1

Source: RegTel, Annual report 2006/07

A1.6 RegTel reports that there are some 370 service providers in operation, and that 11 of the 16 licensed network operators identified in Table A1.2 above are involved in PRS services in Ireland. RegTel also reports that in 2006/07 it authorised a total of 369 new service applications.

A1.7 Over the past three years applications for fixed line PRS (IVRs) by existing service providers have increased by almost 13 per cent; conversely (and somewhat surprisingly) applications for PSMS have decreased by 17 per cent.

A1.8 In 2003 the most frequent PSMS applications requested were competition and information services. More recently they have trended downwards, with games and ring-tones applications becoming more popular.

Classes of PRS services

Fixed line PRS

A1.9 Fixed line PRS services, often referred to in the industry as Interactive Voice Response (IVR) services, provide advice and technical support for a variety of consumer and business-to-business services, horoscopes, virtual chat and dating, information lines, competitions, entertainment, voting, and games.

A1.10 In 2004, RegTel thought that fixed line PRS might be in permanent decline. But in 2005/06 it began to stage a recovery which continued into 2006/07. Call volumes in 2007 were higher by 33 per cent than in 2006, and average call duration rose by just over 20 per cent, from 3.2 minutes to 3.8. RegTel estimates that about one third of all PRS revenues are derived from fixed line services.

A1.11 The main factors contributing to this positive trend are thought to be:

- increased usage of low tariff PRS numbers for marketing purposes;
- extensive advertising of IVR services; and

- increased usage of numbers used for entertainment services.

Mobile PRS and PSMS

A1.12 PRS over mobile handsets are dominated by premium rate short message services (PSMS), which include dating and chat, competitions, voting, information and text alert services (such as weather forecasts and sports results), games, quizzes, ringtones, horoscopes, charity donations, promotions, and services for communities and clubs.

A1.13 Since its launch in 2002, PSMS has shown very substantial growth, and revenues from PSMS now represent around 65 per cent of total PRS revenue. The shift towards mobile delivery of PRS content is not unexpected, given the high penetration of mobile users[34] and the extensive promotion of particular types of services aimed at younger consumers, who are especially attracted to ringtones, logos, wallpapers, sports alerts and competitions.

A1.14 In 2006/07, some 80 million chargeable PRS texts were delivered. A reclassification of some SMS services obscures the recent growth trend, but on a like-for-like basis 2006/07 shows an increase of about 15 per cent over 2004/05. The average value of a PRS text for 2006/07 increased over the preceding year by almost 24 per cent, from €0.59 to €0.73.

Tariff structure

A1.15 In Ireland, PRS charge bands are determined by ComReg after industry consultation, while the precise point at which a service is sold within each band is determined by the operator. Some bands (1512 to 1518) are charged per call, while others (1520 to 1590, with some additional sub-bands) are charged per second or per minute.

A1.16 The charges for per-minute PRS are shown in a simplified form in Table A1.4 below. Within each price band, ComReg applies a cap to the retail tariff of eircom (the incumbent fixed line operator). This is "to address the expressed concerns about fraud and bad debt that might arise in an open-ended system."[35] The highest cap in any of the band groups is €3.50. eircom's published tariffs suggest that it does not charge right up to the cap.

A1.17 The tariffs of mobile operators Meteor and Vodafone, which are not capped, are higher than those of eircom.

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[34] According to ComReg's Quarterly Key Data Report of 29 June 2006, there are in excess of 4 million mobile phones in circulation in Ireland, more than one mobile phone per head of population.

[35] ComReg (27 May 2003), "Review of the Premium Rate Services Numbering Scheme - Response to Consultation"

Table A1.4: Price bands and selected retail tariffs for PRS charged per minute

Code	Price band (€)	eircom	Vodafone	Meteor	O_2
1520	0.30	0.15	0.25	0.30	0.20
1530	0.50	0.33	0.59	0.62	0.45
1540	0.70	0.60	0.89	1.14	0.65
1550	1.20	0.95	1.49	1.40	1.15
1560	1.80	1.25	1.69	1.88	1.50
1570	2.40	1.75	2.19	2.61	2.00
1580	2.95	2.40	2.99	3.58	2.75
1590	3.50	2.95	3.69	4.33	3.25

Note: prices include VAT at 21%

Source: Regtel.

A1.18 The price bands and tariffs for PRS charged per call rather than per minute are shown in Table A1.5 below.

Table A1.5: Price bands and selected tariffs for PRS charged per call

Code	Price band (€)	eircom	Vodafone*	Meteor **	O_2
1512	0.50	0.25	0.39	0.46	0.35
1513	0.70	0.60	0.79	0.98	0.65
1514	0.90	0.75	0.99	1.14	0.85
1515	1.20	1.00	1.29	1.47	1.15
1516	1.80	1.50	1.99	2.22	1.75
1517	2.50	2.00	2.69	2.99	2.30
1518	3.50	3.00	3.89	4.46	3.35
1519	Reserved	-	-	-	-

**** Vodafone allows a maximum of 90 seconds per call.***

***** Meteor records that "A once off advance payment of €60 may be required to call these numbers."***

Sources: Regtel, ComReg, and the companies' websites.

A1.19 As with calls charged per minute, the mobile operators charge above the rates of eircom.

Applications for new services

A1.20 During 2006/07, RegTel authorised 369 service applications and rejected four. Of the 369 that were authorised, 22 per cent concerned scratch-card competitions, 17 per cent concerned different types of entertainment (quizzes and voting are mentioned), and 11 per cent concerned tarot or horoscopes.

A1.21 RegTel notes that the figure of 369 was down on the 602 services authorised in 2005/06. But 369 is some way higher than the 200 or so applications authorised in each of 2003/04 and 2004/05.

The UK

Introduction: recent communications market activity

A1.22 We set out first, in Table A1.6, some background data on the UK communications market.

Table A1.6: Telecoms market data in UK

Revenues (£m.)	**2003**	**2004**	**2005**	**2006**	**% growth 2006/2003**
Fixed lines	11,361	10,704	9,572	9,953	-12.4
Mobile	9,836	11,938	12,940	13,902	41.3
Internet	849	1,301	1,691	2,185	157.4
Total	22,046	22,943	24,203	26,040	18.1
Take-up (millions)					
Fixed lines connections	35.0	34.6	34.1	33.6	-4.0
Mobile subscriptions	52.8	59.7	65.4	69.7	32.0
Broadband connections	3.1	6.1	9.9	13.0	319.4
Total	90.9	100.4	109.4	116.3	27.9
Penetration (%)					
Fixed-line (individuals)	58	57	56	56	
Mobile (individuals)	99	108	115	115	
Broadband (households)	13	25	40	52	

Source: Ofcom, 2007

A1.23 Some key features of the UK market are that:

A1.24 In 2006 the amount spent per household on telecommunications services fell by nearly a pound to £64.73 per month. This is largely caused by average spend on mobile falling (by 70p to £31.72) for the first time as falling prices more than compensated for an increase in the total number of connections and in the average number of voice calls and text messages per subscriber.

A1.25 Penetration of broadband increased to over 50 per cent of households by March 2007. Households with a mobile connection (93 per cent) exceeded households with a fixed connection (90 per cent) for the first time in 2006.

A1.26 Average calls per mobile connection rose above 100 minutes a month for the first time, while average calls per fixed-line connection fell below 300 minutes. 3G mobile connections grew by 70 per cent during 2006 to reach 7.8 million by the end of the year, and all five mobile operators are in the process of upgrading their 3G networks in order to improve coverage and provide faster data speeds.

PRS Definition

A1.27 In the UK, the term PRS is defined formally in Section 120 of the Communications Act 2003, from which an extract follows.

> ***"Conditions regulating premium rate services***
>
> (7) A service is a premium rate service for the purposes of this Chapter if-
>
> (a) it is a service falling within subsection (8);
>
> (b) there is a charge for the provision of the service;
>
> (c) the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
>
> (d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.
>
> (8) A service falls within this subsection if its provision consists in-
>
> (a) the provision of the contents of communications transmitted by means of an electronic communications network; or
>
> (b) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service."

A1.28 The wording of these sub-sections is somewhat opaque. Nevertheless, the definition of PRS under the Act can be seen to possess four key features:

- The service is delivered or accessed by means of an electronic communications service;
- There is a charge for the service;
- The charge appears on the electronic communications service bill; and
- The charge appears on the bill as a charge for an electronic communications service.

PRS Market Size

A1.29 Essential national characteristics relevant to the UK PRS market in 2006/07 were as in Table A1.7 below.

Table A1.7: the UK PRS market 2006/07

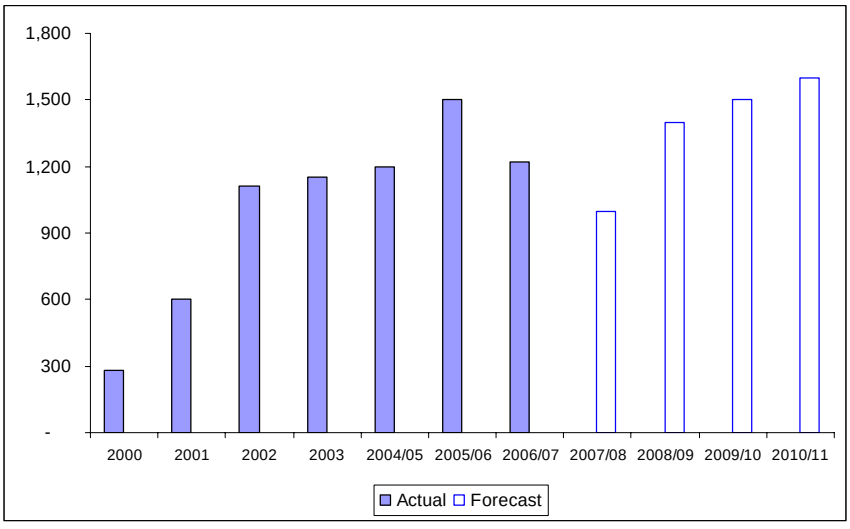
Population	61 million
GDP per capita (GBP)	£16,737 (€21,000)
Fixed telephony penetration (connections per 100 population)	56
Mobile telephony penetration (connections per 100 population)	>100
Major operators (fixed)	BT, NTL/Telewest (Virgin Media)
Major operators (mobile)	O2, Orange, Vodafone, T-Mobile, H3G
Size of PRS market (GBP)	£1,200 million (€1,600 million)
Major PRS providers include:	Opera, Eckoh, Itouch, MBlox, WIN
Level of complaints p.a.	42,000 average over the last three years

A1.30 In its 2008/11 strategic plan, PhonepayPlus states that :

> "The UK market for services with premium payment has grown over the last seven years…..Our assumptions are that the market will remain subdued in 2007/8, down by around 17% but that that will increase in the period of this three-year plan [***PhonepayPlus: A three-year strategic plan 2008/11***], returning to or exceeding recent levels."

A1.31 The actual and forecast figures are as in Figure A1.2 below.

Figure A1.2: UK PRS revenues (£m)



Source: PhonepayPlus, A three-year strategic plan 2008/11

Classes of PRS services

Demand side characteristics

A1.32 The UK PRS industry began in 1986 when BT introduced a new prefix 0898, which provided the opportunity to other companies to offer information and entertainment services over phone lines. Nowadays, PRS cover a wide range of services, from competitions to helplines, downloads and other forms of content and information. Most PRS are accessed on 09xxx telephone numbers (designated as premium rate numbers by the telecommunications regulator, Ofcom). However, directory enquiry services are accessed on 118xxx short codes, some PRS are accessed on 08xxx telephone numbers, and many PRS available over mobile phones are accessed using designated four or five digit mobile short codes.[36]

A1.33 As we have already noted, directory enquiries are not PRS in Ireland, and other services provided under the PRS umbrella in the UK (such as gambling and live sex chat) are prohibited in Ireland.

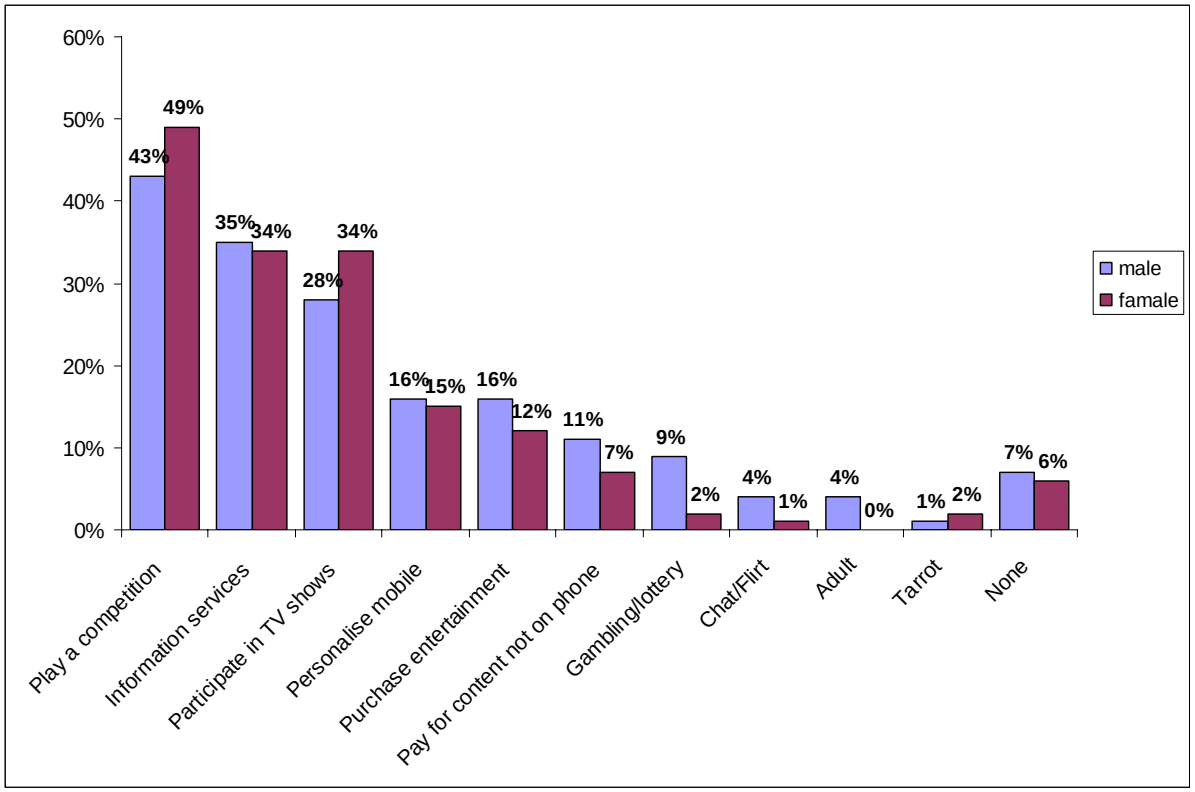
A1.34 According to a survey conducted for PhonepayPlus by Fathom on ***Phone-paid services: today and tomorrow*** the most popular services were information services and competitions (the first including directory enquiries) across all age groups, and among female and male.

A1.35 In 2007 competition services have been the subject of controversy, with a number of allegations made against providers which resulted in several fines and a loss of trust among viewers. It is likely to be the industry's ability to regain that trust that will to a large degree decide whether participation TV services will grow in 2008. In this respect the UK and Ireland face similar challenges.

A1.36 Figure A1.3 illustrates the relative popularity of different forms of PRS.

[36] Directory enquiry is the largest service segment and it is worth about 20% of the market (but it is expected to come under pressure from free directory services).

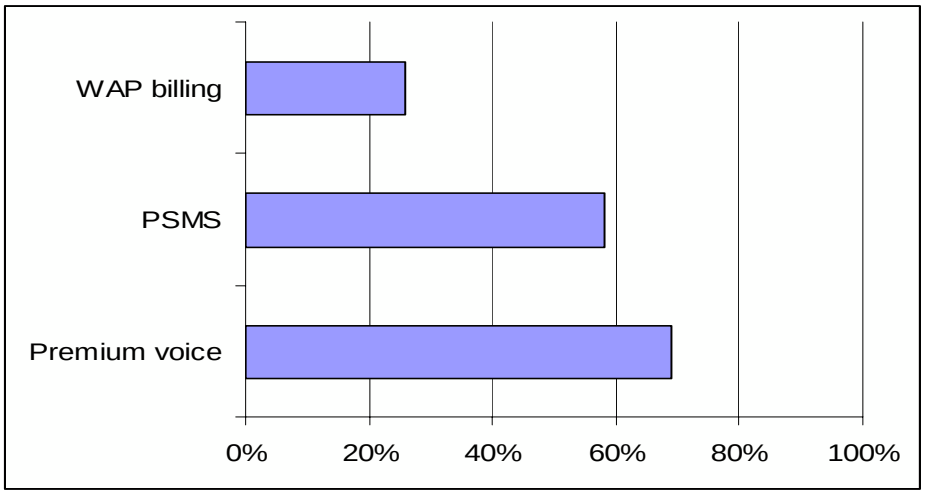
Figure A1.3: PRS used in UK



Source: Industry Survey, Fathom for PhonepayPlus, November 2007

A1.37 The most popular premium rate services in UK are accessed through voice and SMS, as shown in Figure A1.4 below.

Figure A1.4: Most popular PRS accessed in UK



Source: Industry Survey, Fathom for PhonepayPlus, October 2007

A1.38 Premium rate voice services, however, have started to decline in recent years not only because of problems with TV voting and competitions but also because of the increasing penetration of mobile services. Among PRS users aged 18-34, over 60 percent use premium rate text messages as payment whereas just 37per cent use voice calls. This establishes mobile as a key platform for phone-paid services.

A1.39 Payforit, a PRS payment mechanism in its own right, has just been launched but it is at an early stage of development. It is supported by all mobile licensed operators, but only 9 per cent of users in the Fathom survey said they have used Payforit or any other form of WAP billing system.

Market size

A1.40 The size of the PRS market in 2006/07 is estimated at £1.2 billion, down from £1.6 billion in 2005/06. Directory enquiries have the largest share of the PRS market with revenues of £207 million (19%). Adult services account for £153 million (14%), closely followed by TV voting and competitions with £139 million (13%) as shown in Table A1.8 below.

Table A1.8: PRS market shares per platform used in UK

Segment	Description	PRS payment mechanism	Share of market
Directory enquiries	All directory enquiries services, voice and text-based	Voice and mobile	19%
Adult entertainment	All content of a sexual nature, including adult chat, video, images etc.	Voice and mobile	14%
Competition, voting and participation TV	All competitions, votes and registration services regardless of origin of call-to-action. All participation TV activity, including text to screen.	Voice and mobile. TV voting currently predominantly voice	13%
Information services	Sports, new updates, sports scores and tipster lines, specialised services as legal or technical advice	Voice and mobile	13%
Mobile personalization	Ring-tones and graphics	Mobile only	13%
Purchases of entertainment for mobile phones	Games, music. Video TV and others	Mobile only	8%
Flirt/date/chat	chat and dating of a non-sexual nature	Voice and mobile	7%
Tarot/astrology	fortune-telling stories, tarot, astrology and psychic services	Voice and mobile	5%
Payment of non phone content and services	non-phone based content and services including online content, Wi-Fi access	Predominantly mobile but includes voice	3%
Gambling/lotteries	gambling, lottery activity	Voice and mobile	<1%
Other phone-paid	non-TV related content, voice based non adult entertainment	Voice and mobile	<5%

Source: Fathom for PhonepayPlus, 2007

A1.41 Tariffs for UK PRS typically vary from 10 pence per call to £1.50 per minute, while some services are charged at a fixed rate, for example 50p per text message or £1 per download.

APPENDIX 2: SI 194/1995 AND THE REGTEL CODE OF PRACTICE

Statutory Instrument no. 194/1995

A2.1 At the time Statutory Instrument 194/1995: Telecommunications (Premium Rate Telephone Service) Scheme was drafted, the only provider of telecommunications services in Ireland was Bord Telecom Eirann (subsequently eircom) and the SI is thus drafted on that basis. The SI provides that:

> "Service providers must not provide or permit to be provided in a PRS any information or material that would be a criminal offence or be unlawful in Ireland.
>
> Service providers must ensure that PRS they provide is not used for the transmission of any message or other matter which is either: a) grossly offensive, indecent, obscene or menacing character; or b) false for the purpose of causing annoyance, inconvenience, or needless anxiety to a person.
>
> Bord Telecom Eireann is entitled to require that any PRS which is suggested by the regulator to be of sexually suggestive or titillating nature is accessible to subscribers only on telephone numbers with a prefix and by making use of a unique personal identification number (PIN).
>
> Bord Telecom Eireann or the regulator may from time to time require PRS of particular category to be accessible only by telephone number with a prefix or range determined by Board Telecom Eireann. The service providers shall comply with that.
>
> If Bord Telecom Eireann considers that a service providers is in breach of the scheme or any other scheme or agreement or Code of Practice, Bord Telecom Eireann is entitled to bar access to some or all PRS until the breach has been remedied. Bord Telecom Eireann shall inform service provider that access has been barred.
>
> Bord Telecom Eireann may bar access to any PRS by subscribers and callers for breach if it considers that service provider is not providing bona fide PRS; the service provider is conducting business illegally or for an illegal purpose; the PRS or the information conveyed on is used in connection with fraud or a criminal offence against Board Telecom Eireann or any other telecommunication network. When a PRS is barred Bord Telecom Eireann shall inform the service provider.
>
> Bord Telecom Eireann may terminate all or any agreement with service providers by notice in writing and bar the access to access to any PRS by subscribers and callers.
>
> Bord Telecom Eireann may refer to the Regulator any requested restoration of access.
>
> Service providers must on request provide Bord Telecom Eireann or the regulator (or both) with information or material relating to PRS in order to carry out an investigation.
>
> Bord Telecom Eireann must apply the appropriate charge to PRS as published by Bord Telecom Eireann in a national daily newspaper."

A2.2 The broad principles embodied in SI 194/1995 have been carried through to later PRS regulation.

RegTel and the Code of Practice

A2.3 RegTel's terms of reference, in brief, require it to act as follows:

- To set standards of PRS content and promotion and to publish them in one or more Codes of Practice
- To review the Code(s) from time to time
- To receive and investigate complaints relating to PRS
- To monitor compliance with the Code and to investigate apparent breaches
- To take action vis-à-vis service providers in order to secure compliance
- To publicise its own existence, functions and powers.
- Successive Codes of Practice were promulgated and applied by RegTel. As we have reported, a new draft Code is currently undergoing consultation.

A2.4 The current Code (see http://www.RegTel.ie/codeofpractice.htm for the full text) came into force on 1 November 2005. It is structured as follows:

INTRODUCTION
1. THE CODE OF PRACTICE
2. DEFINITIONS
3. SERVICE PROVIDER ADMINISTRATIVE RESPONSIBILITIES
4. DATA PROTECTION
5. THE CODE OF PRACTICE- General Provisions
6. PROMOTION - (General Rules)
7. PRICING INFORMATION
8. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SERVICE
9. LIVE SERVICES
10. ONLINE PREMIUM RATE SERVICES
11. PREMIUM SMS SERVICES
12. FUNDING OF THE REGULATOR
13. PROCEDURES AND SACTIONS
14. OPERATIVE DATE
15. ANNEX

A2.5 The General Provisions of the Code of Practice cover legality, decency, honesty, content, amusement services, unavailability of service, promotion of PRS by non-PRS means, service provider responsibilities and monitoring.

A2.6 In relation to data protection, a critically important provision of the code is:

> "4.1 Service providers must not send, or have others send on their behalf, unsolicited, random, or untargeted telecommunications messages, and the use of Premium Rate Services must not be promoted by the use of such messages. Premium Services may be promoted by outgoing telecommunication messages only where it can be shown to the reasonable satisfaction of the Regulator that the Consumer has 'opted-in' to the receipt of such messages."

A2.7 In relation to PSMS, important parts of section 11 of the Code read as follows:

> "11.1.1 Only PSMS services authorised by the Regulator may be operated by a Service Provider.
>
> 11.1.2 Short Code Numbers must be used only for the Service authorised by the Regulator.
>
> 11.1.3 Service Providers must not send, or have others send on their behalf, unsolicited, random, or untargeted telecommunications messages (referred to as SPAM), and the use of PSMS must not be promoted by the use of such messages.
>
> 11.1.4 The Consumer must have the right to 'opt-in' or 'opt-out' of any promotion or Service, whether subscription based service or otherwise."

A2.8 RegTel's requirements in relation to competitions, covered in Section 8 of the Code, are especially thorough and stringent, consistently with the popularity of such activities through PRS. RegTel's web-age covering competitions (http://www.regtel.ie/code_8.htm) is rather too lengthy to include in full in this report but is worth perusal because it effectively highlights the means whereby rogue operators may defraud consumers.

A2.9 Where a breach of the Code appears to have taken place, RegTel attempts to contact the relevant service provider or aggregator, even though RegTel itself has no direct contractual relationship with any party except the network operator. Then, under Section 13 of the Code:

> "…where a complaint is upheld and the Regulator adjudicates that there has been a breach of the Code of Practice, the Regulator may impose all or any of the following sanctions:
>
> (i) to require the Service Provider to remedy the breach by taking such steps as the Regulator deems appropriate;
>
> (ii) to require assurances from the Service Provider, or any associated individual, relating to future behaviour, in terms determined by the Regulator;
>
> (iii) to require the Service Provider to submit certain or all categories of Service and/or Promotional Material to the Regulator for prior approval for a defined period;
>
> (iv) to require the Service Provider to refund to the complainant and all other callers to the Service an amount to be determined by the Regulator and, in default of payment of that

amount within 14 days, to request the relevant Network Operator to pay that amount to the complainant and all such callers out of monies held by the Network Operator for the account of the Service Provider. Where callers cannot be identified, the Regulator may, on or after the expiration of 60 days from the date of the adjudication, stipulate a charity to which the call revenue must be paid by the Service Provider or the Network Operator as aforesaid;

(v) to require the relevant Network Operator to bar access to some or all of the numbers allocated to the Service Provider for a defined period;

(vi) to recommend to the relevant Network Operator that the Service Provider should be prohibited from providing a particular type or category of Service for a defined period; and

(vii) to recommend to the relevant Network Operator that the Service Provider should no longer be permitted to provide Premium Rate Services.

A2.10 It is noteworthy that in most respects RegTel can ***require*** certain steps to be taken, but that in relation to shutting down a rogue service provider, RegTel can only ***recommend*** this course of action to network operators.

A2.11 At 38 pages, the RegTel Code is about half the length of the PhonepayPlus Code in the UK. A new draft Code for Irish PRS is currently the subject of consultation. The most important changes from the present Code are:

- New requirements for subscription services, including frequency, weekly and monthly cost and formalisation of the use of STOP.
- Live help desk service during office hours
- A requirement to refund complainants and all other callers
- New requirements for the promotion and marketing of PSMS
- Restrictions on the use of the word “free”
- Spending limits generally and a limit of €10 per month for under-18s accessing subscription services.

The Irish Financial Services Regulatory Authority (IFSRA)

A2.12 We include a brief section on the FSA solely because it may become necessary for that body to become involved in issues resulting from the possible widespread use of PRS as a form of payment.

A2.13 The supervisory regime provided for in the Regulation for Electronic Money Issuers (EMIs) is similar, ***mutatis mutandis***, to those which apply to other regulated entities – fitness and probity of relevant parties; sound internal control systems, sound administrative and accounting principles; adequate capital levels, liquidity, etc. There are

certain additional features and requirements that are unique to E-money and EMIs. Among them are these:

- EMIs must not undertake or carry on business other than issuing E-money and the provision of financial and non- financial services closely related to issuing E-money;
- Each EMI must have initial capital of at least €1 million. On an ongoing basis it must maintain capital equal to 2 per cent of E-money issued or €1 million, which ever is the higher;
- The maximum storage capacity of each issued electronic device should not exceed €5,000;
- Small issuers of E-money may benefit from a waiver of certain requirements under certain conditions;
- The bearer of E-money has the right at all times to demand repayment from the EMI of any balance outstanding on the device;
- EMIs can only invest their assets (essentially the balances of unused E-money devices) in cash or near-cash items (i.e. assets carrying a zero weighting in the context of banks' capital adequacy requirements).

A2.14 These conditions can, depending on the definition of players in PRS payment mechanisms, self-evidently have the effect of constraining growth in this segment of PRS.

APPENDIX 3: APPEALS MECHANISMS

A3.1 In this Appendix we set out a more detailed description of appeals mechanisms in Ireland and the UK across different regulated sectors.

Common appeal practices

A3.2 The most common regulatory model applied in the UK and Ireland is one where the regulator carries out a public consultation before taking any final regulatory decision. In principle this approach should tend to reduce the need for, and volume of, regulatory appeals.

A3.3 In virtually all sectors subject to economic regulation in the UK, aggrieved parties may take an appeal against a regulatory decision to the Competition Commission. Strictly speaking, it is the regulator which makes the reference to the Commission, but it does so on the basis of an aggrieved party's refusal to accept the decision in dispute.

Appeals mechanisms in Ireland

The European Framework

A3.4 Under EU law (in this case the Telecoms Framework Directive) Member States must have an effective appeals mechanism. Article 4 requires the following factors to be considered:

(a) Any user or undertaking providing electronic communications networks and/or services affected by a decision of a National Regulatory Authority (NRA) must have the right to appeal against the decision

(b) The appeal body has to be independent of parties involved

(c) It has to possess the appropriate expertise to carry out its functions

(d) Pending the outcome of an appeal the NRA decision shall stand, unless the appeal body decides otherwise"

A3.5 In Ireland, appeal provisions should comply with:

(e) Bunreacht na hÉireann;

(f) European Law; and

(g) The European Convention of Human Rights, as ratified in December 2003.

A3.6 In Ireland parties who wish to appeal a regulator's decision must take their case to the High Court.

A3.7 We now turn to the appeals mechanisms in three regulated sectors – telecoms, energy and aviation – before concluding with RegTel.

ComReg

A3.8 ComReg is the independent electronic communications and postal regulator. Its aim is to promote competition, protect consumers and encourage innovation.

A3.9 Appeals against decisions of Comreg must go straight to court: there is no intermediate appeals mechanism.

The Commission for Energy Regulation (CER)

A3.10 Commission for Energy Regulation (CER) is the independent regulator for Ireland's energy sector.

Appeals procedure

A3.11 One may appeal a CER decision by addressing the Minister to set up an appeals panel in order to hear the appeal. In order to appeal a CER decision, the appellant's case must correspond to one of the situations below:

(a) a network dispute between the system operator and a customer has been determined; and

(b) an issue regarding a decision, a refusal to issue or to modify either a licence to generate electricity, or an authorisation to construct a generation plant.

A3.12 The 2002 Energy Act led to the establishment of an Appeals Panel which must consist of at least than three individuals, including a chairperson appointed by the Minister.

A3.13 The panel must be independent. It must have all the CER's powers and duties necessary to fulfill its purpose. The panel may endorse or dispute the CER's decision. It can make determinations and issue directions under the powers conferred on the CER in relation to disputes between a system operator and a third party.

A3.14 The Appeal Panel also has

> "the powers, rights and privileges vested in the High Court in the hearing of an action regarding the enforcement of the attendance of witnesses and the production of documents. Any person summoned before the Appeal Panel who fails to attend or refuses to co-operate in any way will be guilty of an offence". (See footnote 36)

A3.15 The appeal process is intended to take no more than six months.

The Commission for Aviation Regulation (CAR)

A3.16 The Commission for Aviation Regulation (CAR) is the Irish regulator of certain aspects of the aviation and travel trade industry. One of its main functions is to determine price caps for airport charges and aviation terminal service charges.

Appeal procedure

A3.17 The 2001 Aviation Regulation Act, which led to the creation of the CAR, also made provision for an appeals panel.

A3.18 Any Airport Authority or user may appeal to the Minister regarding a price determination. The appeal must be in writing. Once the Minister receives the written appeal, he/she will then appoint an appeals panel. If the Minister deems the appeal to be unnecessary or unreasonable, he may ignore it.

Appeal panel

A3.19 An appeals panel is required to consist of between three and five members. Even though it can take any issue raised by an appellant into consideration, it may not overturn the CAR's decision. What it may do, is either confirm the CAR's decision or "refer the determination back to the CAR" [37]. The appeal panel is dissolved once it has considered an appeal.

A3.20 Upon receipt of the Appeal panel's verdict, the CAR may assert its original decision, or amend it.

A3.21 CAR's decisions relating to functions other than price setting may be appealed only to the High Court.

RegTel

A3.22 At present there is no appeal process in place for RegTel decisions, short of an appeal to the Courts.

A3.23 According to RegTel's 2006-2007 Annual Report a variety of models for the implementation of an appeal process are under consideration but are still at the discussion phase. The appeal procedure as proposed would apply to a refusal of permission to operate services or to an adjudication of consumer complaint.

Appeals mechanisms in the UK

A3.24 As with Ireland, we review the appeals processes of three major economic regulators before turning to the PRS regulator, PhonepayPlus.

[37] http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Regulatory%20Appeals_2.pdf

Ofcom

A3.25 Ofcom is the independent regulator for communications. It has a wide variety of duties relating to identifying and responding to anti-competitive conduct, ***ex ante*** as well as ***ex post***.

A3.26 Under the Communications Act 2003 Ofcom shares power to enforce competition law with the Office of Fair Trading and is effectively the competition authority for the communications sector. Ofcom also considers consumer complaints under the Unfair Terms in Consumer Contracts Regulations 1999 for the communications sector.

Ofcom's responsibilities

A3.27 Ofcom has set out clear guidelines for its approach when investigating competition complaints and resolving disputes between companies. These guidelines are aimed at reducing the costs to industry of Ofcom's work and at targeting the best use of its own resources. Ofcom will only involve itself in dispute resolution once meaningful commercial negotiations between the parties have failed. This allows Ofcom to focus on the most serious disputes or allegations of anti-competitive practices.

Appeal

A3.28 Appeals against decisions of Ofcom may be addressed only to the Competition Commission.

Ofgem

A3.29 Ofgem is the independent UK regulator for gas and electricity.

Ofgem's responsibilities

A3.30 Ofgem has various responsibilities which include the creation and sustainability of competition, efficient network regulation, protecting Britain's energy supply, representing Britain's interest at the European level, contributing to sustainable development, fighting fuel poverty, and improving regulation.

A3.31 The Energy Act 2004 introduced an appeals process for energy market players. Indeed, service providers had won the right to appeal Ofgem's decisions on "proposed changes to industry codes" through recourse through the Competition Commission.

A3.32 The industry codes include:

(a) The Balancing and Settlement Code;

(b) The Connection and Use of System Code;

(c) The Network Code;

(d) The Supply Point Administration Agreement;

(e) The Master Registration Agreement; and

(f) The Uniform Network Code.

A3.33 In the two cases below, the right of appeal of the Codes listed above is excluded:

(a) If an agreement with the majority recommendation of the code's own governing panel has been reached; or

(b) If the delay caused by holding an appeal against that decision is likely to have a material adverse effect on the availability of electricity or gas for meeting the reasonable demands of consumers in Great Britain.

Appeal

A3.34 Ofgem itself has no appeals panel. Decisions by Ofgem regarding industry codes may only be challenged through appeal to the Competition Commission.

PhonepayPlus

A3.35 PhonepayPlus is exceptional in that it has established an internal appeals panel to which an aggrieved party may appeal. Given the nature of issues which may be subject to dispute in PRS, it is arguable that this provides more flexibility, and possibly greater efficiency, in the way in which issues are dealt with.

A3.36 According to PhonepayPlus' Code of Practice:

> "Service providers, applicants for permission, information providers, associated individuals and network operators ('appellants') may, after an oral hearing at which the appellant or his representative has appeared, appeal to the Independent Appeals Body ('IAB') against PhonepayPlus decisions and adjudications (other than any adjudication by consent)".

A3.37 Appeals shall be carried out if:

> "the disputed decision was based on error of fact,
>
> the disputed decision was wrong in law, or
>
> PhonepayPlus exercised its discretion incorrectly in reaching its decision".

A3.38 Once PhonepayPlus has reached a decision, the appellant has twenty working days to lodge an appeal. It shall justify the reasons for its appeal in a written notice of appeal, which it must send to the clerk of the IAB.

A3.39 The following documents must be provided with the notice of appeal:

(a) the written adjudication;

(b) the case bundle used at the PhonepayPlus oral hearing;

(c) a security deposit of £5,000 or an application (to be determined by the Chairman of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction;

(d) a description of any new evidence upon which the appellant intends to rely and which, for good reason, was previously unavailable;

(e) if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the PhonepayPlus adjudication, the appellant must also provide an application (to be determined by the Chairman of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application".

The Independent Appeals Body

A3.40 The Independent Appeals Body ("IAB") is defined as

> "…a body of persons, independent of PhonepayPlus, appointed to provide tribunals to hear appeals in respect of service providers and following oral hearings:
>
> against adjudications made by PhonepayPlus,
>
> against refusals by PhonepayPlus of applications for permission to provide services,
>
> against conditions imposed by PhonepayPlus upon such permission,
>
> in respect of network operators, against adjudications made by PhonepayPlus which direct that a sanction be imposed."

The Appeal Tribunal

A3.41 Once the IAB's Chairman has received the appellant's documents, he appoints an Appeal Tribunal from among the members of the IAB. The tribunal consists of three members, and the IAB's Chairman (or deputy Chairman) is the Chairman of the Tribunal.

A3.42 In the case of the appellant applying for a lower provision of the required security deposit and if the appeal has been made outside the time limit, the Chairman of the Tribunal may organise a hearing for an application of this kind to be heard and where PhonepayPlus may also be heard.

A3.43 If the appellant applies for a reduction of the security deposit, the Chairman of the Tribunal may reduce or cancel the deposit if he judges that the appeal is justified. PhonepayPlus may apply to the Appeal Tribunal if it deems that the appeal should not be allowed unless the "security deposit is increased to a higher level and/or that a sum is lodged as security

for costs". The Chairman of the Tribunal is entitled to take such a decision at his own discretion.

APPENDIX 4: PRS COMPLAINTS PROCEDURE IN THE UK

A4.1 Consumers who wish to complain about a service to the regulator have a number of options:

(a) complete an online complaint form;

(b) call a free help line;

(c) write to PhonepayPlus;

(d) text PhonepayPlus through a textlink.

A4.2 PhonepayPlus accepts complaints about the promotion, the content and the overall operation of PRS. The most common causes of complaints involve misleading promotions, pricing information and illegality.

Breaches of the Code

A4.3 There are three procedures available to the PhonepayPlus Executive team when dealing with potential breaches of the Code.

(a) **Informal procedure**: the Executive uses this form when the apparent breach of the Code appears to be minor and of little consumer harm. When the informal procedure is adopted the Executive telephones the service provider concerned and outline the nature of the apparent breach(es). If the service provider agrees to take corrective action, no further action is taken.

(b) **Standard procedure:** the Executive uses this form where apparent breaches require remedy and the breaches have the potential to cause or have caused significant consumer harm, e.g. lack of pricing or misleading promotion or unacceptable content. The Executive will write to the service provider concerned, outlining the breach(es) of the Code of Practice and setting a time limit (five working days) for response. Once a response has been received or the time limit has expired, the case is presented to the PhonepayPlus Board for adjudication.

(c) **Emergency procedure:** the Executive and the Board members will invoke this procedure when a service and/or its promotion appears to be causing (or have the potential to cause) serious consumer harm; or when a potential breach of the Code is taking place which is serious and requires urgent remedy, i.e. appears to be deliberate attempt to defraud consumers. The Executive will begin an immediate investigation that may result in the instant barring of access to the service in question. The service provider will be given three working days in which to respond. The case will be presented to the PhonepayPlus Board for adjudication within 10 working days of the Emergency Procedure being started.

A4.4 The Complaints Panel (chaired in rotation and consisting of three Committee members) meets every week to adjudicate complaints and alleged breaches of the Code of Practice. Committee members with current industry interests take no part in this Panel.

Sanctions

A4.5 PhonepayPlus has the power to impose sanctions on service providers who are found to be in breach of the Code. General principles of justice and fairness must apply to the imposition of sanctions. These principles are:

(a) proportionality;

(b) consistency;

(c) freedom from improper discrimination;

(d) compliance with human rights; and

(e) transparency.

A4.6 The Board is accountable for the reasons behind its decisions. The latter are published on PhonepayPlus website.

A4.7 A non-exhaustive list of factors on the basis of which Payphone Plus makes its decisions is reported in the ***ICSTIS Sanctions Guide 2007*** and is summarized below:

(a) General factors:

- The degree and extent of consumer harm caused.
- The need for a sanction to act as an incentive to comply with the Code.
- The revenue generated by the service.
- The seriousness of the breach.

(b) Aggravating factors which may increase the severity of the sanction:

- Whether a sanction in respect of a similar breach has previously been imposed upon the service provider by PhonepayPlus.
- Continuation of the breach after the service provider has become aware of the breach or been notified of the breach by PhonepayPlus.
- No response to a breach letter by a service provider.
- Incomplete, inaccurate or false information supplied by a service provider as part of a defence.

- Breaches occurred after the publication of sanctions on similar services.

(c) Mitigating factors which may reduce the severity of the sanction:

- The extent to which any breach was caused by a third party (other than the information provider) or any relevant circumstance beyond the control of the service provider
- The extent to which the service provider has taken steps in advance to identify and mitigate external factors that might result in the breach
- The extent and timeliness of any steps taken to end the breach in question and any steps taken for remedying the consequences of the breach. For example, refunds made to affected consumers.
- Cooperation with PhonepayPlus investigations.

Administrative charges

A4.8 PhonepayPlus has recently decided to change the way in which administrative charges are applied to cases opened on or after 1 January 2008. From this date, administrative charges for all cases that go to adjudication are calculated taking into account the number of hours spent bringing a case to conclusion, which members of PhonepayPlus personnel were assigned to a case, and the number of secondary cases.

A4.9 The new charges will be applied to service providers, information providers and network operators found to be in breach of the PhonepayPlus Code.[38]

Refunds

A4.10 The Board may also consider ordering a service provider to issue refunds to complainants. The Board, in its "***Statement on the provision of refunds to consumers and the development of industry best practice for customer service"*** (published on 3 October 2006) set out the possible combinations of circumstances which are likely to order the trigger of an order for refunds. These are:

- there was an identifiable (and possibly excessive) financial detriment to individual consumers arising directly from a Code breach or breaches, and a consequential gain to the service provider;
- there was a wilful intent by the service provider to deceive the consumer or engage in other forms of unconscionable conduct;

[38] Source: http://www.phonepayplus.org.uk/pdfs_news/AdminChargesNotice.pdf

- the product or service was not supplied or was of a manifestly unsatisfactory quality;
- the marketing or promotional material was in some way fundamentally misleading and as consequence consumers were misled into purchasing a service that they would not otherwise have wanted to purchase;
- the product was inappropriately priced to disguise the true cost to the consumer which, had they been aware of it prior to purchase, would have significantly impacted on their decision to purchase. One example here is to describe the PRS as "free" when it clearly is not.

Barring

A4.11 The Board has the ability to impose bars on service providers. This will relate either to a number range on which the service operates and/or to a particular service type. Barring is always imposed for a defined period of time. The length of any bar is determined by the seriousness of the case and all other relevant factors particular to the case.

Fines

A4.12 PhonepayPlus can impose fines of up to £250,000 per contravention. The bands of seriousness are listed below:

- Minor: a fine of up to £5,000
- There is a measure of consumer harm: this may attract a fine of up to £10,000
- Moderate consumer harm: a fine of up to £40,000
- Serious: a fine of up to £100,000
- Very serious: a fine of up to £250,000.

A4.13 Examples of "very serious" situations are where:

- the same service provider who provided a service ***and*** was fined £100,000 or more for that service ***and*** has not challenged that decision then essentially replicates the service;
- the service in question is a replica or near-replica of a service which PhonepayPlus had previously judged to be in breach of the Code, for which a very high fine (£100,000 or more) had previously been applied to another service provider, and where PhonepayPlus had published an adjudication on that service.

APPENDIX 5: ORGANISATIONS INTERVIEWED

(In alphabetical order within category)

Regulatory and official bodies

1 Comreg

2 Data Protection Commission

3 Department for Communications, Energy and Natural Resources

4 National Consumer Agency

5 Ofcom (the UK's principal communications regulator)

6 PhonepayPlus (the UK's PRS regulator)

7 RegTel

Network operators

8 3

9 BT

10 Budget Telecom (also a service provider)

11 Meteor

12 O2

13 Vodafone

Service providers

14 Opera Telecom

15 Phonovation

16 PUCA

17 Realm

18 Xiam

19 Zamano

Industry bodies

20 Irish Business and Employers Confederation (IBEC) and the Irish Cellular Industry Association (ICIA) – an interview with a single representative covering both organisations.

21 Mobile Marketing Association of Ireland (MMAI).

APPENDIX 6: THE REGTEL BOARD

A6.1 The following two pages are extracted from RegTel's Report and Accounts for 2006/07.

Board of Directors: 2006/07

Fred Hayden, Chairman
Fred Hayden served as Regulator for a five year period from 1996 to 2001. He formerly held senior Marketing and Management positions with the Wellcome Foundation and Temana Ireland (a Shell Company) and as Chief Executive of the Association of Advertisers from 1986 to 1996.

Maurice Hayes, Director
Maurice Hayes is a Member of Seanad Eireann (Independent), an Author, Columnist and Political Analyst. As well as being a Director of RegTel, Maurice serves as Chairman, National Forum on Europe; Member, Royal Irish Academy; Governor, Linenhall Library, Belfast; Chairman, Ireland Funds, Advisory Committee; Director, Independent News & Media plc; Member, Research Ethical Committee, QUB; Medical School.

Mary Maher, Director
Mary Maher is a freelance journalist, a member of the Irish Executive Council of the National Union of Journalists and a member of the Employment Appeals Tribunal. She was formerly on the staff of The Irish Times, and is also a former member of the Legal Aid Board.

Catherine Lenihan, Director
Catherine Lenihan started her Civil Service career in 1963 in the Customs and Excise branch of the Revenue Commissioners. She is currently serving as Assistant Director in the Office of the Director of Consumer Affairs with responsibility for enforcement of consumer protection and product safety legislation. Nominated by the Director as a member of the RegTel Board in 2002 and to the Electro Technical Council of Ireland in 2003. She is serving on a number of EU Product Safety Working Groups.

Mary McLoughlin, Director
After graduating from UCD, Mary McLoughlin joined the Civil Service, where she has worked in a number of different Departments dealing with a wide range of issues. She currently works in the Department of Health and Children, dealing with child protection and adoption. She is the Financial Secretary of the Association of Higher Civil and Public Servants, and chair of her local branch. Mary is a nominee of the Director of Consumer Affairs to the Complaints Committee of the Advertising Standards Authority for Ireland.

Albert Redmond, Director
Albert Redmond is a senior manager in the Market Framework Division of the Commission for Communications Regulation (ComReg). He is responsible for the introduction of new telecommunications frameworks and new wholesale products to facilitate competition across all sectors of the communications marketplace. He is also responsible for the ongoing management of Ireland's telephone numbering scheme. Prior to joining ComReg (then ODTR) in 1998, Albert spent 10 years in Telecom Eireann, mainly in project management and new product development roles.

Mary Kotsonouris, Director
Mary Kotsonouris was born in Limerick. A former judge of the District Court, in 1995 she was invited by the Director of Consumer Affairs to establish the office of Regulator of Premium Rate Telephone Services and to draw up a code for the industry. She is a legal historian and has published several books as well as being a frequent contributor to radio and television programmes.

Séamus Given, Company Secretary
Séamus Given is a solicitor in Arthur Cox and has been involved with RegTel since its formation.

Appendix 3

Market Map of UK PRS industry – PhonePayPlus.

Market Map

www.phonepayplu
Fax: 020 7
Switchboard: 020 7
(Mon-Fri, 9

Market Commentary

Premium rate services are a form of micro-payment for paid for content, data services and value added services that are subsequently charged to subscribers.

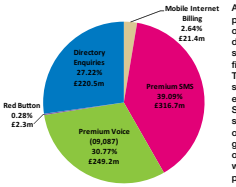
The UK Premium Rate Services (PRS) Market in 2009 was estimated to be worth £810m exc. VAT. As well as premium revenues, PRS generate additional communication revenues to delivery networks from their traffic. An estimate of £62.6 million in voice communication revenues and £23.8 million in standard SMS revenues is generated by PRS traffic for mobile network operators. (Think Tank 2010)

About PhonepayPlus

PhonepayPlus is the regulatory agency for premium rate (phone-paid) services in the UK, which offer content, products or services which consumers can purchase by charging the cost to their phone bills and pre-pay accounts. PhonepayPlus regulates these services through its Code of Practice which is approved by Ofcom in accordance with the Communications Act 2003. The Act sets out the definition of premium rate services and those who may be regulated in respect of them. The Code sets appropriate standards for the promotion, content and overall operation of premium rate services.

The amended Eleventh Edition of the code of practice took effect on 28 April 2008.

Premium Service Delivery



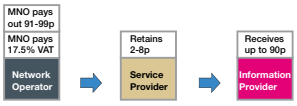
Approximately 40,000 premium rate services are in operation at any one time, delivering a variety of service formats over both fixed and mobile networks. The types of premium services offered have expanded from voice and SMS based to include subscription media services on mobile, interactive gaming on TV and on-demand TV channels with content paid for by premium rate payments.

Market Size by Payment Mechanism (Thinktank / PhonepayPlus 2010)

Revenue Share Arrangements

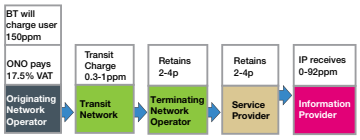
A typical revenue share arrangement for Mobile Premium SMS is:

PRS user pays £1.50 via short code SMS



In the Mobile Value Chain, the network operators deal directly with a small number of large sized service providers who aggregate content or acquire network access (amongst other functions) due to the technical complexity issues of interfacing with five different networks. As recognised by the Communications Act 2003, service providers can organise their businesses in numerous ways. Some focus on providing connections to the phone networks and have limited involvement in the content or promotion of a service, whilst others provide the content or service themselves. Where service providers do not provide the content or service they deal directly with 'information providers', who are parties directly involved in the provision or delivery of the service.

A typical revenue share arrangement for fixed line is:



In the Fixed value chain terminating operators interface directly with a large number of service providers.

Future Trends

Increasing use of internet-capable mobile devices by consumers is creating an alternative method of accessing information, using search engines or direct website access from browsers. PRS will adapt to this challenge by developing services that consumers value over free content. PRS will also offer quick and simple payment methods trusted by consumers.

Prepared by

FirstPartner

find us at www.firstpartner.net email us at hello@firstpartner.net

Disclaimer

Regulators

ASA Advertising Standards Authority

Ofcom The Office of Communications

OFT The Office of Fair Trading

ICO Information Commissioner's Office

Gambling Commission

Industry Associations

SCMG Short Codes Management Group

AIME Association for Interactive Media & Entertainment

MMA Mobile Marketing Associaton

MEF Mobile Entertainment Forum

MDA Mobile Data Associaton

MBG Mobile Broadband Group

PRA Premium Rate Association

FCS Federation of Communication Services

Usage Demographics

Age 11- 17 — 47% of the 11 to 17 age group report using a phone-paid service within the last 6 months, with on average 1.4 services used per person.

Age 18 - 34 — 63% of the 18 to 34 age group report using a phone-paid service within the last 6 months, with on average 1.8 services used per person.

Age 35 - 54 — 48% of the 35 to 54 age group report using a phone-paid service within the last 6 months, with on average 1.1 services used per person.

Target Delivery Devices

SMARTPHONES | CELLULAR HANDSET | PC | FAX | FIXED HANDSET | SET TOP BOX

Delivery Networks

Mobile Operator Networks — MNOs have licensed mobile spectrum and have invested in wireless network infrastructure to comply with regulatory requirements. MNO's normally address a broad customer base through their single brand identity..

MVNO's — MVNOs do not own network infrastructure or spectrum and rely on an MNO partner to provide these services. MVNOs normally rely on a market segment focus with close customer interaction.

Fixed Operato Networks

Service Access

Mobile Messaging — Highly targetable and can be used to deliver either text (SMS) or content containing pictures (MMS). Mobile IM may also offer opportunities for interactive services. Consumers may opt-in for regular delivery of premium services.

Mobile Portal — Operator portals are a dominant channel for mobile content delivery and promotion, offering high levels of reach for premium services.

Mobile Off-Portal — Off-portal browsing will become increasingly dominant as search and handset user experience improve, offering improved abilites for consumers to reliably find services.

Mobile Video — The number of TV ready, video streaming and radio podcast enabled handsets with bundled data tariff plans is growing in all subscriber bases.

Mobile & Fixed Voice — Premium rate voice based services can be accessed from both mobile and fixed networks. Consumers may experience high costs when accessing services using mobile networks.

Web Portal — Premium services may be promoted and delivered through web based portals. Service billi may use premium rate SMS bill charged to the consumer's mob account.

Service Delivery

Shortcodes — Unique mobile numbers with a format significantly shorter than normal numbers to improve campaign response rates.

Aggregation (Service Providers) — Service Providers act as a gateway between the delivery networks and information providers, obtaining best rates by traffic consolidation and providing service access to a number of networks.

Premium Rate Number — Specific prefix numbers allocated for premium rate services. Charges may be in the form of an instant one-off charge when the call is answered, or per minute for the duration of the call.

Content Providers (Information Providers) — A Service Provider may develop and supply their own content and run their own promotional campaigns. Whereas some Service Providers focus solely on connecting the information providers.

Service Delivery Platform — Service providers may manage all aspects of service delivery or this may be left to the information provider. This can include target device formatting and network delivery requirements. Service formats include:

- SMS
- WAP
- MMS
- Video
- LBS
- IVR
- Voting
- Content Management
- Number Translation

Service Billing

Service Payment Methods

Reverse SMS — Consumer is sent a premium rate SMS, the cost of which is charged to the consumer's mobile phone bill. This method can be used as a micro billing alternative to credit cards.

Payforit — Payforit is a mobile payment service, designed to make it easy to pay for low cost services on a mobile phone.

Premium Rate Number — Charged in time units. The tariff is normally set to cover the cost of the service or to generate the required revenue in the delivery duration of the service

Billing Platform — Reconciles consumer payments, revenue sharing and chargebacks . Manages service provider payments.

Mandatory Payment Delay — Period to allow for payment chargebacks and any claims of fraud to be investigated

User Payment
Carrier Bill
Credit & Debit Card

Service Revenue — Out-Payment to the service provider, which is normally dependent on volumes and different network revenue split models.

TV & Radio | Print

Design, Creative & Cam

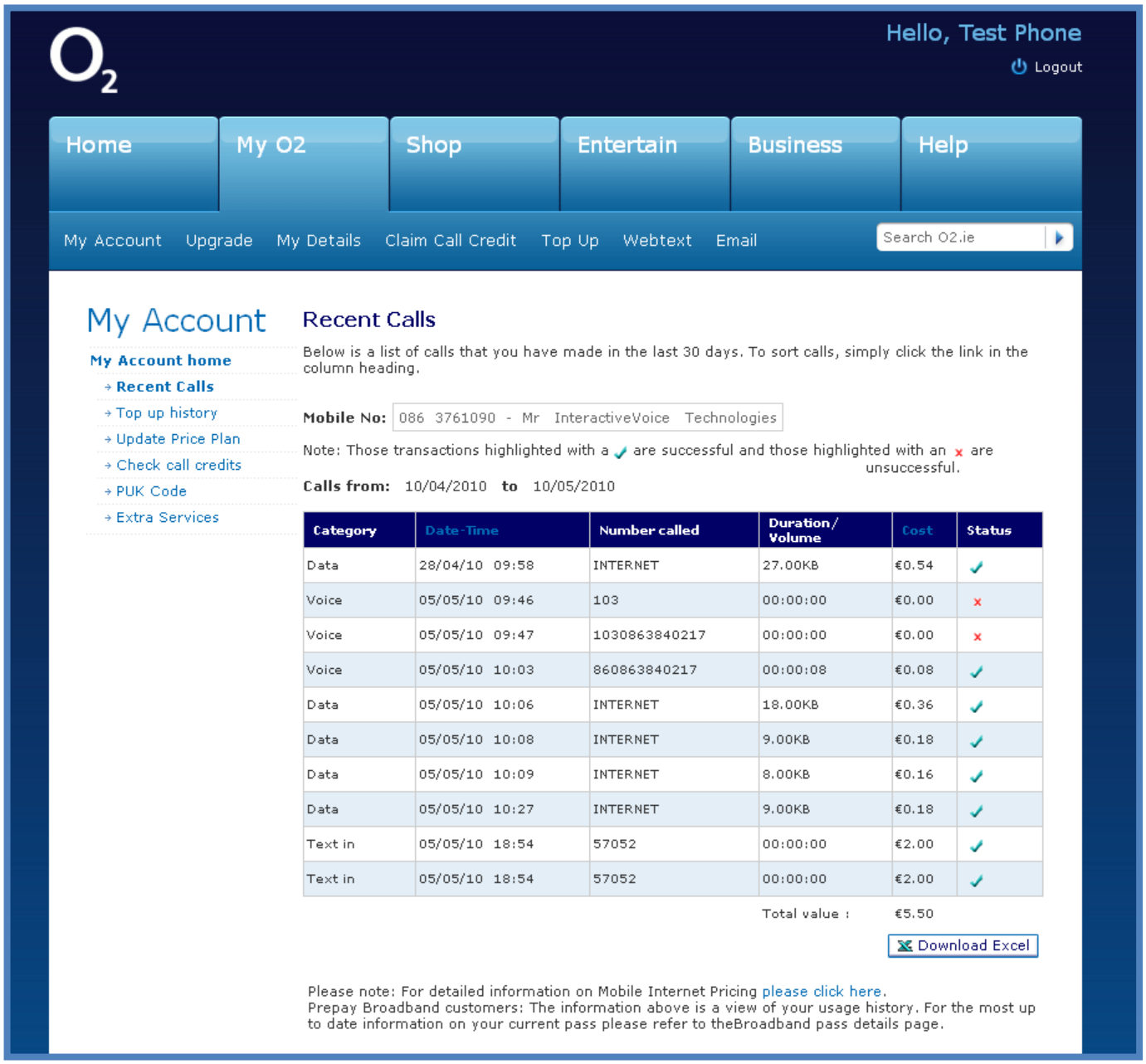
Media Strategists/ Planners/Buyers ◀▶ Full S Agen

Information	Calling	Entertainment		Engagement	Personalisation & Gifts
Directory Enquiries	Call Services	Adult Entertainment	Competitions	Sponsored Content	Videos
Information Services	International Call Routing	Gambling, Lotteries	Mobile Games	Voting	Music
Opt-In Push Messaging	Reverse Charge Services				SD Cards
Government Helplines		Flirt/Date/Chat	Tarot/Astrology/Psychic	Text-to-Screen	Virtual Gifts

Appendix 4

Copy of online bill for Prepaid O2 user

Example of billing information to O2 prepaid user.



Appendix 5

Draft proposals on STOP command send by IPPSA to Regtel

1. Description of the Issue

The current code requires that service providers recognise the keyword STOP as meaning that a consumer wishes to stop their subscription to a service. STOP must also be used to recognise that a consumer wishes to be removed from a promotional database.

It is assumed that if the consumer responds to a promotional message with the word STOP then they wish to be removed from further promotions.

It is further assumed that if the consumer responds to a service message with the word STOP then they wish to be removed from the service.

In general these assumptions are reasonable.

An issue arises however when a consumer signs into a service having responded to a press, TV or Internet advertisement. These advertisements generally inform the consumer that they may receive promotional messages in future. Providers are required to inform consumers how they can opt-out of these promotions.

If the user then sends STOP it is impossible know whether the consumer wishes to stop from future promotions or from the service itself.

The objective is to provide an easily understandable and effective way for consumers to indicate that they wish to exit a service or a promotional database.

2. The Options

Option 1
In the event that the users is not clearly responding to either a service message or a promotional message then ask them by text message to indicate which they wish to be stopped from by using STOP PROMO or STOP SERVICE.

Option 2
Use an alternate keyword such as OUT instead of STOP to indicate that a consumer wishes to opt-out of future promotions.

Option 3
Use a hybrid approach where OUT is provided as the command to opt-out of promotions, but if a consumer responds to a promotional message with STOP then it will be interpreted as an opt-out request. In the even that a user sends STOP at the time they have responded to an advertisement it would be assumed they wish to stop the service.

3. Assessment of the Options

Option 1
Using the same keyword to facilitate both would mean that consumers would always be able to exit from promotional databases or services using the single easy to remember STOP command. This command is well publicised and over 70% of mobile users are aware of it.

There is a risk that a consumer will not read the text message asking them to indicate whether they wish to stop future promotions or the service itself.

Option 2
Using an alternative command such as OUT would entail educating the public about the command in promotional text messages and on advertising.

Consumers may become confused by being told to use OUT and STOP for closely related actions.

Some consumers will no doubt respond to promotional messages using the STOP command even if the promotional message contains details of the OUT command.

It would allow the STOP command to function in a very simple and effective way.

There would be no risk that a consumer who sends STOP would fail to indicate what they wish to stop from.

Option 3
Provides many of the benefits of STOP but caters for the situation where a user has just signed into a service and wishes to be removed from future promotions by using the OUT command.

Consumers may become confused by being told to use OUT and STOP for closely related actions.

4. Recommendation

While there is an instinctive attraction to using STOP alone there is considerable concern that many users will not completed the second stage of the process and thus no action can be taken.

This could cause considerable negative impact on consumers.

We recommend that the approach in Option 3 be taken. This would ensure that consumers can opt-out of promotions when they sign into services using OUT, while at the same time ensuring that they can reply to a promotional message using the STOP command.

It would also eliminate the significant issues around using a second.

The following wording should be added to the guidelines;

If a user responds to a promotional message with the word STOP they should be opted out of further promotions. It is a data protection requirement that Service Providers allow subscribers to opt out of future promotions at the point they joint a service. The word OUT may be used for this purpose. If the user sends STOP having just signed into a service it should be assumed they wish to leave the service.

Appendix 6

Screen shots of www.phonebrain.org.uk

Press Release

PHONEBRAIN TOP OF THE CLASS AT HOLLIS SPONSORSHIP AWARDS

10/03/2010

PhonepayPlus' PhoneBrain schools project scoops top prize in the Education Sponsorship category at last night's Hollis Sponsorship Awards

PhoneBrain – the programme set up by industry regulator PhonepayPlus to help teens recognise phone-paid services and understand the costs involved – has won a Hollis Sponsorship Award in the Education Sponsorship category.

The programme saw 650 secondary schools and over 50,000 pupils take part in 2008/9 via free-to-download ICT and Enterprise teaching resources.

The 2009/10 programme was launched last week with backing from the Department for Children, Schools and Families, and PhonepayPlus estimates that over 1,000 schools will get involved this time around. PhonepayPlus has also teamed up with Fugative, a 16-year-old independent music artist, producer and publisher, to help teens use the skills they learn in the classroom to develop an animated mobile ringtone, create their own phone-paid service business plan, or both!

Hollis is one of the PR world's biggest information providers, and the Hollis Sponsorship Awards reward and recognise the very best sponsorship campaigns in the UK and internationally – across all sectors and across all budget bands.

Commenting on the win, PhonepayPlus Chief Executive, Paul Whiteing, said:

"PhoneBrain is an example of a truly innovative consumer literacy initiative. We are providing teachers with free, curriculum-friendly lesson plans that fit in with the skills students are required to learn, but also help teens get to grips with the services they're using on their mobiles. At the same time, PhoneBrain sees us teaming up with people like Fugative that excite teens and make them want to take part.

"We'd like to thank Hollis for this prestigious award, but more importantly thank everyone that has been involved with PhoneBrain. We will continue to talk to all kinds of UK consumers to develop their understanding about phone-paid services and make sure they can use them with trust and confidence."

For more information, go to **www.phonebrain.org.uk** or call the PhonepayPlus Press Office on 020 7940 7440.

PhoneBrain home page provides information to three distinct consumer groups; kids, teens and teachers/parents. Each section of the site is designed to be highly engaging for each of the specific groups. This site is an excellent example of how modern communication tools can be used to empower consumers by providing good information in a highly effective format.

Kids

The kids part of the site makes it easy for children to understand. It also includes a web based game where children can earn credit by exploying the site. They can then use these credits to customise their phone with ringtones or wallpapers.

Teens

The teens section takes a more grown up approach. They are currently running a competition inviting teens to invent their own phone paid service. This is a great way to motivate them to learn about the services and how they work.

Parents/Teachers

This section of the site focuses on how parents and teachers can educate young people about phone-paid services. It includes lesson plans, PowerPoint presentation, worksheets, etc.

Appendix 7

Survey on consumer usage of PRS services - Amarach Research

Phone Paid Services - Omnibus

A Presentation Prepared For Phonepaid

April 2010

By

NOG
S10-158

Table of Contents

A. Background and Research Objectives

- Phonepaid wish to understand the profile of users of certain phone paid services within the Irish market.
- The key objective of the research was to assess frequency of use (of all those who ever used) and profile these individuals versus normal population demographics.
- Due to the small number of questions being asked an omnibus study was the ideal approach.

B. Research Methodology

- A series of questions were placed on Amárach Research's on-line omnibus. The omnibus is a syndicated service whereby clients can include questions within the survey.

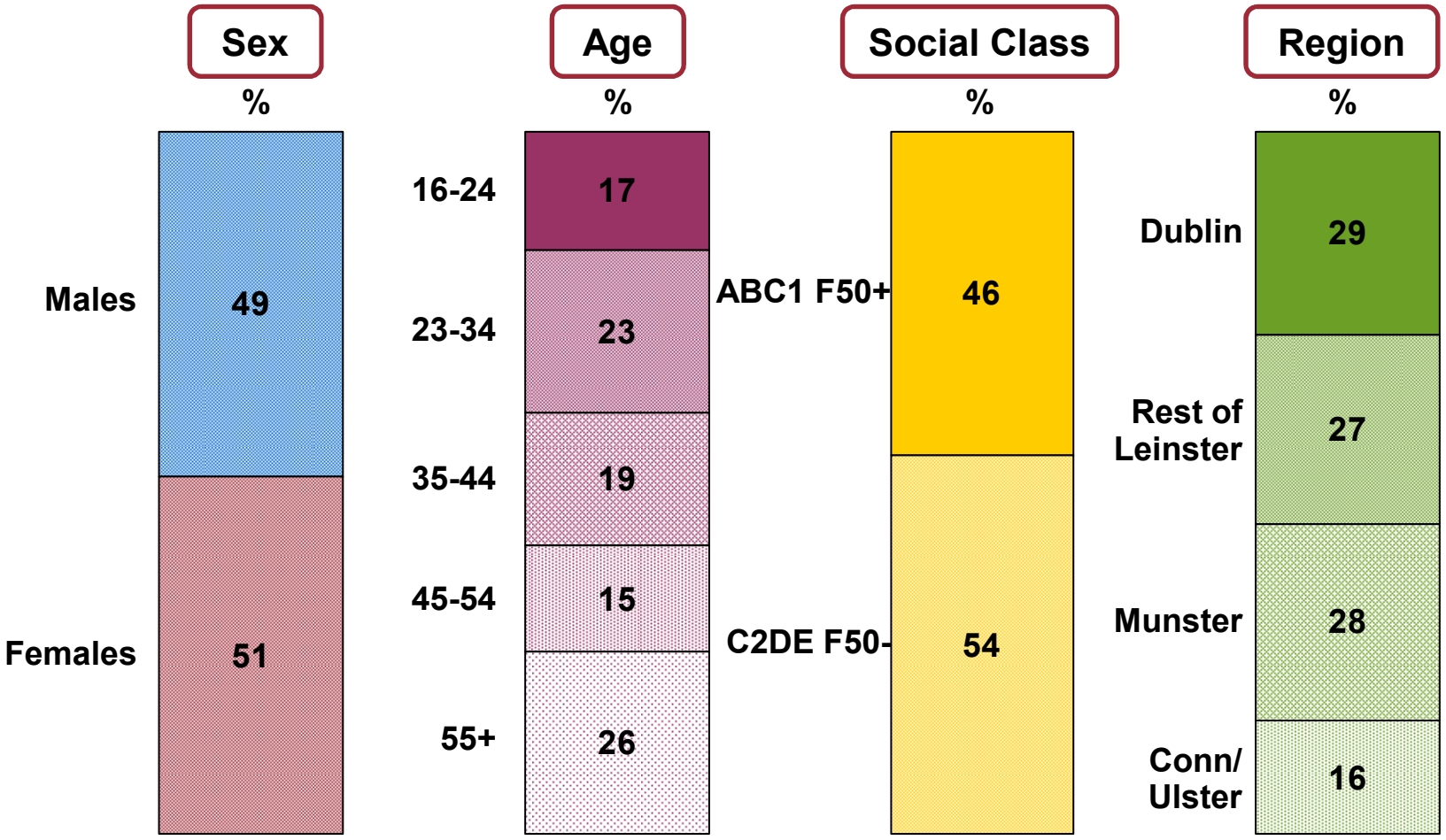
- The omnibus is a cost effective method of assessing results from a large sample of the population.

- On-line omnibus:
  - Quotas set on a representative basis of Irish adult population
    - Quotas set on gender, age, region and social classification.
  - 850 interviews – robust sample (margin of error of +/- 3.4%).

- Interviewing was conducted between 13th – 20th April 2010.

C. Profile of Sample

(Base: All Irish adults 16+ - 850)

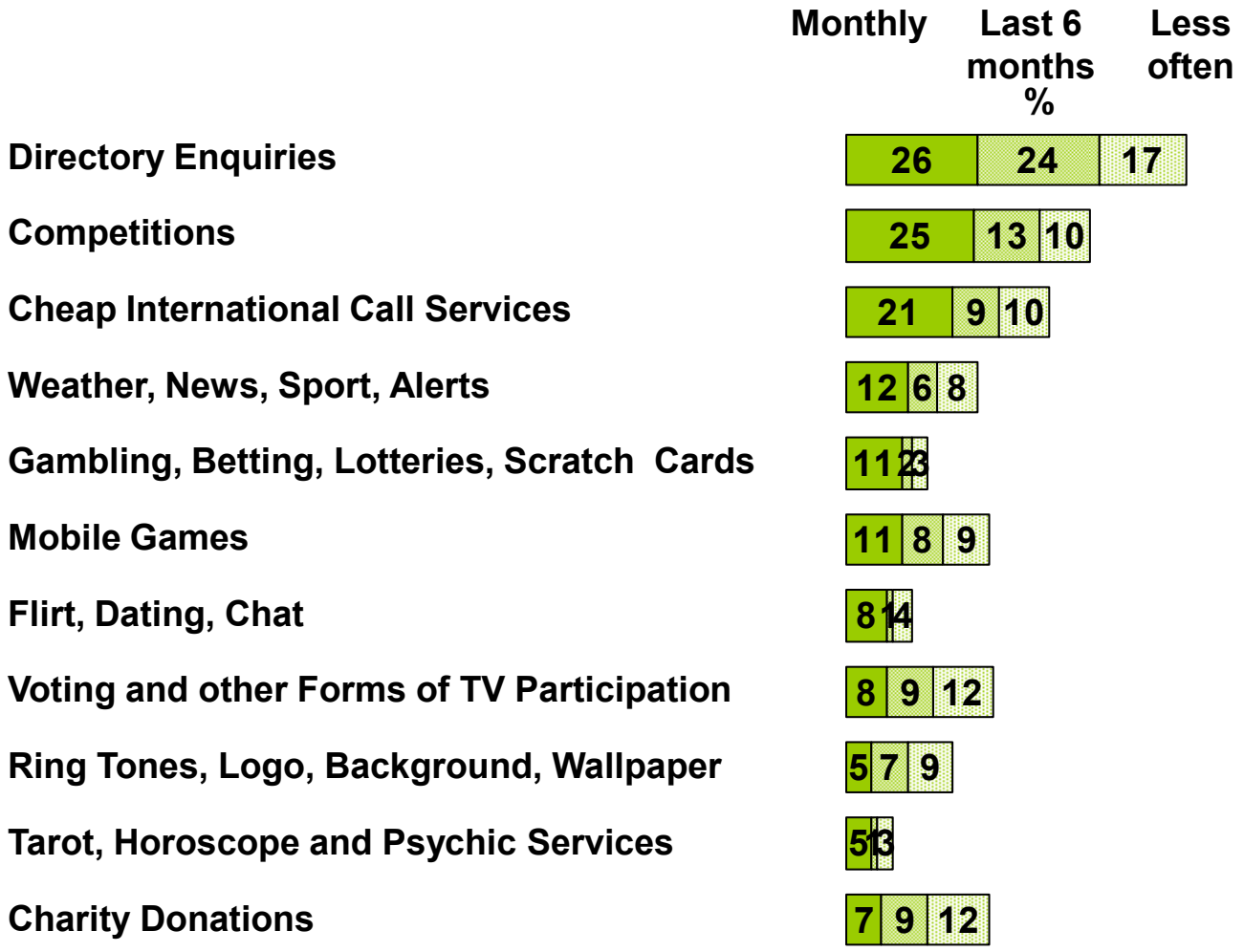


Quotas were set to achieve a nationally representative sample, so as to ensure all data is reflective of the Irish population of adults aged 16+.

MAIN FINDINGS

Use of Phone Paid Services

(Base: Adults 16+ - 850)



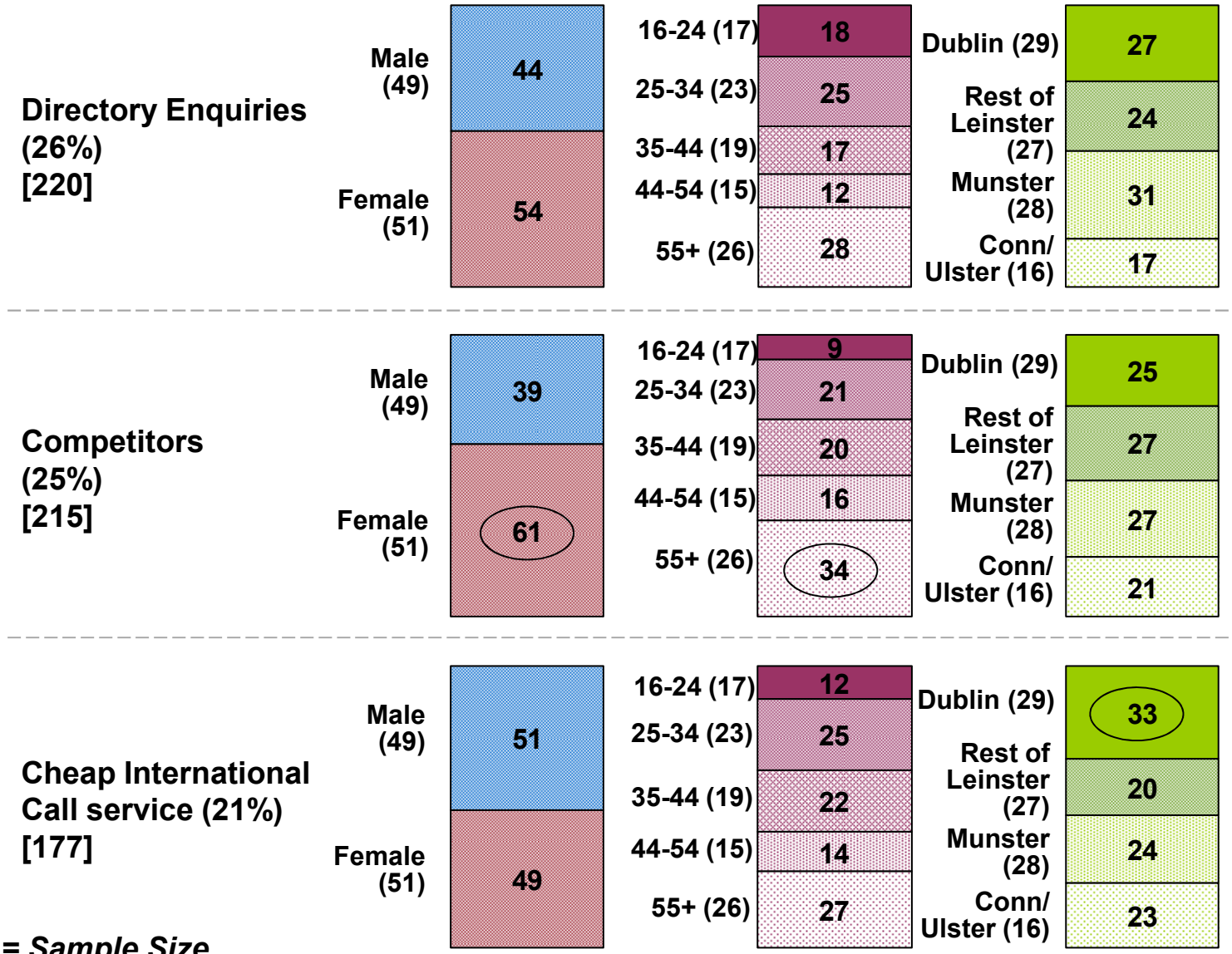
Ever
66
49
40
25
17
27
13
29
22
10
29

Directory Enquiries is the most commonly used phone paid service, competitions are also popular and cheap international services.

(Q.1)

Profile of Users

(Base: All who use service monthly)

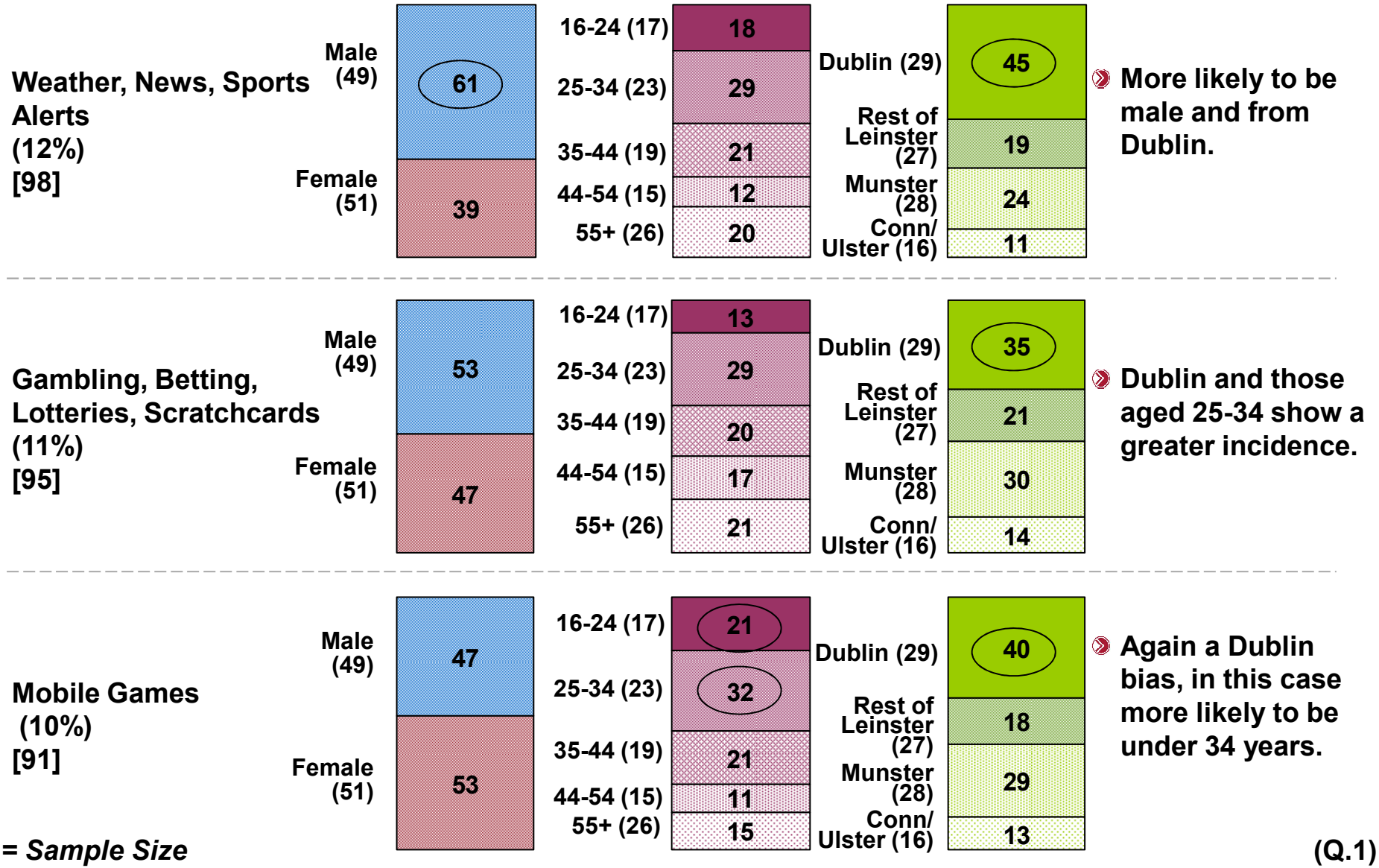


[] = Sample Size

(Q.1)

Profile of Users

(Base: All who use service monthly)



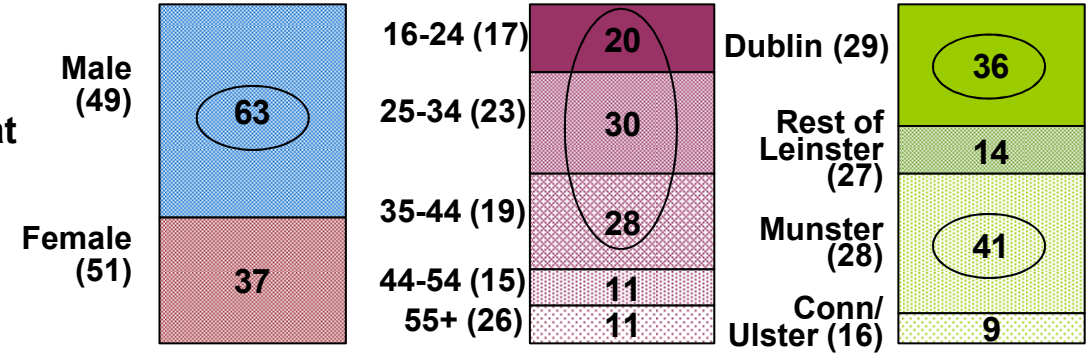
[] = Sample Size

(Q.1)

Profile of Users

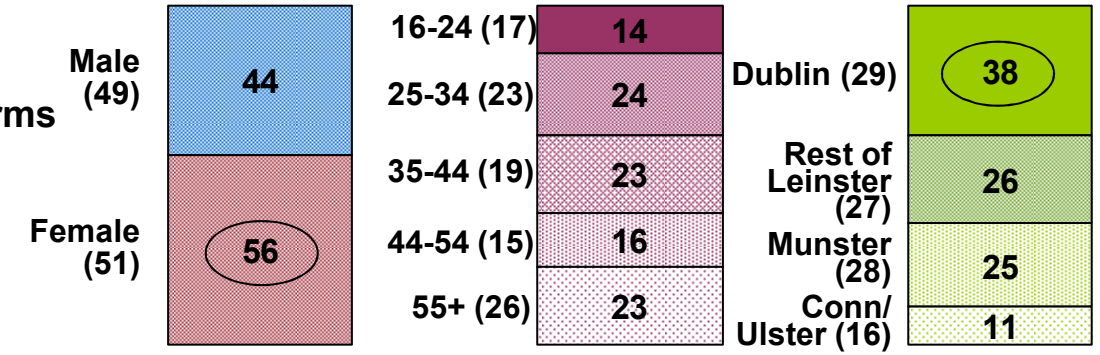
(Base: All who use service monthly)

Flirt, Dating and Chat (8%) [70]



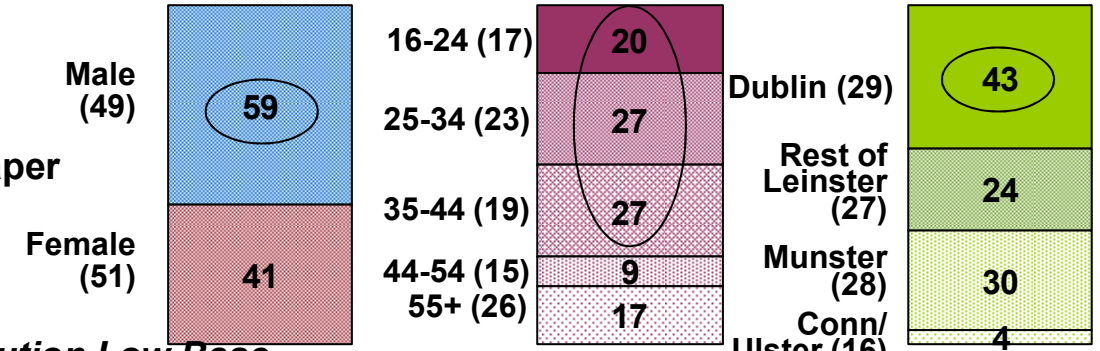
- Munster, Dublin – regional bias. More male and those under 44 years.

Voting and other forms of TV participation (8%) [70]



- More likely to be female and from Dublin.

Ringtone, logo, Background, wallpaper (6%) [46]*



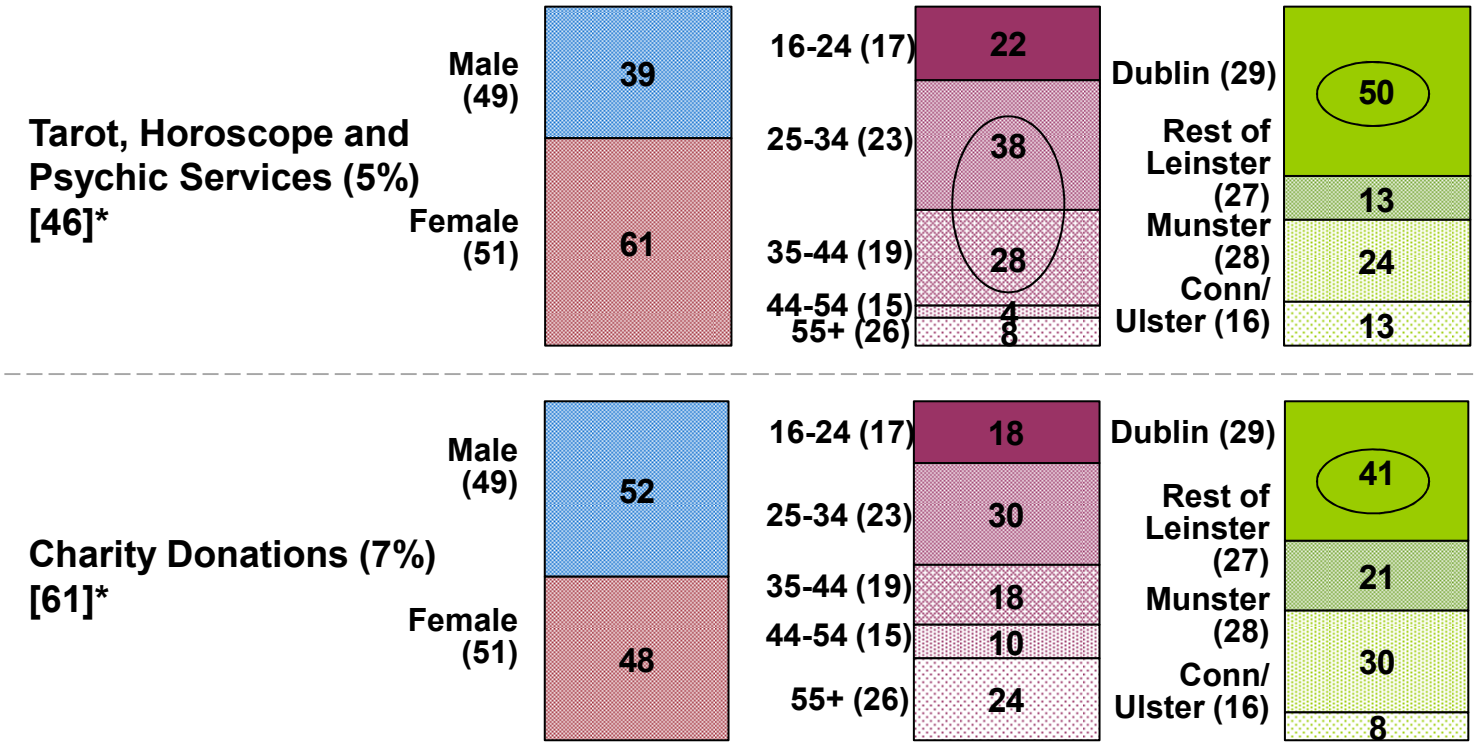
- Younger, male and Dublin bias.

*[] = Sample Size *Caution Low Base*

(Q.1)

Profile of Users

(Base: All who use service monthly)



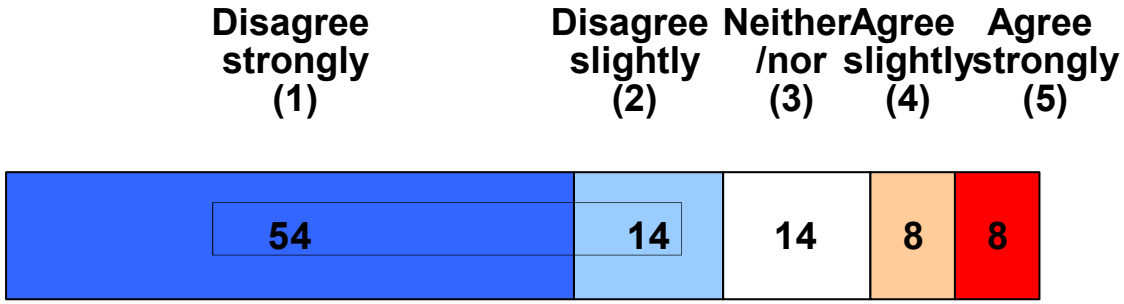
** Caution Low Base*

[] = Sample Size

(Q.1)

“I Think the Government Should Decide What Service you are Permitted to Access on your Phone”.

(Base: Adults 16+ - 850)

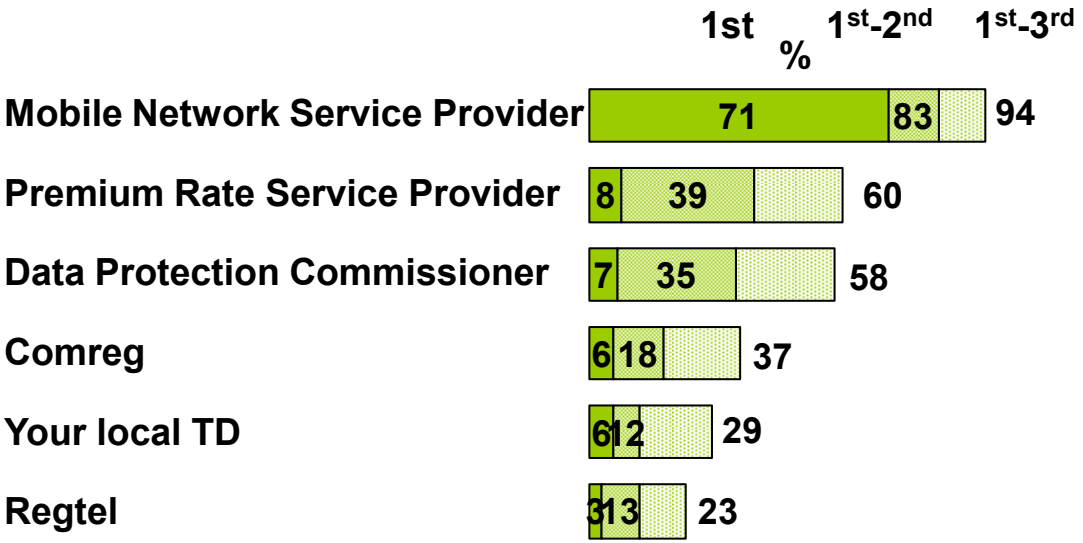


Negative feelings towards the Government being the ones to decide what services you are permitted to access on your phone.

(Q.2)

Who Contact to Complain about Phone Paid Services

(Base: All who had ever used a phone paid service – 76%)



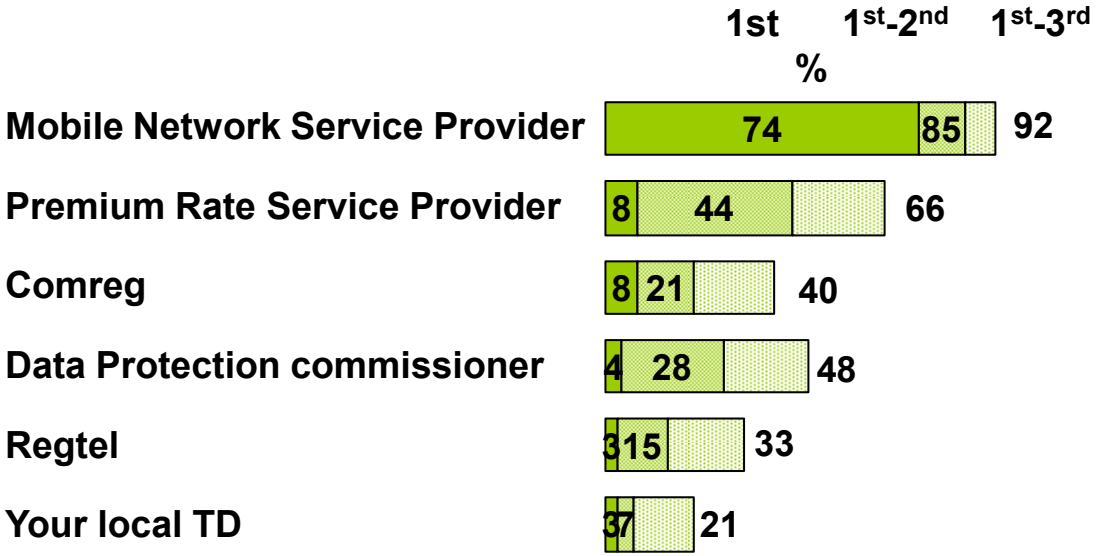
Volumetric
46
16
15
9
7
6

If users were to complain about phone paid services they are most likely to turn to their Mobile Network Service Provider.

(Q.3)

Who Contact to Complain about Cost or Charges

(Base: All who had ever used a phone paid service – 76%)



Volumetric
46
18
11
12
8
5

Similarly if there are issues in respect of cost or charges users would contact their network provider.

(Q.4)

Appendix 8

Figures compiled regarding industry revenues and impact - KPMG

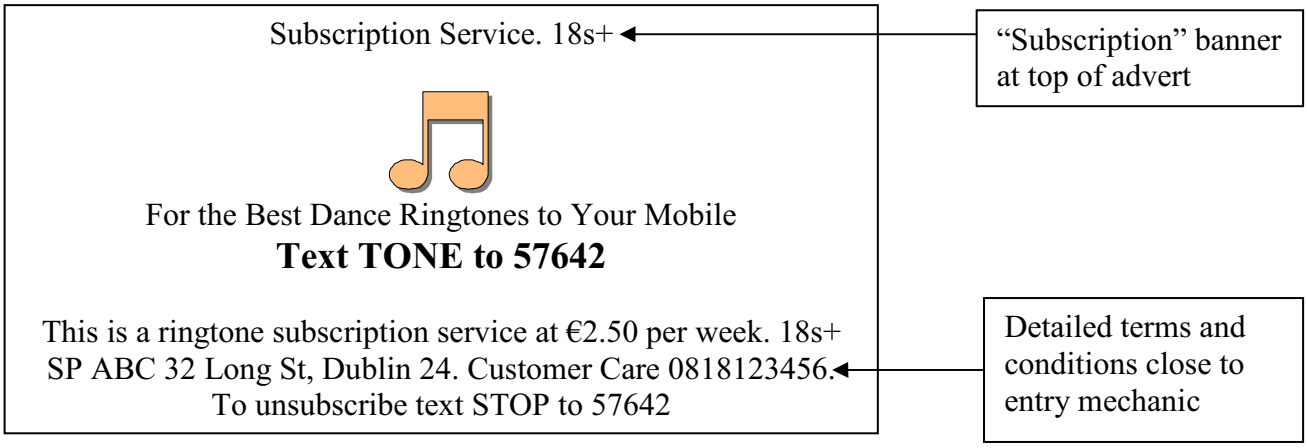
Revenues 2009	**Retail Value €**	
Retail value of Premium Rate SMS Revenues	36,212,344	
Retail value of Premium Rate SMS MO Revenues	431,758	
Retail value of Premium Rate SMS MT Subscription Revenues	34,999,468	
Retail value of PRSMS Subscription entertainment-type Services (Ringtones, Competitions, Games, Chat/Dating, etc.)	28,891,371	*
Retail value of PRSMS Subscription Information-type services (Goal Alerts, Weather Alerts, etc)	0	*
Impact of suggested measures	**%**	
% of PRSMS revenue you would anticipate loosing if forced to use MO as an alternative to subscription	88%	*
% of PRSMS revenue you would anticipate loosing if forced to use MO as an alternative to MT	88%	*
% of PRSMS revenue you would anticipate loosing if forced to use double opt-in	60%	*
* Incomplete submission		

Compiled by KPMG

Appendix 9

Current Regtel Subscription COP requirements

Requirements of RegTel's Code of Practice for Operation of Subscription Services



Users text TONE to 57642 and receive a free information message ;

You have subscribed to a ringtone subscription at 2.50euro per week. 18s+. SP ABC 0818123456 To unsubscribe text STOP to 57642

Users can send stop to unsubscribe at any time and will receive a free confirmation message ;

Thank you. You have been unsubscribed from the service.

Every time €20 is incurred by the user through content this free information message is sent;

You are subscribed to a ringtone subscription at 2.50euro per week. 18s+. SP ABC 0818123456 To unsubscribe text STOP to 57642

Appendix 10

Article 29 Working Party guidelines on the protection of children's personal data

ARTICLE 29 DATA PROTECTION WORKING PARTY

398/09/EN
WP 160

Opinion 2/2009 on the protection of children's personal data (General Guidelines and the special case of schools)

Adopted on 11 February 2009

Protection of children's personal data

(General guidelines and the special case of schools)

I – Introduction

1) – Framing

This opinion is concerned with the protection of information about children. It is aimed primarily at those who handle children's personal data. In the context of schools, this will include teachers and school authorities in particular. It is also aimed at national data protection supervisory authorities, who are responsible for monitoring the processing of such data.

This document should be seen in the context of the general initiative of the European Commission described in its communication "Towards an EU strategy on the Rights of the Child". In contributing to this general purpose, it aims to strengthen the fundamental right of children to personal data protection.

This subject is not entirely new to the Art 29 Working Party, which has already adopted several opinions related to this issue. Its opinions on the FEDMA code of conduct (Opinion 3/2003), on geolocalization (Opinion 5/2005) and on Visa and Biometrics (Opinion 3/2007) include certain principles or recommendations concerning children's data protection.

The aim of this document is to consolidate this issue in a structured way, defining the applicable fundamental principles (Part II) and illustrating them by reference to school data (Part III).

The area of school data was chosen because it is one of the more important sectors of children's life, and comprises a significant part of their daily activities.

The importance of this area is due also to the sensitive nature of much of the data processed in educational institutions.

2) - Purpose and scope

The purpose of this document is to analyse the general principles relevant to the protection of children's data, and to explain their relevance in a specific critical area, namely, that of school data.

In doing this, it aims to identify issues important to the protection of children's data in general, and offer guidance for those working in this field.

According to the criteria in most relevant international instruments, a child is someone under the age of 18, unless he or she has acquired legal adulthood before that age.[1]

A child is a human being in the complete sense of the word. For this reason, a child must enjoy all the rights of a person, including the right to the protection of their personal data. However, the child is in a special situation, which should be seen from two perspectives: the static, and the dynamic.

From the static point of view, the child is a person who has not yet achieved physical and psychological maturity. From the dynamic point of view, the child is in the process of developing physically and mentally to become an adult. The rights of the child, and the exercise of those rights – including that of data protection - , should be expressed in a way which recognises both of these perspectives.

This opinion is based on the conviction that education and responsibility are crucial tools in the protection of children's data. It will examine the main principles relevant to this subject. Most of them relate to the rights of the child, but they will be examined in the context of data protection.

These principles are all contained in the most fundamental applicable international instruments. Some of these instruments relate to general human rights, but also contain specific rules for children. The most important are the following:

- Universal declaration of human rights, 10/12/48 - Arts. 25, 26, N. 3
- European convention for protection of human rights and fundamental freedoms, 04/11/50 - Art. 8
- EU charter of fundamental rights, 07/12/00 - Art. 24[2]

Other instruments which relate directly to the rights of the child are the following:

- Geneva declaration on the rights of the child, 1923
- UN convention on the rights of the child, 20/11/89
- European convention on the exercise of children's rights, Council of Europe, n.º160, 25/01/96[3]
- Eur. Parl. Resolution “Towards an EU strategy on the Rights of the Child”, 16/01/08

[1] - **Namely art. 1 of the UN Convention on the rights of the child, 20/11/89**

[2] - And also:
- Helsinki Declaration, June 1964, Pr. I-11,
- International Covenant on economic, social and cultural rights, 16/12/66 – Art. 10, n. 3,
- International Covenant on civil and political rights, 16/12/66 – Arts. 16, 24,
- Optional protocol of 16/12/66.

[3] - And also:
- UN declaration on the rights of the child, 20/11/59.
- Recommendations of the parliamentary Assembly of the Council of Europe on various aspects of the protection of children (n. 1071, 1074, 1121, 1286, 1551).
- Recommendations of the Committee of Ministers of the Council of Europe on the participation of the children in family life R (98)8, and on the protection of medical data, R (97), 5.
- Convention on personal relations concerning children, Council of Europe, n.192, 15/05/03.

Naturally, the general perspective of personal data protection must always be considered, as enshrined in the data protection directives (Directive 95/46/EC, 24/10/95 and Directive 2002/58/EC, 12/07/02), and partially in other instruments.[4]

II – Fundamental principles

A – In general

1) – Best interest of the child

The core legal principle is that of the best interest of the child.[5]

The rationale of this principle is that a person who has not yet achieved physical and psychological maturity needs more protection than others. Its purpose is to improve conditions for the child, and aims to strengthen the child's right to the development of his or her personality. This principle must be respected by all entities, public or private, which make decisions relating to children. It also applies to parents and other legal representatives of children, either when their respective interests are in conflict, or where the child is being represented. Normally, the child's representatives should apply this principle, but where there is a conflict between the interests of children and their legal representatives, the courts or, where appropriate, the DPAs (Data Protection Authorities) should decide.

2) – Protection and care necessary for the wellbeing of children

The principle of best interest requires a proper appreciation of the position of the child. This involves recognising two things. First, a child's immaturity makes them vulnerable, and this must be compensated by adequate protection and care. Second, the child's right to development can only be properly enjoyed with the assistance or protection of other entities and/or people.[6]

This protection falls to the family, society and the state.

It must be recognised that in order to achieve an appropriate level of care for children, their personal data will sometimes need to be processed extensively and by several parties. This will be mainly in welfare areas: education, social security, health, etc. But this is not incompatible with the adequate and reinforced protection of data in such social sectors, although care should be exercised when data about children is being

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[4] - OECD Guidelines, 23/09/80,
- Convention 108 of the Council of Europe, 28/01/81 and Additional Protocol of 08/11/01,
- UN Guidelines, 14/12/90.

[5] Enshrined in the UN convention on the rights of the child (Article 3), and, afterwards, reaffirmed by Convention 192 of the Council of Europe (Article 6) and the EU charter of fundamental rights (Article 24, N. 2).

[6] The right to protection is so fundamental that it is stated in the universal declaration of human rights (Article 25), and was confirmed by the international covenant on civil and political rights (Article 24) the international covenant on economic, social and cultural rights (Article 10, N. 3), and, more recently, by the EU charter of fundamental rights (Article 24).

shared. Such sharing can obscure the principle of finality (purpose limitation), and create a risk that profiles are constructed without reference to the principle of proportionality.

3) – Right to privacy

As a human being, the child has a right to privacy.

Art. 16 of the UN Convention on the Rights of the Child provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.[7]

It must be respected by everybody, even by the legal representatives of the child.

4) – Representation

Children require legal representation to exercise most of their rights. However, this does not mean that the legal representative's status has any absolute or unconditional priority over the child's - because the child's best interest can sometimes confer upon them rights relating to data protection which may override the wishes of parents or other legal representatives. Nor does the need for legal representation imply that children should not, from a certain age, be consulted on matters relating to them.

If the processing of a child's data began with the consent of their legal representative, the child concerned may, on attaining majority, revoke the consent. But if he wishes the processing to continue, it seems that the data subject need give explicit consent wherever this is required.

For example, if a legal representative has given explicit consent to the inclusion of his child (the data subject) in a clinical trial, then upon attaining capacity, the controller must make sure he still has a valid basis to process the personal data of the data subject. He must in particular consider obtaining the explicit consent of the data subject himself in order for the trial to continue, because sensitive data are involved.

On this issue, it must be remembered that the rights to data protection belong to the child, and not to their legal representatives, who simply exercise them.

5) – Competing interests: privacy and the best interest of the child

The principle of the best interest can have a double role. ***Prima facie,*** the principle requires that children's privacy be protected in the best possible way, by giving effect as far as possible to an infant subject's data protection rights. However, situations may arise where the best interest of the child and his/her right to privacy appear to compete. In such cases, data protection rights may have to yield to the principle of best interest.

[7] This right is a confirmation of the general right to privacy, enshrined in Art. 12 of the Universal Declaration, Art. 17 of the International Covenant on civil and political rights and Art. 8 of the European Convention for the Protection of Human Rights.

This is particularly the case with medical data, where, for example, a youth welfare service may require relevant information in cases of child neglect or abuse. Similarly, a teacher may disclose a child's personal data to a social worker in order to protect the child, either physically or psychologically.

In extreme cases, the principle of the best interest of the child can also come into conflict with the requirement for the consent of their legal representatives. The best interest must also here be preferred – for instance if the mental or physical integrity of the child is at stake.

6) – Adapting to the degree of maturity of the child

Since the child is a person who is still developing, the exercise of their rights – including those relating to data protection – must adapt to their level of physical and psychological development. Not only are children in the process of developing, but they have a right to this development.[8] The way in which this process is managed in the legal system varies from state to state, but in any society children should be treated in accordance with their level of maturity.[9]

Where consent is concerned, the solution can progress from mere consultation of the child, to a parallel consent of the child and the legal representative, and even to the sole consent of the child if he or she is already mature.

7) – Right to participate

Children gradually become capable of contributing to decisions made about them. As they grow, they should participate more regularly about the exercise of their rights, including those relating to data protection.[10]

The first level of this right is the right to be consulted.

This duty of consultation consists of taking into account – though not necessarily submitting to – the child's own opinions.[11]

But when children attain adequate capacity, their participation can increase, even resulting in a joint or autonomous decision.

The right to participate can apply to various different matters, such as geolocation, use of children's images or others.

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8 UN Convention on the Rights of the Child – Arts. **7,** 27, 29.

9 Some legal systems implement this general principle distinguishing the periods before 12, between 12 and 16 and from 16 to 18.

10 UN convention on the rights of the child (Article 12), EU charter of fundamental rights (Article 24, N.1), Convention on personal relations concerning children (Article 6).

11 Such a ***criterion*** is clearly stated in the Recommendation of the Committee Ministers of the Council of Europe about the protection of medical data - Rec. nº R (97) 5, of 13 February 1997, nr. 5.5 and 6.3.

B – Under the perspective of data protection

1) – Scope of the existing legal framework on data protection

The relevant Directives on data protection, i.e. 95/46/EC and 2002/58/EC, do not explicitly mention the privacy rights of minors. These legal instruments apply to all natural persons, but there are no specific provisions relating to issues particular to children. However, this does not mean that children do not have any right to privacy and that they fall outside the scope of the said Directives. According to the wording of the Directives themselves, they shall apply to any "natural person", and therefore include children.

Given the Directive's limited personal and material scope, a number of questions as to the protection of children's privacy within the framework of the Directive remains. This is because most of the provisions do not take direct account of the particularities of children's lives. Problems arise with regard to the degree of individual maturity of a child as well as the requirement for representation in legal acts.

The data protection needs of children must take into account two important aspects. These are, firstly, the varying levels of maturity which determine when children can start dealing with their own data and, secondly, the extent to which representatives have the right to represent minors in cases where the disclosure of personal data would prejudice the best interests of the child. The following will deal with the question of how the existing rules of the Directive could best be applied to ensure that children's privacy is adequately and effectively protected.

2) – Principles of Directive 95/46/EC

a) Data Quality

The general principles on data quality provided for in Directive 95/46/EC must naturally be adequately adapted when applied to children.
This means:

a.1) Fairness

The duty to process personal data in accordance with the principle of fairness (Art. 6a) must be interpreted strictly when it concerns a child. As a child is not yet completely mature, controllers must be aware of this, and act with the utmost good faith when processing their data.

a.2) Proportionality and relevance of data

The principle set out in the Art. 6c) of Directive 95/46/EC provides that only adequate, relevant and non-excessive data can be collected and processed.

When applying the principles of Art. 6c), controllers should pay special attention to the situation of the child, as they must respect their best interests at all times.

According to Art. 6d) of the Directive 95/46/EC, "***data must be accurate and, where necessary, kept up to date. Every reasonable step must be taken to ensure that data that are inaccurate or incomplete, having regard to the purpose for which they were collected or for which they are further processed, are erased or rectified"***.

In view of children's constant development, data controllers will need to pay particular attention to the duty to keep personal data up-to-date.

a.3) Data retention

In this regard, one must keep in mind the "***droit à l'oubli***" which covers any data subject including, ***especially***, children. Art. 6e) of the Directive must be applied accordingly.

Because children are developing, the data relating to them change, and can quickly become outdated and irrelevant to the original purpose of collection. Data should not be kept after this happens.

b) Legitimacy

Directive 95/46/EC sets out fundamental principles in data protection which the Member States have to abide by and implement. With regard to the privacy rights of children, Art. 7 and 8 are of major importance as they state the criteria for making data processing legitimate.

First of all, processing can be allowed if the person concerned has given his unambiguous consent. The meaning of the word "consent" is clarified in Art. 2 (h) of the Directive.

In other words, it must be informed and free. However, consent is not mandatory in all cases. Indeed, processing can also be also legitimate if other legal requirements are fulfilled according to Art. 7 (b-f), for example, processing can also be allowed when a contract is signed.

In cases where legal representatives breach the privacy of their children by selling or publishing their data, the question arises as to how the right to privacy can be protected if the children themselves are not aware of the infringements. Children need a legal guardian, but in a case such as this, cannot exercise their rights. If the children are mature enough to detect a breach of their right to privacy, they should have the right to be heard by competent authorities, including the data protection authorities.

As to the other conditions in Art. 7 of the Directive that render the processing of data legitimate, the principles of the best interest of the child and of representation, have to be respected, as well. At a certain age, for example, children are able, by law, to enter into contractual obligations, e.g. in the field of employment. But those contracts can only – if required by law – be valid if consent has been given by the legal representatives. Prior to the conclusion of a contract, or during its performance, the other party may want to collect data on the child as an employee.

Legal representatives facilitate the data processing by giving their consent. Parents or guardians should make decisions on the basis of the best interest of the child. They should take into consideration the ways in which the disclosure of data could pose a threat to their child's privacy and vital interests, for example, by not disclosing medical data. There are other areas in which even children are allowed to decide independently from their legal representatives.

Regarding the condition in Article 7 e), it has to be pointed out that the principle of the best interest of the child may be classified as a public interest as well. This might be the case when the youth welfare service needs personal data of the child in order to take care of him/her. The provisions of the Directive may therefore be applied directly to these circumstances.

However, the question arises whether children who can in certain cases conclude legal acts without the consent of their legal representatives (in instances where they enjoy partial rights), can also give valid consent to the processing of their own data.

According to applicable local regulations, this might occur in cases of marriage, employment, religious matters etc. In other cases the child's consent might be valid on condition that the legal representative does not object. It is also clear that children's level of physical and psychological maturity must be taken into account and that from a certain age they are able to judge matters related to them. This might be important in instances where the legal representative does not agree with the child but the child is mature enough to decide in his or her own interest, for example, in a medical or sexual context. Instances where the best interest of the child limits or even prevails over the principle of representation should not be neglected, and need further consideration.

The widest legitimacy ground refers to the legitimate interests of the controller or of a third party (Art 7 f), except where they are overridden by the interests or fundamental rights and freedoms of the data subject. On making this balance, special care must be taken in relation to the status of children as data subjects, using their best interest as a guide.

c) Data security

According to Art.17 of the Directive 95/46/EC "***Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration unauthorized disclosure or access***" and specifies that:

"***Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.***"

Special care and attention should be exercised in relation to children's data. Security measures should be adapted to the children's conditions. It should be noted that children may be less aware than adults of the risks that can affect them.

d) Rights of data subjects

d.1) Right to be informed

It should be pointed out that the consent requirement under the Directive goes hand in hand with the obligation to adequately inform data subjects (Art. 10, 11, 14).

The Working Party has already had the opportunity to address information requirements in several documents; in particular, the Opinion on more harmonised information provision (WP 100) and the Recommendation on certain minimum requirements for collecting personal data online in the EU (WP 43) should be taken into account as they provide clear guidance.

In the context of providing information to children or their legal representatives, special emphasis should be put on giving layered notices based on the use of simple, concise and educational language that can be easily understood. A shorter notice should contain the basic information to be provided when collecting personal data either directly from the data subject or from a third party (Article 10 and 11). This should be accompanied by a more detailed notice, perhaps via a hyperlink, where all the relevant details are provided.

The information must (always) be given to the legal representatives, and, after attaining adequate capacity, also to the child.

Special requirements are applicable to information posted online.

As the Working Party has noted in its recommendation about online data processing, it is fundamental for the notices to be posted at the right place and time – i.e. they should be shown directly on the screen, prior to collecting the information. As well as being a requirement under the Directive, this is especially important as a tool to raise children's awareness of the possible risks and dangers arising out of online activities. Indeed, it might be argued that in the online environment, unlike in the real world, this is the only opportunity for children to be apprised of such dangers.

d.2) Right of access

The right of access is normally exercised by the legal representative of the child, but always in the interest of the child. Depending on the degree of maturity of the child, it can be exercised in his/her place or together with him/her. In some cases the child may also be entitled to exercise his/her rights alone.

When very personal rights are concerned (as for instance in the health field), children could even ask their doctors not to divulge their medical data to their legal representatives.

This might be the case if a teenager has given sexual data to a physician or a help line explicitly excluding the legal representatives from such information.

It might also be the case if the child does not trust his or her legal representatives and contacts the youth welfare service, for example, when consuming drugs, or feeling suicidal.

The question arises whether legal representatives may have access to such details, and whether the child may object. To assess whether the children's right to privacy prevails over the legal representatives' right to access, the interests of all parties involved have to be carefully balanced. In this balancing exercise, the best interest of the child is of special importance.

In the case of access to medical data, the appreciation of the practitioner might be relevant to assess the opportunity of access by the legal representatives.

National practice gives useful illustrations as well: in the United Kingdom, for example, teenagers above 12 are entitled to exercise their right of access alone.

In several countries, the right of access of legal representatives to the data of their teenager daughters is limited in cases of abortion.

As a general comment, the criteria for the conditions of access will be not only the age of the child, but also whether or not the data concerned were provided by the parents or by the child – which is also an indication of his/her degree of maturity and autonomy.

d.3) Right of rectification, erasure or blocking

The right of access has a value and meaning in itself.

But it can also be a way to allow the exercise of the right of rectification, erasure or blocking – concerning data that are not correct and/or updated.

About the performing of these rights may be considered similar perspectives as described above, in respect of the right of access.

d.4) Right to object

Art. 14 a) states that the data subject has the right to object the processing – at least in cases referred to in Art 7 e) and f) – on compelling legitimate grounds. These grounds can be particularly compelling when they concern children. It should also be recalled that data subjects are entitled in any case to object to the processing of their data for direct marketing purposes (Art. 14 b)).

e) Notification

Finally, it is necessary to refer to the duty to notify the processing where the law so prescribes.

III – At school

In this following section, the opinion will illustrate how the fundamental principles recalled above can be specified with regard to the school context. Indeed, the life of a child develops as much at school as within the family, so it is natural that several data protection questions arise in connection with the school life of children. These are questions of a varied nature, and raise correspondingly different problems.

1) – Student files

a) Information

Data protection questions relating to children (and also, sometimes, their families) can arise in connection with student files as early as at their enrolment at school. Indeed, there are countries where legislation permits school authorities to require forms, containing personal data, to be completed for the purpose of creating student files, computerised or others.

On forms such as these the data subjects should be informed that their personal data will be collected, processed, and for what purpose, who are the controllers, and how the rights of access and correction can be exercised. They must also be informed, when applicable, as to whom these data may be disclosed.

b) Purpose limitation and proportionality

Personal data must only be included in student files where necessary for the legitimate purposes pursued by the schools and should not be used in a way incompatible with these purposes (Article 6, b of the Directive)

The data required must not be excessive: e.g. data about academic degrees of parents, their profession or labour situation are not always necessary. Data controllers must consider whether they are really needed.

c) Non – discrimination

Some of the data contained in these forms can possibly cause discrimination, for example, data relating to race, immigrant status, or suffering from certain disabilities.

This information is usually collected to make sure that the school is aware of, and devotes the necessary attention to, pupils with cultural (for example, linguistic) or economic difficulties.

The principles of best interest and strict purpose limitation should be the criteria in the processing of such information.

A very strict perspective must namely be applied in what concerns the registration of the religion of pupils; this can only be accepted when the nature (religious school) and administrative purposes justify it, and only to the extent strictly necessary. No superfluous deduction on the religion of the pupil should be drawn where data are only

needed for administrative purposes (e.g. following a course on religion, indicating meal preference).

Information on the wealth and income of a child's family can also be a source of discrimination, but may be processed in the child's own interest, for instance, if the representatives ask for grants or reductions in school fees.

All data that might lead to discrimination must be protected by proper security measures, such as processing in separate files, by qualified and designated people, subject to professional secrecy, and other appropriate measures.

The consent to the processing of all data that can cause discrimination must be clear and unambiguous.

d) Principle of finality

d.1) Communication of data

There are cases where school authorities provide the names and addresses of their pupils to third parties, very often for marketing objectives.

This happens, for instance, when data are sent to banks or insurance companies which want to attract the pupils as their clients, or when student data are communicated to the local elected representatives. This constitutes a breach of the finality principle, as data intended for school aims are being used for incompatible purposes.

In accordance with Art. 6. 1) b) of Directive 95/46/EC, children's data cannot be used for purposes incompatible with the one that justified their collection.

The issue here is not the problem of children being the addressees of marketing; this is a consumer protection problem. What is at stake is the prior collection of personal data, in order to send the data subjects marketing messages later. Such processing should always be subject to the prior consent of the representatives (and of the children, depending of their maturity).

In any case in which a marketing operation was considered as being legitimate and compatible, such processing should always be done in the least intrusive way.

In addition to the conditions mentioned above, if data of parents and/or pupils are requested by a third party for marketing purposes, their transmission should always be subject to the prior information and consent of the legal representatives (and of the children, depending of their maturity).

d.2) Access to data

The data contained in the student file must be subject to rigorous confidentiality, in accordance with the general principle of Directive 95/46/EC, Art 16.

The processing of data of a special nature must be subject to particular security requirements.

The following are examples of such kinds of data:

- Disciplinary proceedings
- Recording of violence cases
- Medical treatment in school
- School orientation
- Special education of disabled people
- Social aid to poor pupils

Access to data should be given to the legal representatives of the pupils (and to the pupils themselves, if they are already mature). Such an access must be strictly regulated, and limited to school authorities, school inspectors, health personnel, social workers and law enforcement bodies.

d.3) School results

Different countries have different traditions with regard to the publication of school results.

There are countries with long established traditions of publishing results.

The purpose of this system is to allow comparison of results and facilitate possible complaints or recourse. Schools shall, in those countries, strictly follow the rules set by national law and publish only the minimum of personal data necessary for that purpose.

In the countries where school results are subject to the rule of confidentially, these can be disclosed to the legal representatives and to the pupils, exercising their right of access.

Their publishing is subject to the consent of those representatives (or also of the pupils, according to their capacity).

A special problem concerns the publication of school results on the internet, which is a convenient way of communicating them to the interested persons. The risks inherent in this mode of communication demand that access to the data should only be possible with special safeguards. This might be achieved by using a secure website, or personal passwords assigned to the legal representatives or, when they are already mature, to the children.

The modalities of the right of access will be different, depending on the degree of maturity of the child. It is likely that in primary school, access will be exercised mostly by legal representatives, while in secondary school students will also be able to access the data by themselves.

d.4) Retention and elimination

The general principle whereby no data should be kept for longer than is necessary for the purpose for which it has been collected is applicable to this context as well. Therefore, careful consideration should be given as to which data from school files should be kept, either for educational or professional reasons, and which should be erased, for example, those concerning disciplinary procedures and sanctions.

2) – School life

Data protection questions emerge in some areas of daily school life.

There are means of control of the school population, especially pupils, which can be particularly intrusive.

This is particularly the case with the collection of biometric, CCTV and RFID data.

The adoption of such means of control should always be preceded by a thorough discussion between teachers and parents (or other pupils' representatives) taking into account the stated aims and the adequacy of the means proposed.

a) Biometric data – access to the school and canteen

Over the years, there has been an increase in access control in schools. This access control may involve collecting, at entry, biometric data such as fingerprints, iris, or hand contours. In certain situations such means may be disproportionate to the goal, producing an effect which is too intrusive.

In any case, the proportionality principle should be applied to the use of these biometric means as well.

It is strongly recommended that legal representatives have available to them a simple means of objecting to the use of their children's biometric data. If their right to object is exercised, their children should be given a card or other means to access the school premises concerned.

b) Closed Circuit Television (CCTV)

There is an increasing tendency to use CCTV in schools for security reasons. There is no recommended solution valid for all aspects of school life and for all parts of schools.

The capacity of CCTV to affect personal freedoms means that its installation in schools requires special care. This means that it should only be installed when necessary, and if other less intrusive means of achieving the same purpose are not available.

There are places where safety is of paramount importance, so CCTV can be more easily justified, for example, at entrances and exits to schools, as well as to other places where people circulate - not just the school population, but also people visiting the school premises for whatever reason.

The choice of location of CCTV cameras should always be relevant, adequate and non-excessive in relation to the purpose of the processing. For instance, in some countries, the use of CCTV cameras outside of the school hours was considered as adequate regarding data protection principles.

On the other hand, in most other parts of the school, the pupils' right to privacy (as well as that of teachers and other school workers), and the essential freedom of teaching, weigh against the need for permanent CCTV surveillance.

This is so particularly in classrooms, where video surveillance can interfere not only with students' freedom of learning and of speech, but also with the freedom of teaching. The same applies to leisure areas, gymnasiums and dressing rooms, where surveillance can interfere with rights to privacy.

These remarks are also based on the right to the development of the personality, which all children have. Indeed, their developing conception of their own freedom can become compromised if they assume from an early age that it is normal to be monitored by CCTV. This is all the more true if webcams or similar devices are used for distance monitoring of children during school time.

In any case where CCTV is justified, the children, the rest of the school population, and legal representatives must all be informed of the existence of surveillance, its controller, and its aims. The information intended for children should be appropriate to their level of understanding.

It must be furthermore considered, that the interests to be taken in account are not only those of the pupils, but also those of teachers and other school-workers. In some countries there are even legal rules applying to the adoption of CCTV to control workers.(1)

The justification and the relevance of the CCTV system should be reviewed regularly by the school authorities to decide whether or not it should be maintained. The legal representatives of the children should be informed accordingly.

(1) See also WP 89 (Opinion 4/2004 of 11 February 2004).

c) Health conditions

Data about pupils' health conditions are sensitive data. For this reason, their processing must strictly adhere to the principles of Article 8 of the Directive. Such data should only be processed by doctors, or those who directly "take care" of the pupils, such as teachers and other school personnel bound by professional secrecy ethics.

The processing of data of this kind depends either on the consent of the legal representatives of the children or on vital interests connected with school or educational life.

d) School websites

A growing number of schools create websites targeted at students/pupils and their families, and those websites become the main tool for external communications. Schools should be aware that disseminating personal information warrants more stringent observance of fundamental data protection principles, in particular data minimisation and proportionality; additionally, it is recommended that restricted access mechanisms are implemented with a view to safeguarding the personal information in question (e.g. login via user ID and password).

e) Children's photos

Schools are often tempted to publish (in the press or on the internet) photos of their pupils. Special attention should be drawn to the publishing by schools of photos of their pupils on the internet. An evaluation should always be made of the kind of photo, the relevance of posting it, and its intended purpose. Children and their legal representatives should be made aware of the publication.

If the school intends to post individual photographs of identified children, prior consent from parents or other legal representatives (or from the child, if already mature) should be obtained.

In the case of collective photos, namely of schools events, and always in accordance with national legislation, schools might not require prior consent from the parents where the photographs do not permit easy identification of pupils. Nevertheless, in such cases schools must inform children, parents and legal representatives that the photograph is going to be taken and how it will be used.

This will give them the opportunity to refuse to be included in the photograph.

f) Pupil's cards

For the control of access and the monitoring of purchases: many schools are utilising pupils' cards not only to control access to the school, but also to monitor the purchases made by the children. It is questionable if the second purpose is completely compatible with the privacy of the child, especially after a certain age.

In any case, the two functions should be separated, as the second may raise privacy issues.

For the location of pupils[12]: Another means of control used in certain schools (whether with a card or not) is the location of pupils through RFID badges. In this case, the relevance of such a system must be justified with regards to the specific risks at stake, particularly where alternative methods for control are available.

g) Videophones in schools

Schools can play a crucial role in setting out precautions for the use of MMS, audio and video recording where personal data referring to third parties are involved, without the data subjects' being aware of it. Schools should warn their students that unrestrained circulation of video recordings, audio recordings and digital pictures can result in serious infringements of the data subjects' right to privacy and personal data protection.

3) – School statistics and other studies

In most cases, personal data are not needed to obtain statistics (nevertheless, it can happen in exceptional cases; for instance: when statistics are made on professional integration).

According to Art. 6 e) of the Directive, statistical results should not lead to any identification of data subjects, be it direct or indirect.

Studies are often conducted that use various personal data about pupils, obtained from more or less detailed questionnaires. The collection of this data should be authorised by the legal representatives (in particular if it is sensitive data), and the representatives should be informed of the purpose and the recipients of the study.

Furthermore, whenever it is possible to develop studies without identifying the children, that procedure should be followed.

IV – Conclusion

1) – Law

This opinion shows that the provisions set out in the current legal framework, in most cases, effectively ensure the protection of children's data.

A prerequisite for effective protection of children's privacy is, however, that the provisions are applied in accordance with regard for the principle of the child's best interest. The application must take into account the specific situations of minors, and those of their representatives. Directives 95/46/EC and 2002/58/EC should be interpreted and applied accordingly.

[12] See WP 115 (adopted on November 25, 2005) on the principles relating to the localization of minors.

In cases of conflicting interests, a solution can be sought by interpreting the Directives in accordance with the general principles of the UN Convention on the Rights of the Child, namely, the best interest of the child, and also by reference to the other legal instruments already mentioned.

Member States are encouraged to bring their laws into line with the above-mentioned interpretation by taking the necessary measures. Also, at Community level, recommendations or other appropriate instruments dealing with this subject would be welcomed.

As stated earlier, this opinion contains only the general principles of privacy and data protection as relevant to children's data, and their application to the important field of education. Other specific areas could warrant separate study by this Working Party in the future.

2) – Practice

This opinion sets out the general concerns and considerations when looking at data protection and privacy issues related to children. The Working Party has chosen the field of education as a first step to address this issue due to the importance of education in society. As can be seen, the approach to protect children's privacy is based on education - by families, schools, data protection authorities, children's groups and others on the importance of data protection and privacy, and the consequences of giving out personal data if not necessary.

If our societies are to strive for true culture of data protection in particular, and defence of privacy in general, one must start with children, not only as a group that needs protection, or as subjects of the rights to be protected, but also because they should be made aware of their duties to respect the personal data of others.

In order to achieve this goal, the school should play a key role.

Children and pupils should be brought up to become autonomous citizens of the Information Society. To this end, it is crucial that they learn from an early age about the importance of privacy and data protection. These concepts will enable them later to make informed decisions about which information they want to disclose, to whom and under which conditions. Data protection should be included systematically in school plans, according to the age of the pupils and the nature of the subjects taught.

It should never be the case that, for reasons of security, children are confronted with over-surveillance that would reduce their autonomy. In this context, a balance has to be found between the protection of the intimacy and privacy of children and their security.

Legislators, political leaders and educational organisations should, in their respective areas of competence, take effective measures to address these issues.

As has been stated all along in this document, education and responsibility are crucial tools in the protection of children's data. To achieve a better protection of personal data of minors it is crucial that those who are dealing directly with the education of children have comprehensive training in data protection principles beforehand.

The role of data protection authorities is four-fold: to educate and inform, especially children and authorities responsible for the well-being of young people; to influence policy makers to make the right decisions as regards children and privacy; to make controllers aware of their duties; and to use their powers against those who disregard legislation or do not adhere to codes of conduct or best practice in this area.

An effective strategy, in this context, can be the formulation of agreements between DPAs, Ministries of Education and other responsible bodies, defining clear and practical terms of mutual cooperation in this area to foster the notion that data protection is a fundamental right.

Children should be made aware, in particular, that they themselves must be the primary protectors of their personal data. According to this ***criterion***, the gradual participation of children in the protection of their personal data (from consultation to decision) should be made effective. This is an area where the effectiveness of empowerment can be demonstrated.

Done at Brussels, on 11/02/2009

For the Working Party
The Chairman
Alex TÜRK