



Response to Consultation and Further Consultation

General Authorisation

Response to Consultation Document 07/45 and Further Consultation on Amended Proposals to Attach New Conditions to the General Authorisation in relation to Electronic Communications.

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All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg 08/27” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 27 May 2008 to:

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

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1 Foreword John Doherty, ComReg Chairperson

This document is a response to Consultation Document 07/45 which was a national consultation on the proposal to attach conditions to the General Authorisation regarding electronic communications service disruption. As stated in the original Consultation Document (07/45), electronic communications services are of key importance for many consumers and any disruption to these services must be treated as a matter of great seriousness. This document addresses some of the concerns raised and addresses issues surrounding what happens when an operator chooses, or is forced, to cease to provide service.

This document underlines ComReg's belief that Authorised Persons ought to minimise the effects of disruptions and cessations to publicly available electronic communications services. The proposals in this document would help protect consumers and lead to enhanced confidence in the market.

However, in this document ComReg has decided to reflect some of the comments received on 07/45 and to amend the proposed conditions accordingly. As the proposals have changed, it is appropriate to re-consult on this matter. ComReg is now proposing to maintain the notification obligations proposed by the original consultation 07/45 but to withdraw, for now, obligations relating to Disruption Minimisation Plans. ComReg presents a number of reasons why it believes the remaining (revised) conditions are appropriate and again provides interested parties with an opportunity to comment further in relation to these.

ComReg invites responses to this consultation from operators, consumers and all those affected either directly or indirectly by the conditions of the General Authorisation. In the light of responses to this consultation, ComReg will issue a Response to Consultation and depending on the responses to consultation may amend the General Authorisation to include some or all of the proposed conditions.

Views on these proposals are sought by Tuesday the 27th of May 2008.

John Doherty
Chairperson

2 Executive Summary

This document is ComReg's response to Consultation 07/45. Consultation 07/45 put forward proposals to amend the General Authorisation to include certain conditions which would apply in the event that an operator ceased to trade or experienced significant non-transitory service disruption.

The General Authorisation contains conditions which all electronic communications operators in Ireland must adhere to if they wish to do business in this country. The current version of the General Authorisation can be viewed at

http://www.comreg.ie/publications/conditions_of_general_authorisation.583.101047.p.html

It is still ComReg's preliminary conclusion, following from the initial Consultation and responses to that Consultation, that it is appropriate to amend the terms of the General Authorisation (and specifically Condition 18) to provide for situations of service disruption to consumers. ComReg has considered responses to 07/45 and has decided to remove the originally proposed paragraph 18.3 from the list of proposed amendments to the General Authorisation. This condition required, *inter alia*, that "*The Authorised Person shall have in place an effective plan to ensure that, in the event of the Authorised Person ceasing ... to provide on a retail or wholesale basis an electronic communications network or an electronic communications service, any disruption to ... services provided to consumers is minimised*".

This change is proposed because ComReg accepts the view that the original condition was insufficiently clear as to the distinction between normal commercial business continuity planning and network resilience planning. ComReg is now of the view that the relative costs and benefits of implementing any requirements regarding a disruption minimisation plan need to be better understood.

In this Consultation and Response to Consultation document, ComReg proposes to maintain many of the original proposed conditions, although it has amended them to provide additional clarity. In particular, ComReg now proposes a definition regarding the term "Cessation of Service". This definition along with other defined terms, should render clearer the scope of the proposed provisions. ComReg also proposes quantified materiality thresholds which alleviate certain concerns, such as those relating to normal operational activities, for example, cut-off for non-payment. This document also addresses the comments of Respondents and provides ComReg's reasoning for proceeding or not with particular conditions.

Since the proposed amendments to the General Authorisation have changed, it is appropriate to re-consult.

3 Introduction

The following discussion summarises the consultation responses and replies to the issues raised. It also demonstrates the manner in which these responses informed ComReg's new proposed conditions. It should, however, be noted that responses to the consultation were, with certain important exceptions, generally supportive of the proposed conditions, with 6 of the 8 respondents broadly welcoming the initiatives in the Consultation.

ComReg received 8 responses to ComReg Document 07/45 from the following respondents:

- BT
- O2
- Alto
- Vodafone
- Meteor
- Eircom
- Imagine
- Cable and Wireless

ComReg thanks all respondents for their submissions.

In light of the responses received (including confidential responses), ComReg has amended its original proposed conditions to be attached to the General Authorisation and in view of these amendments, it is now re-consulting on the remaining conditions. ComReg is withdrawing from this Consultation process, conditions that related to the requirement to maintain Disruption Minimisation Plans.

The remainder of this document adopts the following layout:

Section 4 of the document considers question one of Document 07/45 *"Do you agree with the text of the conditions proposed for attachment to the General Authorisation? If not, please indicate which of the proposed conditions you do not agree with and why?"* It discusses the views of the respondents to all conditions that were proposed under Document 07/45, provides ComReg's conclusions of the submissions and demonstrates ComReg's rationale regarding the conditions going forward. It also sets out the amended conditions which are now proposed.

Section 5 of the document considers question two of Document 07/45 *"Do you agree that the text of the condition 14.5 proposed for attachment to the General Authorisation can be classified as a condition providing for 'Interoperability of services and interconnection of networks in conformity with the Access Regulations?"* It discusses the views of the respondents to this condition proposed under Document 07/45, provides ComReg's conclusions of the submissions and demonstrates ComReg's rationale regarding the condition going forward.

Section 6 of the document considers question three of Document 07/45 *“Do you agree that the text of conditions 18.2-18.10 proposed for attachment to the General Authorisation can be classified as conditions providing for ‘Consumer protection rules specific to the electronic communications sector including conditions in conformity with the Universal Service Regulations?’* It discusses the views of the respondents to the conditions proposed under Document 07/45, provides ComReg’s conclusions of the submissions and demonstrates ComReg’s rationale regarding the conditions going forward.

Section 7 of the document considers question four of Document 07/45 *“Do you agree that the text of the conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?”* It discusses the views of the respondents to the conditions proposed under Document 07/45, provides ComReg’s conclusions of the submissions and demonstrates ComReg’s rationale regarding the conditions going forward.

Section 8 of the document considers question five of Document 07/45 *“In your view do the conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or conditions which are applicable to undertakings by virtue of other laws?”* It discusses the views of the respondents to this question posed under Document 07/45, provides ComReg’s conclusions of the submissions and demonstrates ComReg’s rationale regarding the conditions going forward.

Section 9 of the document considers question six of Document 07/45 *“Respondents are requested to provide views on whether the proposed specifications are proportionate and justified and offer views on other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment?”* ComReg responds to the key points of the respondents to this question, provides ComReg’s conclusions of the submissions and demonstrates ComReg’s rationale regarding the conditions going forward.

Section 10 contains the procedure for submitting comments in relation to the new proposed conditions (as now amended).

Appendices:

Appendix A sets out the new conditions as now proposed under this Consultation document.

Appendix B sets out the original proposed conditions (for ease of reference).

Appendix C sets out the questions posed under this Consultation.

Appendix D sets out the legislation and legal basis of the Consultation.

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

4.1 Consultation document 07/45 asked at Question One:

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

The original text to Condition 18.2 read:

The Authorised Person must at all times use all reasonable endeavours to ensure any disruption to the publicly available electronic communications services provided to consumers is minimised and continuous provision of publicly available electronic communications services to consumers is maintained.

Respondents' Views:

- 4.1.1 One operator felt the condition was unnecessary, stating that to maintain connectivity is a standard practice in responsible businesses. This operator stated that the proposed text was overly broad in scope, unclear as to whom it applies and fails to identify any reasonable circumstances in which it could be triggered. It stated in relation to notifications generally that it may give rise to rumour, speculation and malicious behaviour. It stated the proposal surrounding notifications was ill-conceived and potentially very destabilising. It further stated that notifications to customers fall under contractual obligations and are also normal practice. It also stated that it could result in what it called the "farcical" situation where every operator notifies, or is required to notify, a possible failure or the "equally farcical situation" where it is a matter for each operator to determine whether some possible event or other is or is not notifiable. In either case, neither the market nor the consumer will benefit. In actual fact, according to this respondent, the market will have been damaged.
- 4.1.2 A second operator stated, though not expressly in relation to this specific condition, that the proposed regulatory intervention was unduly prescriptive in nature and it was not clear that it would provide incremental benefits to consumers over possible alternative options such as self-regulation or industry initiatives facilitated by ComReg. This operator asked what the term "disruption" might mean in this context.
- 4.1.3 Another operator while broadly agreeing with all conditions asked that 'reasonable endeavours' be clarified.
- 4.1.4 A fourth operator welcomed this initiative and the principle to ensure that any Authorised Person be obliged to ensure that a reasonable level of service continuity is provided to its customers. It stated the initiative would address a gap in relation to undertakings not obliged to provide a level of consumer protection that already exists in mobile telecoms licences. Specifically in relation to the wording of this condition, it stated that it agreed that Authorised Persons should use reasonable endeavours to minimise disruption to customers. However, it sought clarification of the term 'continuous provision' stating that it could not be expected, for example, that a party that fails to pay for services be expected to provide

continuous supply. As regards the likelihood of operators exiting the market, this operator stated that it could be expected.

- 4.1.5 A fifth operator stated that it supports the objective of this policy initiative and believes it is appropriate that Authorised Persons take steps to ensure as far as possible that potential service disruption to consumers is minimised. This operator asked what is meant by “publicly available electronic communications services”.

ComReg’s View:

- 4.1.6 ComReg proposes not to alter the text of this condition substantially and it is proposed therefore to maintain this condition albeit with some amendment to reflect some of the comments submitted. This amended condition has been re-numbered as condition 18.5 (see below for ease of reference after section 4.1.11, and also Appendix A).

- 4.1.7 In ComReg’s view, the condition is necessary as it is evident that connectivity has not always been maintained in the past, notably in late 2006 in the context of a particular operator. It cannot be said that the circumstances that lead to that situation or a similar situation could never be repeated and this is also the view of some other respondents. Given the important nature of electronic communications services and the cost and time incurred by consumers as a result of disruption (in particular unexpected disruption), it is prudent to provide for this in advance of any event. ComReg does not believe that the market will be damaged by the introduction of the new proposed conditions. ComReg considers that consumers will have increased confidence in the market and with newer entrants in particular so that the market in general will benefit from the conditions. ComReg further considers that the new defined terms “*Cessation of Service*” and “substantial number of consumers” will address any questions in relation to the scope of the conditions¹. In relation to the point that many businesses already manage issues to do with consumer disruption by way of their normal practice or by observance of existing laws, ComReg considers, and as was evidenced from the situation that arose with an operator in late 2006, that existing legal obligations are not sufficiently robust or specific to issues of service disruption to adequately cater for the circumstances under discussion here. In relation to it being normal practice for responsible businesses, ComReg considers that for these businesses the requirements now proposed will not pose a significant burden for them or represent broad changes to their practices. For businesses already with a strategy to deal with service disruption, this will now be underpinned by regulatory requirements. The proposed conditions highlight for businesses that do not have a strategy for service disruption that they must be in a position to meet these regulatory requirements in order to provide the Authorised Services. A degree of consistency of practice across the industry will thereby be facilitated. As regards the points made in relation to notifications, these are dealt with further below at section 4.4.4 below.

- 4.1.8 In relation to the second operator’s comments, as to the prescriptive nature of the conditions, ComReg would point out that the requirement for Authorised Persons to adopt Disruption Minimisation Plans has been withdrawn from this Consultation. More generally ComReg, as noted above,

¹ Since this term will be a defined term it will appear in the *Definitions and Interpretation* section of the General Authorisation document which is currently to be found at http://www.comreg.ie/publications/conditions_of_general_authorisation.583.101047.p.html.

does not consider that self-regulation is a preferable option over these proposals. In relation to the term “disruption” ComReg proposes to delete this term and substitute it for the term “*Cessation of Service*”. This is a beneficial amendment which shall render the remaining text clearer and more consistent.

- 4.1.9 “Reasonable endeavours” is a term commonly employed in commercial dealings and has been recognised as a particular standard in case law. It is a term extensively employed. Operators will be aware that in relation to the adoption of criteria for standards, other norms could have been proposed, such as “best endeavours”. However in this instance ComReg is satisfied to have the standard of “reasonable endeavours” employed over “best endeavours” on the grounds of proportionality.
- 4.1.10 The term “continuous provision” should be clear enough on a plain reading but readers are in any event referred to the definition of *Cessation of Service* which should assist in an understanding of these new requirements. As to whether a consumer should be provided with a service in all instances (even in cases of consumer fault), it is submitted that this can now be better assessed against the amended wording of Condition 18.5.
- 4.1.11 An operator asked what is meant by “publicly available electronic communications services”. It is submitted that the term “publicly available” should mean available to the public and is clear from a plain reading. Moreover this term is widely used in electronic communications regulatory law. However, the definition of “*Cessation of Service*” which is now proposed to be employed extends simply to both Electronic Communications Network and Electronic Communications Services (both terms being defined in the General Authorisation already) and this should be noted as an amendment from the original proposed draft conditions.

New proposed text in relation to issues raised in this section reads as follows (see also Appendix A herein):

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

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

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

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

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

thereto and shall mean 20,000 Consumers in the case of any Suspension or Restriction of any Electronic Communications Network or an Electronic Communications Service, or access thereto;

New Condition 18.5 (note new numbering) now provides (see also Appendix A herein):

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

4.2 The original text to proposed Condition 18.3 read:

The Authorised Person shall have in place an effective plan to ensure that, in the event of the Authorised Person ceasing (whether voluntarily or involuntarily) to provide on a retail or wholesale basis an electronic communications network or an electronic communications service, any disruption to the publicly available electronic communications services provided to consumers is minimised (the 'Disruption Minimisation Plan'). The Authorised Person shall take all appropriate steps to ensure its Disruption Minimisation Plan is viable and shall maintain the Disruption Minimisation Plan to reflect the ongoing portfolio of services offered by the Authorised Person and any retail providers of electronic communications services to which it supplies wholesale electronic communications networks or electronic communications services. The Authorised Person must lodge an up-to-date copy of the Disruption Minimisation Plan with the Commission.

Respondents' views:

- 4.2.1 One respondent felt that a fixed operator with significant market power (“SMP”) should in addition to the obligation set out in the proposed condition be required to publish its “Disruption Minimisation Plan” on the public website and for Other Authorised Officers to be allowed to make representations in respect of it.
- 4.2.2 One respondent felt that the condition was too broad in scope and should be narrowed to where there has been a finding of SMP.
- 4.2.3 Another respondent stated that many operators already maintain Business Continuity Plans and it did not believe there is justification for these plans to be lodged with ComReg, particularly as the plans will necessarily be highly commercially sensitive. It further stated that any assessment by ComReg of the ‘Disruption Minimisation Plans’ would serve to create a barrier to new market entry. This operator could accept an obligation that operators need to maintain a Business Continuity Plan (BCP) reflecting their services but not services of the retailers they supply. It stated elsewhere in its submission that parties seeking wholesale services will put in place clauses to ensure continuity of supply in which case no commercially minded wholesale provider would voluntarily withdraw service if that were to breach such an agreement, therefore, it states, any regulation could be unnecessary.
- 4.2.4 Another operator expressed concern, in relation to this proposed condition, and as to the guidance provisions of Annex B of ComReg Document 07/45. It acknowledged that while Annex B of Document 07/45 was for guidance purposes only and was not intended to be exhaustive, it considered that some of its elements were impractical in a commercial environment and that the proposed Disruption Minimisation Plan would require the modification or amendment of existing wholesale and retail contracts. It pointed out there are strong commercial incentives to ensure continuity of service and that it had already devoted significant resources to developing plans to deal with service disruption. It stated ComReg’s views as to the plans (as set out in Appendix B of Document 07/45) were unrealistic and disproportionate especially as regards matters such as the novation of contracts. It stated it would be unduly burdensome for all operators on the market to modify or amend exiting wholesale and retail contracts at least prior to their scheduled renewal.
- 4.2.5 A third operator stated that it had no difficulty with the principle to have a Disruption Minimisation Plan. However, it felt the proposed condition was very broadly crafted and required a materiality threshold to deal with the scope of services covered and potential eventualities.
- 4.2.6 A fourth respondent stated that it was in broad agreement with the aim but felt the proposals such as outlined in Appendix B and the contractual obligations were entirely unworkable for a non-residential wholesale company to take on large numbers of residential customers. The wholesale carrier may also incur further substantial costs on behalf of the failed operator. It stated that any continuation of service would need to be provided upon an emergency basis.

ComReg’s view:

- 4.2.7 ComReg has reflected carefully on this matter and has decided against proceeding with this condition for now. References to Disruption Minimisation Plans and possible guidance in Appendix B of Consultation 07/45 are therefore not part of this Consultation. This is because ComReg would like to explore further with industry how this requirement can be

adequately distinguished from normal commercial business continuity and how such plans can be prepared and implemented if required, without disproportionate expense.

- 4.2.8 As regards the suggestion that additional obligations should be imposed specifically on SMP operators, ComReg notes that the obligations which may be imposed on foot of SMP are described in the Access Regulations². ComReg does not consider that a General Authorisation condition could be made specific to an SMP operator.

4.3 **The Original Text to proposed Condition 18.4 read:**

The Authorised Person must implement its Disruption Minimisation Plan in appropriate circumstances.

Respondent's View:

- 4.3.1 One operator felt this condition was superfluous and should be assumed under 18.2.

ComReg's View:

- 4.3.2 ComReg, for the reasons noted above, will not in this document further consider the requirement of Disruption Minimisation Plans.

4.4 **The Original Text to proposed Condition 18.5 read:**

The Authorised Person shall notify the Commission immediately if it is of the view that there is a reasonable possibility that it may in the foreseeable future cease (whether voluntarily or involuntarily) to provide an electronic communications network or an electronic communications service to consumers or that its actions may result in a substantial number of consumers' access to publicly available electronic communications services being terminated, suspended or restricted.

Respondents' Views:

- 4.4.1 One respondent stated generally, although not in relation to this specific condition, that it considered it reasonable for ComReg to be notified in the case of withdrawal of service by a wholesale supplier due to circumstances beyond its control as it stated this is likely to occur at short notice. In relation to this condition, however, it took issue with wholesale providers notifying in circumstances involving the supply of retail services. It stated in relation to this particular condition, that specific conditions should differentiate between a voluntary decision to cease pursuant to contract and one that is in breach of contract, perhaps without warning. Finally this respondent asked for clarification as to the relevant circumstances for notification.
- 4.4.2 Another operator felt the condition was too broad in that it applied to almost all value-added services, including Premium Rate services as drafted. It recommended that only regulated products and services should fall within the condition's scope. It further recommended that it be limited to

² See Regulation 9 of the Access Regulations S.I. 305 of 2003, as amended

“probability” of cessation and that a fixed time should be included e.g. ten working days.

- 4.4.3 A third operator stated that the trigger for notification is too low and ought to be based on a real and immediate prospect of services being terminated or suspended.

ComReg’s View:

- 4.4.4 ComReg considers the conditions relating to the requirements to notify ComReg or consumers to be reasonable and does not propose to amend them substantially. ComReg considers it reasonable that any Authorised Person who serves a termination notice on another Authorised Person should also put ComReg on notice of this occurrence in order that ComReg can assess the situation and any requirement for action. In relation to the suggestion that conditions differentiate between a voluntary decision and other situations of withdrawal, ComReg does not consider that there exists grounds for warranting separate conditions that differentiate between a voluntary decision to cease pursuant to contract and one that is in breach of contract or otherwise. ComReg considers it necessary for consistency and certainty that all cessations, however they might arise, be notified to ComReg. Any exceptions to this are as now articulated within the definition of “*Cessation of Service*” and other defined terms. If operators exit the market, while yet observing the terms of their contracts, consumers may still face difficulties and problems (including in relation to migrating to other Authorised Providers if large volumes of consumers are involved). For this reason, ComReg does not deem it necessary or appropriate to demarcate between voluntary or involuntary cessations or cessations which may or may not be in breach of contract. See also section 4.1.7 which also discusses ComReg’s views as to necessity for ComReg to be notified of instances of Cessation of Service.

- 4.4.5 In relation to the respondent who referred to “value added services”, ComReg considers that only those matters that are contemplated by the definition of an electronic communications network or an electronic communications service should fall within the scope of the conditions and this will not include content. Moreover the term “value added service” is not a term of art and is not objective. What an operator may regard as falling into such a category may be regarded by consumers as being of the utmost importance. ComReg believes it to be prudent to include all electronic communications networks or services. Notwithstanding this, it should be noted that the definition of Cessation of Service excludes circumstance where a network or service is being replaced by a functionally equivalent substitute. In addition, it will also be noted that the defined terms, in addition to the definition of *Cessation of Service* also contain certain reservations and exceptions, for example in terms of the number of consumers that might be affected. In relation to the suggestion that the term “probability” be adopted over “possibility” this has also been provided for and this suggested amendment is now included in the proposed conditions in this Consultation.

- 4.4.6 The new proposed conditions now provide for a definition of “*Cessation of Service*” and other defined terms which articulate clearly the parameters of cessation and by extension when ComReg ought to be notified of instances of cessation.

The new proposed text in relation to issues raised in this section is as follows (note new numbering) (see also Appendix A herein):

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

18.2 An Authorised Person shall notify the Commission in writing;

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

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

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

4.5 The Original Text to proposed Condition 18.6 read:

When the Authorised Person receives a notification that could result in termination of publicly available electronic communications services to consumers (e.g. a notice of termination of a contract related to the provision of an electronic communications network or service), it shall notify the Commission immediately and use all reasonable endeavours to ensure that disruption to consumers is minimised and continuous provision of publicly available electronic communications service to consumers is maintained.

Respondents’ Views:

- 4.5.1 One operator stated that the condition was acceptable in principle but felt that it was already catered for in whole or in part by conditions 18.2 and 18.5.
- 4.5.2 Another operator felt this condition was too broad as it extended to value-added services and change of services on a day-to-day basis.

ComReg’s View:

- 4.5.3 ComReg has now organised many of the provisions relating to notifications into one larger condition for ease of reference. As can be noted, the conditions have also been amended.
- 4.5.4 ComReg’s view as to whether this should extend to value added services has been dealt with above.

See new proposed text after section 4.4.6.

4.6 The Original Text to proposed Condition 18.7 read:

An Authorised Person that takes any action (including issuing a notice of termination of a contract to another provider of an electronic communications service or network) that could result in termination, suspension or restriction of publicly available electronic communications services to consumers shall simultaneously notify the Commission of the action.

Respondents' Views:

- 4.6.1 One respondent felt this condition should be deleted. It felt that with the exception of a withdrawal that is involuntary or in breach of contract, it should be the responsibility of the party offering the retail service to notify ComReg. Requiring the wholesale provider to notify ComReg would at best result in a duplication of roles as both the wholesale provider and the retail provider would be required to notify ComReg in this instance. The wholesale provider is unlikely to have any visibility of any alternative or contingency measures that the retail provider may have in place. The retail provider is best placed to determine the potential impact on its customers. Therefore ComReg should rely on 18.5 and delete 18.7 ("old" numbering).
- 4.6.2 Another respondent felt it was too broad and extended cessation of service to individual customers.
- 4.6.3 A third respondent felt it was too broadly stated and required a materiality threshold where substantial disruption is likely to follow.

ComReg's view:

- 4.6.4 ComReg does not consider the requirement to notify ComReg in this situation, even if it might result in duplicate notifications, to be overly burdensome. ComReg considers that the condition is justifiable in light of the difficulties that might accrue where consumers are vulnerable to a cessation of service. In relation to the appropriateness of an Authorised Person notifying ComReg vis-à-vis another Authorised Person, this has been addressed at section 4.4.4 above.
- 4.6.4 Regarding the submission concerning disruptions to individual consumers, the definition of "*Cessation of Service*" makes it clear that, in relation to this provision, a substantial number of consumers are required to be affected.
- 4.6.5 In relation to the scope of this condition, ComReg again considers that the definition of "*Cessation of Service*" will assist in adding clarity as to the extent of obligations.

Please find the new proposed text after section 4.4.6 and in Appendix A of this document.

4.7 The Original Text to proposed Condition 18.8 read:

An Authorised Person shall notify the Commission no later than 10 days in advance of withdrawing any electronic communications service(s) or access to its electronic communications networks including if this withdrawal is pursuant to contract, except in cases where the action is urgently required in respect of ensuring network integrity or safety of life.

Respondents' Views:

- 4.7.1 One respondent claimed that this condition, which it considered to be an encroachment on wholesale commercial operators, was neither objectively justified nor proportionate. It noted the parallel obligations that exist for retail operators to notify ComReg. It further stated that this requirement to notify ComReg no later than ten days in advance of withdrawing service, could result in such notice being provided long after any notice given by affected retail operators who would be required to notify ComReg immediately.
- 4.7.2 A second operator questioned if the condition successfully captured the service disruption in the manner described. However, it also stated it had no difficulty informing ComReg where it proposes to withdraw a service but believed that the management of such withdrawals should be left to the commercial judgement of operators.
- 4.7.3 A third operator felt it was too broad and extended the definition of cessation of service to individual customers.
- 4.7.4 One respondent claimed that this condition, which it considered to be an encroachment on wholesale commercial operators, was neither objectively justified nor proportionate. It noted the parallel obligations that exist for retail operators to notify ComReg. It further stated that this requirement to notify ComReg no later than ten days in advance of withdrawing service, could result in such notice being provided long after any notice given by affected retail operators who would be required to notify ComReg immediately.
- 4.7.5 A second operator questioned if the condition successfully captured the service disruption in the manner described. However, it also stated it had no difficulty informing ComReg where it proposes to withdraw a service but believed that the management of such withdrawals should be left to the commercial judgement of operators.
- 4.7.6 A third operator felt it was too broad and extended the definition of cessation of service to individual customers.

ComReg's View:

- 4.7.7 ComReg does not consider it to be an encroachment on wholesale commercial operators, or on any Authorised Person, for the Authorised Person to be obliged to notify ComReg along the terms now set out in the new proposed conditions. However, the condition to notify ComReg no later than ten working days in advance of a withdrawal has been amended. The amended condition now provides that every Authorised Person must notify ComReg no later than ten working days prior to the actual or anticipated

Cessation of Service affecting a Substantial Number of Consumers (certain other exceptions and reservations have again been provided for). In this way, every Cessation of Service and not one just in relation to a withdrawal of service or access thereto, requires to be notified. It should now be clear that all Authorised Persons shall notify ComReg immediately as to the probability of a Cessation of Service affecting a Substantial Number of Consumers and it shall notify ComReg within ten working days of the actual or anticipated Cessation of Service affecting a substantial number of consumers. In relation to the suggestion that the ten day notification might be rendered redundant because notification has already been provided "immediately", ComReg is not of this view and considers that a notification period of ten working days should be maintained. It is ComReg's view that the period of ten working days should provide further visibility to ComReg as to the seriousness of the situation, the likelihood of a Cessation of Service affecting a substantial number of consumers and act as an indicator as to when the cessation is likely to occur.

- 4.7.8 In relation to the type of service disruption captured under the condition, ComReg considers that the defined term of "*Cessation of Service*" now proposed should clarify what service disruption is contemplated. As regards the requirement to manage the withdrawal, it can be noted that while the requirement to adopt a Disruption Minimisation Plan has been withdrawn from this consultation, it can be seen there remains a requirement to minimise the effects of the cessation, including maintaining the Electronic Communications Network or an Electronic Communications Service, where practicable. ComReg considers this requirement to be reasonable, not overly burdensome and justifiable in light of the difficulties that might accrue where consumers are vulnerable to a cessation of service. Finally it can be noted that the provision refers to a "*Substantial number of Consumers*" which is now defined.
- 4.7.9 Regarding the submission in relation to disruptions to individual consumers, ComReg considers that the definition of a "*Substantial number of Consumers*" under this provision renders clearer an Authorised Person's obligations under this provision. ComReg does not consider that the services captured by these conditions are too broad and it is considered that it is important to avoid anomalies and inconsistencies. For this reason, ComReg has stated that while all cessations are contemplated by the new conditions ("howsoever arising") some exceptions and certain provisos have also now been inserted.

Please find the new proposed text after section 4.4.6 of this Document (and Appendix A herein).

4.8 **The Original Text to proposed Condition 18.9 read:**

In the event that an Authorised Person decides to withdraw a type of publicly available electronic communications service from consumers it shall notify the Commission immediately and its own consumers as soon as is practicable.

Respondents' Views:

- 4.8.1 One respondent felt a general requirement to notify in advance would have an impact on commercially sensitive initiatives and impinge upon commercial freedom. It felt there was adequate provision under Regulation

17(4) of the Universal Service Regulations which provides for the notification to notify customers of any modification of the terms of the consumer contract. It felt this proposed condition was not proportionate and should be deleted.

- 4.8.2 A second respondent felt it was too broad and applied to all types of service, including value added services.
- 4.8.3 A third respondent felt the circumstances referenced did not involve service disruption in the manner described elsewhere in the Consultation Document and while it has no difficulty informing ComReg where it proposes to withdraw a service, it believes the management of this should be left to the commercial judgement of the respondents.
- 4.8.4 A fourth respondent was of the opinion that it was not necessary to notify its customers where it decides to withdraw as notification is already required under existing regulations. It felt that there are existing mechanisms and a strong commercial incentive to facilitate, in so far as possible, the switching of consumers so as to ensure continuity of service.
- 4.8.5 A fifth operator considered that the proposal to unilaterally notify customers and the market of a potential issue would remove any opportunity for rectifying the situation. It stated to notify consumers of a potential issue is a self-fulfilling prophecy that would severely damage a business. It further stated that notifications made by one Authorised Operator in relation to another Authorised Operator could be based on rumour, speculation or malicious behaviour. It stated there were adequate practices already available to operators that could deal with the orderly notification to customers of the withdrawal.

ComReg's View:

- 4.8.6 ComReg envisages two distinct situations in this context.
- 4.8.7 In the first case where consumers have already experienced disruption, ComReg believes that mandatory communication is reasonable where a Termination (as defined) has taken place. However, the position is less clear where service is to be restored since it is possible that the restoration may have taken place before the communication has been sent. It follows that mandating communication with consumers in the General Authorisation for all Cessations of Service may be unwarranted and for this reason ComReg has decided to restrict the scope of the obligation to the situation of a "Termination" affecting a Substantial Number of Consumers (as defined). Condition 18.5 as currently proposed would impose a requirement to minimise the impact of any Cessation of Service.
- 4.8.8 The second case is where an Authorised Person decides in advance to implement a Cessation of Service. In this case the timing will be under the control of the Authorised Person and it therefore seems reasonable that, in this context, the obligation would apply to all Cessations of Service subject only to the qualification that the Cessation of Service would affect a Substantial Number of Consumers.
- 4.8.9 Insofar as provisions exist elsewhere to protect the consumer, it was demonstrated in 2006 that neither Regulation 17(2)(e) of the Universal Service Regulations (which requires Authorised Persons to specify particulars of termination to the consumer) nor Regulation 17(4) of the Universal Service Regulations assisted consumer in the management of the

modification³ in the conditions of the contract or in the termination of the contract. Many consumers endured serious disruption. In relation to the term "modification" it could be argued that it is unclear if a cessation of a service or of all services could be considered merely a modification of the contract. ComReg considers therefore that additional provisions are required and that the case for regulatory intervention is clear. The proposed conditions shall form part of an Authorised Person's General Authorisation to operate in the market to provide services and ComReg considers it a proportionate response to adopt conditions in relation to situations where an Authorised Person, having provided services to consumers, will now cease to do so.

4.8.10 In relation to the type of service disruption captured under the condition, ComReg considers that the defined terms of "Cessation of Service", "Termination" and other defined terms now proposed should clarify what service disruption is contemplated. Please see also section 4.1.11 of this Document. As regards the requirement to manage the withdrawal, it can be noted that while the requirement to adopt a Disruption Minimisation Plan has been withdrawn from this consultation, it can be seen there remains a requirement to minimise the effects on all consumers of the cessation including continuing to provide the services where practicable. ComReg considers this requirement to be reasonable, not overly burdensome and justifiable in light of the difficulties that may be experienced by a consumer as a result of a cessation of service.

4.8.11 As regards operators' comments that there exist strong commercial incentives to ensure continuity of service, ComReg considers that to this extent the new requirements should not therefore present an overly burdensome obligation on operators who consider that they are adequately responsible in this regard in respect of their consumers. However, the provision will apply to all Authorised Persons and it should bring uniformity to the level of obligation required of all Authorised Persons.

The new proposed text in relation to issues raised in this section is as follows (and can be found at Appendix A herein):

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

4.9 The Original Text to proposed Condition 18.10 read:

Where the Commission forms the view that there is an imminent possibility that publicly available electronic communications services to consumers may be disrupted, the Authorised Person will, upon request from the Commission, provide

³ Insofar as it withdrawal of a service or of all services for example could be considered merely as a modification of the contract

the Commission with any information which the Commission considers is required to facilitate the process of minimising disruption of consumers publicly available electronic communications services.

Respondents' Views:

- 4.9.1 One operator objected to conditions applying to the removal of service in line with contractual obligations, but otherwise supported this condition as it would apply to all other circumstances of service withdrawal. It stated the condition should in any event be more specific as regards the circumstances under which ComReg may exercise its powers. It stated it would be disproportionate to oblige the automatic provision of all information and that only sufficient information should be provided to ComReg.
- 4.9.2 A second operator stated the condition should be amended so that Authorised Persons need only provide information where ComReg has objective grounds to believe there is an imminent possibility of cessation of service and that ComReg receives the information on a confidential basis.

ComReg's view:

- 4.9.3 ComReg considers that it should be entitled to be furnished with information pertaining to a cessation of service. ComReg does not consider the provision of this information to present an overly burdensome task on Authorised Persons. As a public body, ComReg is required to act reasonably and objectively in all instances. Some amendments have been made to the text of this condition in this regard. Similarly as regards the requirement to maintain certain information confidential, ComReg would be obliged to comply with the provisions of its Guidelines governing the treatment of confidential information, see ComReg Document Number 05/24.
- 4.9.4 As previously indicated above, ComReg does not consider it appropriate to distinguish between different types of operators.

New proposed text in relation to issues raised in this section can be found at Appendix A herein and as follows (note new numbering of condition 18.4):

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

This Consultation and Response to Consultation document now asks:

Question One of this Consultation: Do you agree with the text of the amended conditions proposed for attachment to the General Authorisation? If not, please indicate which of the amended proposed conditions you do not agree with and why.

5 Proposed Conditions as Providing for Interoperability of Services and Interconnection of Networks

Question Two of Consultation 07/45 asked: *Do you agree that the text of the condition 14.5 proposed for attachment to the General Authorisation can be classified as a condition providing for ‘Interoperability of services and interconnection of networks in conformity with the Access Regulations?’*

Condition 14.5 of Consultation 07/45 read: *“The Authorised Person shall notify the Commission immediately if it is of the view that there is a reasonable possibility that it may in the foreseeable future cease (whether voluntarily or involuntarily) to provide on a wholesale basis an electronic communications network or an electronic communications service or that its actions may result in a substantial number of consumers’ access to publicly available electronic communications services being terminated, suspended or restricted.”*

Respondents’ views:

- 5.1 Respondents did not all agree that this condition necessarily concerned interconnection and one respondent asked that ComReg clarify whether it contemplated a permanent cessation of service or at least longer term service disruption.

ComReg’s view:

- 5.2 ComReg has decided not to re-consult in relation to this condition on this occasion and the text of that condition as proposed in the original Consultation document 07/45 does not form part of this Consultation. As regards the clarification of the meaning of “cessation”, the new definition will assist in this regard.

6 Proposed Conditions as Consumer Protection Rules:

Question Three of Consultation 07/45 asked: *Do you agree that the text of conditions 18.2-18.10 proposed for attachment to the General Authorisation can be classified as conditions providing for Consumer protection rules specific to the electronic communications sector including conditions in conformity with the Universal Service Regulations?*

Respondents' Views:

- 6.1 In general the operators who responded to this question agreed that the conditions could be so classified, however, a number of these operators expressed the view that the conditions remained too broad or were inappropriate in other ways. One operator felt proposed condition 18.9 does not conform to the Universal Service Regulations. Another operator also did not agree that condition 18.9 so conformed. It stated that it was merely mirroring something that was already often standard practice.

ComReg's View:

- 6.2 ComReg considers that the proposed conditions are capable of being classified as consumer protection rules specific to the electronic communications sector. ComReg also considers that the conditions do conform to the Universal Service Regulations. The objective of the proposed conditions relates to the safeguarding of consumers against a cessation of a service for which they have subscribed. It is recognised that electronic communications are important to consumers and are relied upon quite heavily by consumers for communication and information. ComReg considers that the proposed conditions which are intended to protect consumers in the situation of a cessation of service are in the spirit of consumer protection rules as contemplated by the Universal Service Regulations.

Question Two of this Consultation (and Response to Consultation) now asks: Do you agree that the text of conditions 18.2-18.5 proposed for attachment to the General Authorisation can be classified as conditions providing for 'Consumer protection rules specific to the electronic communications sector including conditions in conformity with the Universal Service Regulations'?

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

Question Four asked: *Do you agree that the text of the conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?*

Respondents' Views:

- 7.1 Not all operators agreed that the conditions were in all instances objectively justified, non-discriminatory, proportionate and transparent. Some operators felt the scope of the conditions affected the conditions and whether the conditions were objectively justified, non-discriminatory, proportionate and transparent and that certain conditions succeeded on some grounds but not on others. The opposite views were expressed by other operators in relation to these conditions.
- 7.2 One operator felt the conditions were objective but were too broad and not therefore, it stated, proportionate or justified. Another operator felt the conditions were not in all instances objectively justified and proportionate. A third operator did not believe ComReg's approach to be appropriate or proportionate. It considered that the conditions were unduly prescriptive without incremental benefits being conferred on consumers. This operator agreed that the text of the conditions was non-discriminatory and adhered to the principle of transparency. This operator contended, however, that the Regulatory Impact Assessment conducted as part of the consultation process was neither objectively justified nor proportionate. A fourth operator considered that the sentiment underlying the proposed changes was laudable but that it was disproportionate to apply the conditions equally to all operators. It further stated the conditions were discriminatory and not objectively justified. It stated that it would be better if there was a material attempt by ComReg to address the underlying issues instead. A fifth operator while supporting the principles of the proposed conditions, did not consider that they were proportionate or objectively justified and needed to be better focused on the difficulties of business and the dissemination of those difficulties.

ComReg's View:

- 7.3 ComReg's preliminary view is that the amended conditions now proposed are in all instances objectively justified, non-discriminatory, proportionate and transparent.

The conditions appear to be objectively justifiable and represent important consumer protection requirements. A Cessation of Service can potentially be very serious and the management of a Cessation of Service while observed by some Authorised Persons as industry practice, needs to be observed by all Authorised Persons. The conditions are moreover consistent with the terms of the General Authorisation and are in the spirit of imposing minimal General Authorisation obligations. While the case for regulatory intervention was very clearly made with the departure from the market of an operator in 2006, the proposed conditions do not go beyond the boundaries of normal regulation. It is ComReg's view that the incidence of operator exit, which caused considerable disruption and damage to the industry's reputation at that time, demonstrates the necessity for planning for such circumstances and for this to be placed within the regulatory framework. Disruption Minimisation Plans are not being proposed in this Consultation so that the new proposed conditions should not cause significant cost to be incurred by operators. Any costs of compliance are proportionate to the benefits which should accrue. Where operators obtain

rights by way of the General Authorisation to enter the market and sell services to consumers, ComReg believes that it is entirely justified that operators have corresponding obligations to consumers regarding the withdrawal of these services.

The amended conditions are not discriminatory and the conditions do not impose more onerous obligations on any one operator as against another, and impose no heavier duties on SMP operators. The conditions proposed demand the same of all Authorised Persons and are therefore consistent as between all operators.

The conditions are proportionate and do not go beyond what is currently offered by many Authorised Persons but now the obligations shall apply uniformly throughout markets and to all Authorised Persons. The remaining obligations include obligations relating to notification, disruption minimization and continuity of service (where practicable). The conditions have been amended where ComReg considered it necessary, bearing in mind the submissions from Respondents. The definition of "Cessation of Service" and other defined terms in particular provides more clarity. This definition contains certain limitations and exceptions so that the circumstances when action is required on the Authorised Person's part is both more certain and is also to be read in light of the reservations contained in the definition. The proposed changes will not distort the market as all Authorised Persons and new entrants will be required to adhere to the provisions. The level of regulation being proposed is reasonable and is not overly prescriptive and represents a proportionate and reasoned intervention as a response to recent market difficulties.

In relation to transparency, it is clear that the amended conditions, and in particular the new definition of "Cessation of Service" and other defined terms, achieve enhanced precision and clarity. The obligations are clear on the face of the conditions and this should assist Authorised Persons in the assessment of their duties.

Question Three of this Consultation (and Response to Consultation) now asks: Do you agree that the text of the conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?

8 Are Proposed Conditions Specific Obligations?

Question Five of Consultation 07/45 asked: *In your view do the conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or conditions which are applicable to undertakings by virtue of other laws?*

8.1 *Respondents' Views:*

- 8.1.1 One operator stated that the new conditions seem to overlap with general consumer protection legislation within the remit of the National Consumer Agency and Regulation 17 of the Universal Service Regulations.
- 8.1.2 Another respondent stated, although not expressly in relation to this question, that it was not necessary to provide for a requirement that an operator notify its customers where it decides to withdraw a type of electronic communications service, as, it stated, notification is already required under existing regulations. It questioned the appropriateness of employing the General Authorisation when the conditions will be imposed on all authorised persons.
- 8.1.3 A third stated it is common practice with most operators to adopt the conditions of the type contemplated under the Consultation and provisions of Company Law also already exist which are applicable.
- 8.1.4 A fourth operator felt that the original proposed condition 18.9 (in relation to notification to consumers) would at the retail level over-ride regulation 17(4) of the Universal Service Regulations.
- 8.1.5 A fifth operator stated that other laws do not adequately cover this and that therefore the proposed conditions are warranted.

8.2 *ComReg's View:*

- 8.2.1 ComReg does not consider that the new conditions are already applicable to Authorised Persons by virtue of other consumer laws within the remit of the National Consumer Agency or under Regulation 17 of the Universal Service Regulations. In relation to consumer law generally, ComReg has considered existing provisions of consumer law and found that they do not expressly deal with issues of cessation of service satisfactorily when evaluated against the conditions now proposed. ComReg also considers the new proposed conditions and Regulation 17 of the Universal Service Regulations, which requires that conditions of termination be specified in the consumer contract and that all modifications of a contract be notified one month in advance, are capable of being distinguished from each other. ComReg further considers the term "modification" may not necessarily contemplate on the face of it all cessations of service as now contemplated by these proposed conditions.
- 8.2.2 In relation to the appropriateness of utilising the General Authorisation, it can be noted that operators are authorised under the General Authorisation to enter the market to provide services to consumers. ComReg considers that it is not only appropriate but also necessary and that Authorised Persons owe corresponding obligations to consumers regarding the withdrawal of these services. See section 8.2.1 above concerning the submission insofar as it related to existing regulations.
- 8.2.3 ComReg does not consider that all Authorised Operators already make provision for instances of cessation of service as set out in the proposed conditions. The provisions of company law were examined in so far as they might relate to cessation of service and ComReg does not consider that company law adequately provides for consumer protection or for the circumstances now under discussion.

8.2.4 See section 8.2.1 above for a discussion as to the existing provision of Regulation 17(4) of the Universal Service Regulations. As regards the new requirements over-riding Regulation 17(4), it can be seen that Authorised Persons are required to notify consumers as soon as possible notwithstanding the provisions of Regulation 17(4) of the Universal Service Regulations in the event of a "Termination" which is a defined term and immediately when a final decision has been taken to implement a cessation of service. This condition makes it clear that Authorised Persons should where possible notify consumers of Terminations in advance of the one month's notice that is prescribed under Regulation 17(4). Authorised Persons should notify its consumers immediately where a final decision has been taken to implement a Cessation of Service and this could also be in advance of the one month's notice that is prescribed under Regulation 17(4). It can also be noted for the avoidance of doubt that this provision does not mean that consumers can be notified any shorter than is currently required at, or pursuant to law (insofar as the cessation of service can be considered on the particular facts to be a modification of the contract). ComReg considers that this is prudent so that in situations where an Authorised Person can notify a consumer earlier than it currently is obliged to, it should do so. It can be noted that this provision, in any event, pertains to A Substantial Number of Consumers, as now defined.

8.2.5 Finally, ComReg does not consider the proposed conditions to be a Specific Obligation. It can be noted that Specific Obligations are defined in the Framework Regulations as *"obligations that may be imposed by the Regulator on an undertaking under Regulations 6(1), 6(2), 6(3), 7 and 9 of the Access Regulations and Regulations 13, 14, 15 and 16 of the Universal Service Regulations, and on those designated under Regulation 7 of the Universal Service Regulations to carry out the obligations referred to in that Regulation"*. Accordingly it is ComReg's view that the proposed conditions cannot be considered Specific Obligations. Neither Regulations 7, 13 to 16 of the neither Universal Service Regulations nor Regulations 6, 7 or 9 of the Access Regulations provide for the imposition of obligations that expressly relate to the Cessation of Service as now contemplated by the proposed conditions.

Question Four of this Consultation (and Response to Consultation) now asks: In your view do the conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or conditions which are applicable to undertakings by virtue of other laws?

9 Regulatory Impact Assessment.

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

9.1 Respondents' Views:

- 9.1.1 One respondent felt that while the proposed conditions were proportionate and justified, they did not go far enough as regards a fixed operator with SMP.
- 9.1.2 A second respondent felt the condition should be narrowed to where there has been a finding of SMP.
- 9.1.3 A third respondent felt the Regulatory Impact Assessment (RIA):
1. Fails to show that the benefits to the conditions exceed the costs;
 2. Is too narrow in scope and fails to analyse options; and
 3. Assumes regulation is preferable to the status quo, while neglecting options other than ComReg's proposal which could give equivalent or greater benefits while imposing a lower regulatory burden.

This respondent stated that the text itself of the conditions is non-discriminatory and is transparent. However, it said that the RIA is neither objectively justified nor proportionate nor is it the minimum necessary to achieve the identified objectives. It stated that the RIA fails to assess the full range of potential options to address the issue of possible service disruption. It asserted that the RIA fails to consider the key issue of the probability of such service disruption incidents actually occurring. It stated ComReg's analysis must take into account both the relatively low number of individuals affected and the exceptional nature of the service disruption that occurred with another Authorised Person in late 2006. It stated that the chance that large vertically integrated operators permanently might cease to provide service is negligible and has no economic logic for an operator. It stated ComReg must consider options that focus more specifically on the alternative operators and suggested an industry forum facilitated by ComReg to progress contractual and other changes necessary. In relation to costs, it is stated that it is inaccurate to describe them as once-off in nature and while noting that Appendix B is an illustrative guide only, it suggested that significant man hours would be needed to negotiate amendments to existing commercial contracts to make provision for the possible transfer of customers to another operator under certain circumstances. Amendments to customer contracts would require full notification of the entire customer base affected, requiring that costs be incurred in national advertising, written correspondence and other forms of communication.

- 9.1.4 A fourth operator stated it did not believe that the RIA was proportionate and justified in all instances. It stated the RIA ought to consider the impact on new entrants to adopt a Disruption Minimisation Plan - in addition to the standard notification requirement. It pointed out the conditions demanded

dual notification which would bring costs to those parties. It stated there would be costs of false alarms both in terms of administration and possible damage to reputation of retail providers if wholesale providers alert ComReg even where there is no impact to consumers. It referred to ComReg Document 07/56 regarding ComReg's approach to Regulatory Impact Assessment (Response to Consultation and Guidelines paragraph 2.6, 07/56) where ComReg stated that effective use of an RIA required the identification of the full range of options available to it. Here ComReg also committed to keep the scope of the RIA open to revision. This operator asked that ComReg consider a broader range of options.

9.1.5 A fifth respondent stated that no quantification of costs had been put forward, either in terms of capital or ongoing costs.

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

The following sets out ComReg's views in relation to Respondents' submissions as regards the Regulatory Impact Assessment contained in ComReg Consultation 07/45. ComReg again restates the policy issues and objectives now sought to be addressed. ComReg once more determines the impacts on stakeholders. Respondents are again asked to respond to ComReg's analysis of the Impact Assessment on Authorised Persons vis-à-vis Electronic Communications Service Disruption Minimisation.

- 9.2.1 Many comments appear to relate to the Disruption Minimisation Plans. As noted already ComReg does not propose to proceed further in this Consultation with Disruption Minimisation Plans. As such, the perceived costs to operators as a result of these proposals are likely to be considerably lower than respondents originally suggested.
- 9.2.2 Absent the proposed requirement to have in place a Disruption Minimisation Plan, the newly proposed obligations include (i) obligations to provide notifications to ComReg in the event of prospective service cessation involving "*a Substantial number of Consumers*" and notification of ComReg in advance of an actual or anticipated cessation of service affecting a "*Substantial number of Consumers*"; (ii) the obligation to inform consumers in the event of prospective service cessation involving a "*Substantial number of Consumers*"; (iii) the obligation to use reasonable endeavours to minimise disruption to consumers and to continue to provide services where practicable to all consumers; and, (iv) the obligation to provide ComReg with information that it may reasonably require to minimise disruption to all consumers.
- 9.2.3 Some comments were made in relation to the costs associated with the possibility that more than one Authorised Person may notify ComReg of a reasonable possibility of cessation. ComReg does not consider these costs to be great and further considers that the costs associated with notification are not so that they cannot be justified in light of the benefits to consumers that may accrue with sufficient notice of a reasonable probability of cessation, as determined by the Authorised Person, being highlighted to them.
- 9.2.4 With regard to obligations to provide information to ComReg (as provided for in proposed paragraphs 18.2 and 18.4), these do not appear to involve significant costs to operators. Information can be sent in to ComReg swiftly and with minimum cost. The benefits should clearly exceed this, as such information may allow ComReg to take actions to help minimise any service disruption for consumers (as per the definition of Cessation of Service).
- 9.2.5 With regard to informing consumers, again the cost of this is limited. Consumers could be informed by letters being sent to all consumers and other methods might also be employed in order to fulfil this obligation. Again it can be noted that the notification provisions vis-à-vis consumers relates to a "*Substantial number of Consumers*".
- 9.2.6 Paragraph 18.5 requires operators to use all reasonable endeavours. ComReg is not attempting to be overly-prescriptive in this regard, and it should be noted that ComReg must be proportionate in terms of enforcing this obligation. As such, it is not considered likely that substantive long-term costs to operators will be incurred.
- 9.2.7 As against the costs, the benefits are likely to be considerable. Survey evidence, as well as the weight of consumer complaints, suggests that consumers are seriously harmed by loss of service when that service was expected to continue. For instance, if 75,000 consumers were left without any service for two weeks, even assuming that each consumer only derived a value that they paid for the service, assuming each consumer spent approximately €50 per month on fixed-line services, then this would amount to consumer harm of €1.875 million, which seems considerably in excess of cost. Moreover, this number is a significant underestimate, as it ignores the consumer surplus that the vast majority of consumers would enjoy from

having a fixed-line service. However, given the benefits that even this under-estimate produces, it should be clear they exceed the cost.

- 9.2.8 Another benefit is the confidence that consumers would have that their operator will not leave them without service. This is likely to improve confidence and make consumers feel more secure about using alternative operators. This should have long-term benefits to competition, which will aid most operators, as well as leading to lower prices and clear consumer benefits.
- 9.2.9 Many of the obligations will not be crystallised until such time as there is a reasonable probability of a Cessation of Service that relates to a substantial number of consumers. Effort or cost on the part of the operator may therefore only be incurred when there is an extant Cessation of Service that affects consumer welfare issues. As such there is a direct balancing of the operator obligation against the consumer benefit. Furthermore ComReg is of the view that the consumer benefit will in any event clearly outweigh the operator impact.

Question Five of this Consultation (and Response to Consultation) now asks: Respondents are requested to provide views on whether the proposed specifications are proportionate and justified and offer views on other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment.

10 SUBMITTING COMMENTS

All comments are welcome, however, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

The consultation period will run for 4 weeks from Monday the 28th of April 2008 to Tuesday 27th of May 2008 during which ComReg welcomes written comments on any of the issues raised in this document.

Having analysed and considered the comments received, ComReg will review the proposed conditions once more and publish a response to this consultation.

In order to promote further openness and transparency, ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg Document 05/24. We would request that electronic submissions be submitted in an unprotected format so that they can be appended to the ComReg submissions document for publishing electronically.

Please note ComReg appreciates that many of the issues raised in this document may require respondents to provide confidential information if their comments are to be meaningful.

As it is ComReg's policy to make all responses available on its web-site and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response

Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg Document 05/24.

Appendix A –NEW PROPOSED CONDITIONS:

Definitions and Interpretation

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

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

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

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

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

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

18.2 An Authorised Person shall notify the Commission in writing;

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

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

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

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

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

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

Appendix B: ORIGINAL PROPOSED CONDITIONS, Consultation 07/45:

14.5 The Authorised Person shall notify the Commission immediately if it is of the view that there is a reasonable possibility that it may in the foreseeable future cease (whether voluntarily or involuntarily) to provide on a wholesale basis an electronic communications network or an electronic communications service or that its actions may result in a substantial number of consumers' access to publicly available electronic communications services being terminated, suspended or restricted.

18.2 The Authorised Person must at all times use all reasonable endeavours to ensure any disruption to the publicly available electronic communications services provided to consumers is minimised and continuous provision of publicly available electronic communications services to consumers is maintained.

18.3 The Authorised Person shall have in place an effective plan to ensure that, in the event of the Authorised Person ceasing (whether voluntarily or involuntarily) to provide on a retail or wholesale basis an electronic communications network or an electronic communications service, any disruption to the publicly available electronic communications services provided to consumers is minimised (the 'Disruption Minimisation Plan'). The Authorised Person shall take all appropriate steps to ensure its Disruption Minimisation Plan is viable and shall maintain the Disruption Minimisation Plan to reflect the ongoing portfolio of services offered by the Authorised Person and any retail providers of electronic communications services to which it supplies wholesale electronic communications networks or electronic communications services. The Authorised Person must lodge an up-to-date copy of the Disruption Minimisation Plan with the Commission.

18.4 The Authorised Person must implement its Disruption Minimisation Plan in appropriate circumstances

18.5 The Authorised Person shall notify the Commission immediately if it is of the view that there is a reasonable possibility that it may in the foreseeable future cease (whether voluntarily or involuntarily) to provide an electronic communications network or an electronic communications service to consumers or that its actions may result in a substantial number of consumers' access to publicly available electronic communications services being terminated, suspended or restricted.

18.6 When the Authorised Person receives a notification that could result in termination of publicly available electronic communications services to consumers (e.g. a notice of termination of a contract related to the provision of an electronic communications network or service), it shall notify the Commission immediately and use all reasonable endeavours to ensure that disruption to consumers is minimised and continuous provision of publicly available electronic communications service to consumers is maintained.

18.7 An Authorised Person that takes any action (including issuing a notice of termination of a contract to another provider of an electronic communications service or network) that could result in termination, suspension or restriction of publicly available electronic communications services to consumers shall simultaneously notify the Commission of the action.

18.8 An Authorised Person shall notify the Commission no later than 10 days in advance of withdrawing any electronic communications service(s) or access to its electronic communications networks including if this withdrawal is pursuant to contract, except in cases where the action is urgently required in respect of ensuring network integrity or safety of life.

18.9 In the event that an Authorised Person decides to withdraw a type of publicly available electronic communications service from consumers it shall notify the Commission immediately and its own consumers as soon as is practicable.

18.10 Where the Commission forms the view that there is an imminent possibility that publicly available electronic communications services to consumers may be disrupted, the Authorised Person will, upon request from the Commission, provide the Commission with any information which the Commission considers is required to facilitate the process of minimising disruption of consumers publicly available electronic communications services.

Appendix C – Consultation Questions

All Consultation Questions posed in this document and requiring a response are listed here.

List of Questions

Q.1 Do you agree with the text of the conditions proposed for attachment to the General Authorisation? If not, please indicate which of the proposed conditions you do not agree with and why.

Q.2. Do you agree that the text of conditions 18.2-18.5 proposed for attachment to the General Authorisation can be classified as conditions providing for ‘Consumer protection rules specific to the electronic communications sector including conditions in conformity with the Universal Service Regulations’?

Q.3 Do you agree that the text of the conditions proposed for attachment to the General Authorisation are objectively justified, non-discriminatory, proportionate and transparent?

Q.4 In your view do the conditions proposed for attachment to the General Authorisation constitute Specific Obligations, or conditions which are applicable to undertakings by virtue of other laws?

Q.5 Respondents are requested to provide views on whether the proposed specifications are proportionate and justified and offer views on other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment.

Appendix D –Legal Basis

Legal Basis

The procedure for attaching conditions to the General Authorisation is established by Regulation 8 of the Authorisation Regulations⁴. In particular note;

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

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

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

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

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

⁴ European Communities (Electronic Communications Networks and Services (Authorisation) Regulations S.I. No.306 of 2003