



Commission for
Communications Regulation

Response to Consultation 13/84 and Decision

Code of Practice for Premium Rate Services

Response to Consultation

Reference:	ComReg 14/31
Decision:	Decision D03/14
Date:	17 April 2014

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1 Introduction

- 1 Premium Rate Services (“PRS”) are, typically, goods and services that a consumer can buy by charging the cost to their fixed line or mobile telephone account, whether pre-paid or bill-paid. At present most PRS are provided via premium rate telephone numbers (starting with the prefix 15XX) and shortcodes¹ (in the form 5XXXX) but technological developments now result in some PRS being charged directly to consumer mobile phone accounts without recourse to premium rate shortcodes (PRS that are charged in this manner are referred to as “direct-carrier-billing” or “DCB”). PRS usually offer information and entertainment services, some examples of which are digital content such as games and videos delivered to mobile handsets, quiz television services, chat-line services, ringtones, sports alerts, weather alerts, television voting and competitions. However, recent advancements allow consumers to pay for mobile apps and game credits as well as “off-handset”² goods and services, such as parking fees, by charging the cost to their mobile phone account.
- 2 On 6 September 2013 ComReg published its consultation³ on whether to amend certain provisions of its current Code of Practice (“the current Code”) to be followed by providers of PRS.
- 3 Having carefully considered the submissions received, ComReg is now publishing its response to Consultation 13/84 and has made final decisions, which will be incorporated into the updated Code of Practice for PRS providers (“the updated Code”). ComReg has published the relevant extracts from the updated Code as an Appendix 1 to this Response to Consultation and Decision. This decision comprises three elements, two of which will amend sections of the current Code (Sections 4.8 and 5.20), while the third will result in ComReg maintaining the current provisions that apply to subscription PRS. The rationale for the decisions is set out in this document and the updated Code, incorporating these decisions, will replace the current Code, which fully came into effect in July 2012.
- 4 PRS providers will require a period of time to make technical adjustments to bring their promotions and their PRS into alignment with the updated Code and for that reason the updated Code will not come into effect until 03 June 2014, six weeks from the date of publication of this Decision.
- 5 ComReg believes that the updated Code provides greater protection for end

¹ "Short Code" or "shortcode" means a five-digit number within the range of 50xxx to 59xxx as provided for in the National Numbering Conventions.

² "Off-handset" goods and services is a colloquial term used to refer to PRS where no goods or services are delivered to the end users handset and can include, for example, parking fees, vending machine charges or road toll charges

³ ComReg document 13/84 (<http://www.comreg.ie/fileupload/publications/ComReg1384.pdf>)

users in their dealings with PRS through the provision of clear information, in particular transparency of tariffs and material conditions and enhanced certainty in the purchase process. ComReg will keep the provisions of the updated Code under review and may, as provided for in Section 15 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010 (“the PRS Act”) consult on existing provisions or any potential new provisions to ensure that it remains appropriate as the PRS market evolves.

2 Executive Summary

2.1 Background and Legislative Basis

- 6 On 12 July 2010, the regulation of PRS was placed on a statutory footing with the enactment of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010 (the “PRS Act”). The PRS Act also amended the Communications Regulation Act, 2002 (the “Principal Act”) which sets out the Commission for Communications Regulation (“ComReg”) objectives, functions and many of its powers, and now requires ComReg to carry out investigations into matters relating to the provision, content and promotion of PRS in order to “*protect the interests of end-users of PRS*”.
- 7 Section 15 of the PRS Act requires ComReg, following a consultation with PRS providers, other interested parties and, as it considers relevant, other regulatory bodies in the State, to publish a new Code of Practice to be followed by providers of PRS with respect to the provision, content and promotion of PRS. Accordingly, on 1 December 2010, ComReg consulted on the draft provisions for a new Code. At the conclusion of a comprehensive consultative process, ComReg issued the current Code of Practice⁴ on 5 April 2012, which came into effect on 25 July 2012.
- 8 The PRS industry is particularly subject to change and is influenced by technological developments in the areas of digital marketing, mobile handsets and consumer purchasing practices. In this regard, ComReg has undertaken to keep the provisions of any Code under review and will propose, where it considers appropriate, changing the existing provisions or introducing new provisions to ensure that the Code remains appropriate as the PRS market evolves.

2.2 Review of the existing Code of Practice

- 9 In light of its experience regulating the PRS sector, in particular since the introduction of its current Code in July 2012, ComReg considered that some provisions of the current Code may require modifications and clarifications. Accordingly, in Sept 2013, ComReg consulted on these matters, proposing changes to the existing provisions of the current Code relating to price transparency and the interval at which regulatory reminder messages should be sent to subscribers of subscription PRS. In addition to these proposed amendments, ComReg also sought submissions on whether a threshold value

⁴ ComReg document 12/29 <http://www.comreg.ie/fileupload/publications/ComReg1229.pdf>

should be introduced below which the “double opt-in”⁵ requirements set out in Sections 5.15 to 5.18 of the current Code of Practice would not apply or might apply in a modified manner.

- 10 ComReg received responses to the questions it posed from the following seven parties:
- Office of the Data Protection Commissioner (“ODPC”)
 - Vodafone Ireland (“Vodafone”)
 - Likecharity
 - RTE
 - Meteor Mobile Communications Ltd (part of the eircom group of companies “eircom”)
 - Hutchinson 3G Ireland Limited (“Three”)
 - Fundraising Ireland

These responses are briefly summarised below, according to the consultation issue, and addressed in greater detail in Section 4 of this paper.

2.3 Section 4.8 - Price Transparency

- 11 Section 4.8 of the current Code requires that end users are fully informed of the full and true cost of a PRS prior to incurring any charges. While this would appear to be an incontrovertible and straightforward requirement, the nature of PRS price structures (which may comprise several independent features such as sign-up costs, additional network charges beyond the control of the PRS provider and free or discounted periods) can result in the full cost of the PRS being ambiguous and, consequently, unclear to some end users.
- 12 Accordingly, ComReg proposed amending the provisions of Section 4.8 of the current Code relating to the provision of pricing information in promotions. The purpose of the amendment was not to introduce any new obligations but rather to better set out for PRS providers how the existing price requirements should be provided to end users.
- 13 ComReg’s proposals were broadly accepted and the provisions of Section 4.8 of Code have been updated to incorporate these changes.

2.4 Section 5.20 - Regulatory Reminder Messages

- 14 Section 5.20 of the current Code provides that end users, who are subscribed to a PRS with a recurring charge (i.e. a subscription PRS), must receive

⁵ The double opt-in is the rule that an end-user must positively confirm, by sending a text message, their intention to subscribe to a premium rate service.

periodic reminders setting out details about the cost of the PRS and how to cancel the subscription. Such regulatory updates are required to be delivered by SMS and are intended to be received by end users after each €20 spend interval.

- 15 However, where the cost of a PRS, or a multiple of the periodic cost of the PRS, does not fall precisely on €20 then the end user may not receive a regulatory reminder SMS until they have incurred charges in excess of the €20 interval, contrary to the requirements of the current Code. For example, if the weekly cost of a PRS is €8, then the end user may not receive the regulatory reminder message until after the charges for the third week of the PRS have been incurred, resulting in the reminder message being received after the end user has incurred charges of €24.
- 16 Accordingly, ComReg proposed amending the existing provisions of the current Code to provide that the regulatory update messages must be received by end users at intervals no greater than €20.
- 17 ComReg proposals were welcomed by respondents and the provisions of Section 5.20 of the current Code have been updated to incorporate these changes.

2.5 Sections 5.13 to 5.18 - Price Threshold for “Double Opt-in” requirements for Subscription Services

- 18 The “double opt-in” requirements contained in Sections 5.13 to 5.18 of the current Code apply only to subscription PRS and not to single or “once-off” purchases. These provisions require that after an end user has first responded to a PRS promotion, they must receive an SMS from the PRS provider setting out details of the recurring cost of the PRS, and instructions on how to subscribe to the PRS. In this manner, end users who wish to subscribe must clarify their intention (i.e. enter a contract, typically of indefinite duration) by sending a confirmatory SMS from their handset to the PRS provider – hence the “double opt in” title.
- 19 ComReg consulted on whether it should introduce a price threshold for subscription services, below which the current “double opt-in” requirements would not apply or may apply in a modified manner. It also set out its preliminary position not to introduce such a threshold and its rationale for adopting this position.
- 20 Respondents were broadly in favour of ComReg’s preliminary position to maintain the *status quo* and not to introduce a threshold below which the “double opt-in” provisions would not apply or would apply in a modified manner.

- 21 However, some respondents requested ComReg to consider that the “double opt-in” requirements should not apply to certain classes and types of PRS, such as charitable donations and those that are charged through “direct-carrier-billing” (“DCB”). These matters are addressed in Section 3 of this Response to Consultation. ComReg is not minded to exempt any class or type of PRS at this time but highlights the provisions of Section 3.3 of the Code which permit PRS providers to meet the provisions of the Code by alternative means, subject to approval from ComReg.
- 22 Accordingly, ComReg has decided not to change the current provisions of the current Code pertaining to subscription PRS and the existing “double opt-in” provisions, set out in Sections 5.13 to 5.18, inclusive, will be retained.

2.6 Future Reviews of the Code

- 23 ComReg is committed to keeping the provisions of the Code under review and may consult on existing provisions or any potential new provisions to ensure that it remains appropriate as the PRS market evolves.
- 24 ComReg is particularly mindful of the enactment of the European Consumer’s Rights Directive⁶ (“CRD”), which was transposed into Irish Law as European Union (Consumer Information, Cancellation and Other Rights) Regulations, 2013⁷ (“Consumer Rights Regulations”) and which will come into force on 13 June 2014. ComReg has been given enforcement powers under these regulations, the provisions of which may have particular relevance for PRS as it lays down the information requirements for distance and off-premises contracts, including information about the functionality and interoperability of digital content. The Consumer Rights Regulations also specify obligations in respect of the right of withdrawal (length of the withdrawal period, procedure and effects of the withdrawal) that must be provided by traders (which includes PRS providers) and may be used by consumers to notify them of their withdrawal from the contract.
- 25 ComReg will keep the impact of the commencement of these Regulations on the PRS industry under review and, as required under Section 15 of the PRS Act, ComReg will consult with PRS providers, other interested persons and, as it considers relevant, other regulatory bodies in the State, should it consider it appropriate to introduce any further amendments to the current Code.
- 26 Because the changes to the current Code are for the purpose of clarifying the existing provisions and do not introduce any new provisions, ComReg has not considered it necessary to notify these amendments to the European

⁶ Directive on Consumer’s Rights – (Directive 2011/83/EU) of the European Parliament and of the Council of 25 October 2011

⁷ SI 484 of 2013

Commission⁸ prior to their commencement on 03 June 2014.

⁸ Pursuant to the provisions of Article 8 of Directive 98/34/EC as amended by Directive 98/48/EC

3 Consultation Issues

- 27 The current Code was introduced on 5 June 2012 and came into force in full on 25 July 2012. ComReg's stated approach is to monitor developments and practices in the PRS industry in order to ensure the Code remains relevant and appropriate in the PRS market.
- 28 Since the introduction of the current Code ComReg identified two areas, Sections 4.8 and 5.20 of the Code, where it considers that the provisions might be slightly amended so that ComReg may better meet its statutory objective to protect the interests of end users of PRS. In addition, ComReg consulted on whether a threshold value should be introduced below which the "double opt-in" requirement set out in Sections 5.15 to 5.18 of the current Code would not apply or might apply in a modified manner. These matters are developed in greater detail below.

3.1 Section 4.8 – Price Transparency

3.1.1 Description of the Issue

- 29 In its consultation document⁹ (), ComReg set out the provisions of Section 4.8 of the current Code, which are intended to ensure that end users of PRS are "*informed clearly, comprehensively and unambiguously of the full and true cost of a using a PRS prior to incurring any charge*". ComReg also highlighted, however, that because some PRS providers may need to send a number of reverse-billed¹⁰ premium SMS in order to charge the end users the required amount for the PRS, this can lead to charges being presented to end users in terms which they are not accustomed to and are not typical for other retail purchases.
- 30 ComReg cited the example where a PRS provider, which charges €12.50 for its PRS may need to send the end user five individual reverse-billed SMS at a cost of €2.50 each. While, theoretically, there is nothing wrong with this, in practice ComReg has encountered the price being represented as:

"5 x €2.50"

rather than stating the normal retail price of

"€12.50"

⁹ ComReg Document 13/84

¹⁰ "Reversed-billed" or "MT-billed" (standing for "mobile-terminated") SMS is a mechanism whereby a consumer is charged for receiving a message at the retail level. The opposite of this is Mobile Originated (MO) Billing where the consumer is charged for sending an SMS

Presenting the price in such a manner has, in some instances, led to confusion as some end users do not comprehend the true price of the PRS. Some end users who contacted ComReg believed that they would receive five items for a total of €2.50 rather than receiving one item at a cost of €12.50 (which was charged by the PRS provider sending five reverse-billed premium SMS at a cost of €2.50 each).

- 31 While the provisions of Section 4.8 of the current Code allow for PRS providers to inform end users of how many SMS will be required to complete the transaction, this information is intended to be supplementary information to the total price and not a substitute to a clear and unambiguous total cost. Accordingly, ComReg proposed clarifying the provisions of Section 4.8 of the current Code to ensure that end users are first and foremost provided with the total cost of the PRS.

3.1.2 Views of the Respondents

- 32 The submissions received to ComReg's proposals to amend Section 4.8 of the current Code were broadly welcomed. Vodafone, RTE and Three all concurred with the proposals, while eircom agreed with the aim of the proposals but also submitted that further enhancements should also be introduced.

- 33 In particular, eircom proposed that the premium rate shortcode associated with the PRS should be included with the pricing information in all promotions. eircom highlighted that with 39% of end users of PRS¹¹ are unaware that they may be charged for receiving a premium rate SMS and submits that:

"This provides further justification for advising end users not only of the charge but also the code associated, so as to ensure that end users are alerted to a change [sic] being incurred and to assist end users in detecting issues such as the receipt of excessive messages from these short codes."

- 34 Specifically, eircom proposed the inclusion of the following provisions, (note: eircom's proposals are set out in blue text), in the revised Section 4.8(c)(iv) of the Code:

*"(iv) the **premium charge price per message received or sent**, and the number of messages required to complete the transaction **while associating the short code associated with the premium charge.**"*

- 35 eircom also proposed that Sections 5.14 (f), 5.17, 5.21(e)(i) and 5.22 are similarly amended to require the inclusion of the shortcode with the cost per message received and/or sent along with pricing information.

¹¹ Figures provided from Quantitative Research conducted by Ipsos MRBI on behalf of ComReg - <http://www.comreg.ie/fileupload/publications/ComReg1151a.pdf>

3.1.3 ComReg's Views and Conclusions

- 36 ComReg welcomes the support it has received for its proposed amendments to clarify the pricing requirements set out in Section 4.8 of the current Code. In relation to eircom's submission that ComReg mandate that the shortcode associated with the PRS should also be included with pricing information, ComReg sees merit by qualifying the cost of a PRS to include details, in Section 4.8(c)(iv), of the cost per messages "**received or sent**". This proposal is supported by the conclusions from the Quantitative Research, previously published by ComReg¹², insofar as a substantial number of end users were unaware that they could be charged for receiving a premium SMS.
- 37 However, it is not entirely evident that eircom's proposals to mandate the inclusion of the shortcode with the pricing information is justified based on the evidence to hand. While ComReg is not opposed to the proposal, it is mindful that it did not specifically consult on the matter and considers that the wider industry is required to make submissions before such a requirement could be introduced.
- 38 Nonetheless, ComReg undertakes to conduct further research to determine the level of awareness amongst the public about reversed-billed charges, to include, whether end users associate shortcode numbers in a promotion with the subsequent incurrance of a premium rate charge. Pending the finding of the research, ComReg will consult on the whether there is a requirement that the shortcode is included with pricing information in all promotions for PRS in a future review of the updated Code.
- 39 Further to the above, ComReg has decided to amend the provisions of Section 4.8 of the current Code, as proposed in its Consultation, and to partly adopt eircom's proposed amendment to Section 4.8(c)(iv) to include reference to a charge per message "received or sent". Section 4.8 of the updated Code is attached at Annex 1, while included below is a tracked version of Section 4.8 setting out the existing provisions of Section 4.8 in black text, ComReg's original proposals to amend these provisions in red text with any additional amendments based on the submissions received set out in blue text:

4.8 (a) PRS Providers must ensure that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge. ~~To this end, PRS providers are required to ensure that:~~

(b) Costs must be presented in Euro, inclusive of VAT unless no VAT applies, and include the Euro symbol (€) or, where that is not possible, use the word

¹² http://www.comreg.ie/_fileupload/publications/ComReg1151a.pdf

"EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"

~~(a) charges and prices are inclusive of VAT, where appropriate,~~

~~where applicable,~~ (c) Without prejudice to the generality of the requirement imposed by Section 4.8(a) above, PRS providers must, where appropriate, provide the following information ~~is conveyed in a transparent, prominent and clear manner:~~

(i) any costs, additional to the cost of the service, relating to delivery or other charges,

(ii) any sign-up cost,

(iii) that **additional** network data charges may apply,

(iv) the price per message **sent and/or received** and the number of messages required to complete the transaction

(v) the duration of any "free" or discounted period and the relevant charges that will apply thereafter, and

(vi) if it is a Subscription Service, the charge per period and that charge period,

~~(c) as appropriate, that prices are presented in the form:~~

(vii) ~~(i) the~~ **numerical price per minute for time based/charged services,** or ~~(ii) the total cost to the end-user and, if applicable, include the minimum duration of the call necessary to participate, or (iii) whichever of (i) or (ii) is most relevant to the end-user making an informed decision to proceed with a transaction, and~~

(vii) ~~(d) in respect of voice services the required pricing information for voice services states the price relates to rate for callings from the Eircom network and that calls from other networks may be higher, and .~~

~~(e) values in Euro include the Euro symbol (€) or, where that is not possible, use the word "EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"~~

3.2 Section 5.20 – Regulatory Reminder Messages

3.2.1 Description of the Issue

- 40 ComReg set out in Consultation 13/84 that the clear intention of Section 5.20 is for end users to be provided with periodic regulatory updates, each time they spend €20, in order to remind them that they are subscribed to a PRS and, if they wish to do so, how to cancel their subscription and associated charges.
- 41 ComReg also highlighted, however, that where multiples of the periodic cost of a PRS does not fall precisely on €20 then the end user may not receive a regulatory reminder SMS until they have incurred charges in excess of the intended €20 interval. For example, if the weekly cost of a PRS is €8, as was the case with some PRS providers which ComReg found did not comply with the provisions of the Code, then the end user may not receive the regulatory reminder message until after the charges for the third week of the PRS have been applied, resulting in the reminder message being received when the end user has incurred charges of €24 (i.e. 3 weeks x €8/week).
- 42 Accordingly, ComReg proposed amending Section 5.20 of the current Code to clarify that the regulatory update messages must be received by end users at intervals no greater than €20. This proposal also afforded greater flexibility to PRS providers to structure their charges as they see fit without having to comply with the precise requirement to send the regulatory update messages at each €20 interval.

3.2.2 Views of the Respondents

- 43 Three, RTE and Vodafone supported ComReg's proposed amendment to Section 5.20 and considered that specifying a maximum €20 spend interval between each regulatory reminder message maintained an appropriate level of consumer protection but also allowed greater flexibility to PRS providers to structure their recurring charges as they saw fit.
- 44 Vodafone drew a distinction between "*premium rate SMS and voice services, which generate significant volumes of consumer complaints, and new and emerging services also within the scope of the definition of PRS – particularly Direct Carrier Billing (DCB)...*". Vodafone submitted that these DCB services are not a source of significant consumer complaints and, "*in the interests of maximising regulatory certainty*", requested to ComReg confirm that the provisions of Section 5.20 of the current Code do not apply to DCB services.
- 45 Likecharity and Fundraising Ireland submitted that recurring donations made by premium SMS would have more onerous obligations to provide periodic opt-out (unsubscribe) details when compared to recurring direct debit and credit card

donations, for which no such recurring reminders are required. However, both submissions also stated that *“in the billing receipt message, the donated amount and billing frequency be it one off or recurring is displayed in the message. In the case of recurring SMS donations all end users are given the option to text STOP at given time (sic) thereby ending their recurring donation to their chosen charity.”* It is not entirely clear from this extract (which is identical in both submissions), if it is the case that each billing message receipt includes details of how the end user may unsubscribe. If end users are informed that they are subscribed to a PRS and how they may cancel that subscription in each and every message they receive then, subject to obtaining approval from ComReg under the provisions of Section 3.3 of the current Code, this would appear to have the effect of meeting the requirements of Section 5.20 of the current Code and there would be no requirement to send an additional regulatory reminder message after the end user has incurred costs of €20.

46 Likecharity further submitted that:

- a. all charitable fundraising material complies with the regulations by displaying unambiguously and prominently the full amount being charged to the end user (ComReg notes that the amount being charged to the end user may not be the same as the amount that is donated to the charity), and
- b. there is no evidence that charitable donations collected by premium SMS pose a significant risk to consumers and ComReg’s current position appears contrary to the Government-established Forum on Philanthropy, which identified the need to *“...support the development of an infrastructure in relation to giving by ensuring that there is a spectrum of giving opportunities suited to individuals’ preferences and circumstances.”*

47 eircom agreed in principle with the proposed amendment but envisaged difficulties arising because of how the revised Section 5.20 was drafted in the Consultation. In particular eircom stated that:

- a. ComReg’s proposed amendments placed the onus on the end user **receiving** regulatory update messages at intervals not exceeding €20 however, the ultimate delivery of such messages is often beyond the control of all parties in the “value chain” and, as such, ComReg should retain the obligation for PRS providers to **send** regulatory update messages at intervals not exceeding €20, and
- b. PRS providers may structure their charges such that regulatory reminder messages are sent to (and received by) end users on or below the €20 interval but, while complying with the amended requirements of the

updated Code, the PRS provider may, with mal intent, also chose to apply a partial charge on end users before sending the regulatory update message to the end users detriment. For example, if the weekly charge of a PRS is €6, which is charged as 3 x SMS at €2 each, then the requirement would be for the PRS provider to send subscribers a regulatory update message after the third week's charges i.e. after the end user has incurred €18 costs. However, the PRS provider could chose to send one additional €2 SMS from the fourth week's charges before sending the regulatory update message. In this manner, if the end user unsubscribed after receiving the regulatory update message, then they would have incurred an additional €2 charge for which they may not have received any PRS (i.e. they only partially paid for the fourth week's PRS) while the PRS provider would have complied with the provisions of the Code.

- 48 Accordingly, eircom submitted an alternative draft of Section 5.20 to that proposed by ComReg in its consultation.

3.2.3 ComReg's Views and Conclusions

- 49 ComReg notes Vodafone's submission that PRS which are charged using DCB are distinguishable from PRS that are charged using premium SMS insofar as it claims that "*DCB service are not a source of significant consumer complaint....*". However, ComReg is also mindful that DCB services are a relatively new development in the PRS industry and it remains to be seen what level of consumer complaints may be generated when this technology becomes more prevalent. Notwithstanding that the scope of PRS regulation was not a matter for consultation, ComReg notes Vodafone's submission that it may have anecdotal evidence that PRS charged in this manner give rise for less consumer complaints. However, it does not appear to ComReg that this provides a fundamental basis, at this time, for exempting DCB from the provisions of the updated Code.
- 50 In relation to Vodafone's submission, ComReg is also mindful of the following:
- a. Section 3.3 of the current Code provides that where a PRS provider satisfies ComReg that any requirement of the Code can be adequately met by alternative means to that specified in the Code, ComReg may permit such alternative means to be used by the PRS provider. Accordingly, if Vodafone, or any other PRS provider, considers that the promotion and operation of their PRS offers equivalent protections to those that exist in the updated Code, it may apply to ComReg to use alternative means. Periodic updates, which remind end users that they are subscribed to a PRS and how to unsubscribe from it, are considered valuable tools to allow end users to monitor and control their expenditure.

- b. ComReg considers that providing end users with regulatory updates, which will assist them in monitoring their costs, is not overly burdensome and, having regard for ComReg's requirement to act in a non-discriminatory manner, there are no apparent grounds to support exempting a class of PRS (i.e. DCB) from this requirement at this time.
- c. In light of the commencement of the Consumer Rights Regulations¹³ in June 2014, under which ComReg has been granted enforcement powers, ComReg will review the impact that this legislation may have on the PRS industry. In particular ComReg will review the information that must be provided to consumers for distance contracts (into which category PRS generally fall), including the right of withdrawal that must be provided by traders (which includes PRS providers) and that may be used by consumers to notify their withdrawal from the contract. Any amendments to the updated Code that ComReg may consider appropriate pursuant to the commencement of the Consumer Rights Regulations will be subject to ComReg's consultation process.

51 With respect to the submissions received from Likecharity and Fundraising Ireland, ComReg is mindful of the requirements for charitable donations in the UK where the practice is more widespread and developed than in Ireland. In that jurisdiction, the regulator PhonepayPlus ("PPP"), in conjunction with the charities sector, conducted a pilot programme (initially for six months but which was extended to eighteen months) which, for the purpose of donating money via a premium rate text shortcode on an on-going subscription basis (i.e. a subscription basis), permitted:

- a. the use of a SKIP facility i.e. allowing subscribers to text SKIP to miss a month's subscription payment, but without opting out of (unsubscribing from) the ongoing donation entirely, and
- b. the dis-application of the requirement in the Code to remind consumers of the STOP command each month, by replacing it with a requirement to remind consumers every three months, and
- c. exempting PRS-based charitable donations operating on a subscription basis from the requirement to seek permission to operate where the donation exceeded £4.50 in any given seven-day period i.e. the double opt-in requirements would not apply to subscription charitable donations during the pilot programme.

52 This pilot programme permitted PPP to identify potential risks to consumers and to allow a broader, longer set of data to accumulate. At the same time,

¹³ Which transpose the Directive on Consumer Rights (Directive 2011/83/EU) of the European Parliament and of the Council of 25 October 2011

PPP commissioned further research into PRS-based charitable donations. At the conclusion of the pilot programme, PPP published a “*Statement of Application In relation to charitable donations, the STOP command and SKIP functions*”, which establishes the following provisions for charitable donations via PRS:

- a. threshold for double opt-in requirements raised to £10 in any given seven-day period rather than the normal £4.50 in any seven-day period, and
- b. the use of the SKIP instruction to allow end users to forego a scheduled monthly payment, and
- c. the monthly SKIP instruction must be sent 24 hours prior to when the consumer is due to be charged, and
- d. details of the STOP command (i.e. how end users may cancel their subscription) must be sent every three months rather than every month, and
- e. where an end user uses the SKIP command in three consecutive months, they must send details of the “STOP” instruction.

53 While it is clear that, consequent to a successful pilot programme, PPP has modified certain provisions of its Code as they apply to charitable donations, but the following is noteworthy:

- a. the “double opt-in” requirements have not been completely removed but the threshold for charitable donations by SMS is raised to £10 in any seven-day period, and
- b. the SKIP instruction must be sent to each subscriber on a monthly basis and the STOP command must be sent to each subscriber every three months. This is potentially more burdensome than the provisions of Section 5.20 of ComReg’s updated Code. If a subscriber were to donate €5 per month, for example, the updated Code would require that the regulatory reminder message to be sent after every fourth month.

54 ComReg is amenable to working with industry in accordance with the provisions of Section 3.3 of the updated Code, which allows PRS providers to meet the provisions of the Code by alternative means. ComReg is mindful of Likecharity’s submission that “*all charitable fundraising material, in strict adherence to the current regulations, displays unambiguously and prominently, the full amount being charged to the end user*”. However, Likecharity cannot guarantee the accuracy and transparency of the fundraising promotions throughout the entire industry and seeking approval to meet the requirements of the updated Code by alternative means, in accordance with the provisions of Section 3.3 of the updated Code, would appear to a more prudent option while

the public becomes more aware of and more confident in using this relatively new technology.

- 55 Having carefully considered the submissions received, ComReg has decided to amend its proposed draft of Section 5.20 to accommodate, in part, eircom's submission that the regulatory update messages may not be received by the end user for reasons that are outside the control of the PRS providers in the value chain. However, ComReg has also decided not to completely remove the obligation on the PRS provider to make its best endeavours to ensure that its charging structure and technical systems are such that the end users are more likely than not to receive the regulatory reminder messages at intervals of €20, or some lesser amount. Accordingly, ComReg has decided to amend its proposed draft of Section 5.20(b)(ii) as follows (note: the existing provisions of Code are in black text, ComReg's original proposals to amend these provisions are set out in red text with any additional amendments based on the submissions received set out in blue text):

(b) Such Regulatory Update messages must

[..]

(ii) be sent such that it is likely to be received by an end user each and every time an end user spends a total of €20 or some lesser amount, on the subscription Service and..."

- 56 In this regard, when considering whether to take any compliance action in relation to the failure to send regulatory update messages at the correct interval, ComReg will consider the cost of the PRS and the frequency of regulatory update messages it has sent. For example, if a PRS costs €8 per week, ComReg would expect the overwhelming majority of end users to receive regulatory update messages every fortnight (i.e. after the second week's charges have been imposed and the end users have incurred €16 costs). Similarly, in the case of a weekly charge of €7 per week, ComReg expects that end users should receive regulatory update messages each time they spend €14 and, in the case of a subscription PRS costing €6 per week, ComReg would expect that end users should receive regulatory update messages every third week i.e. when the end users has incurred charges of €18.
- 57 If, on occasion, and for reasons beyond the PRS providers control, such as the end user being out of coverage or roaming abroad, the end user does not receive a regulatory reminder message or if it is received late (i.e. after a further weekly charge has been imposed), ComReg will have cognisance for the number of end users affected and the number of times the matter has occurred. For example, if it is an isolated incident this would suggest that there is nothing untoward happening. However, if a number of end users do not receive their

regulatory update messages at the required interval, and if this is a recurring problem, then this would suggest that the PRS provider has not structured its PRS in a manner that does, in normal conditions, comply with the revised provisions of Section 5.20 of the updated Code.

- 58 ComReg accepts the potential issues that eircom raised in its submission with respect to the possibility that PRS providers could choose to send regulatory update messages having partially charged for the upcoming week's service e.g. sending the regulatory update message after €20 in circumstances where the PRS costs €8 per week. In this way, if the end user unsubscribed after receiving the regulatory update message they would have paid for two and a half week's services and may not, therefore receive anything for the extra €4 for which they have incurred (i.e. 2 x €8/week + €4) a charge.
- 59 ComReg, however, would like to highlight the provisions of Section 3.18 of the updated Code which is relevant in such circumstances and which state

“Without prejudice to Section 13 of the 2010 Act, end-users must not be charged in respect of PRS, or parts thereof, that were not supplied, “.

In this regard, it would not be acceptable that a PRS provider would arrange the provision of it PRS such that it sends the regulatory update message before the full charges for that charge period had been imposed e.g. if the charges for the period were €8 per week then the regulatory message can only be sent at €8 intervals. As such and to save sending regulatory reminder messages after each weekly charge, the PRS provider can then select the appropriate number of charge periods after which to send the messages. Nonetheless, for the avoidance of doubt, ComReg has decided to amend its proposals in relation to Section 5.20(c) as follows (note: ComReg's original proposals to amend these provisions are set out in red text with any additional amendments based on the submissions received set out in blue text):

“(c) be sent only after the full charges for that charge period have been imposed and at a time that allows an end user a reasonable period of time within which to unsubscribe before any further charges are incurred”

- 60 Further to the above, a tracked version of ComReg's decision to revise Section 5.20 of the current Code is set out below and the new updated version is attached at Annex 1 (note: the existing provisions of code are in black text, ComReg's original proposals to amend these provisions are set out in red text with any additional amendments based on the submissions received set out in blue text):

“5.20 (a) For Subscription Services, ~~every time an end-user has spent a total of €20 on the Subscription Service a~~ PRS providers must ensure that end

users receive periodic Regulatory Update Message, containing the information set out in Sections 5.21 and 5.22

(b) Such Regulatory Update messages must be sent:

- (i) ~~be sent~~ via a free standard SMS,*
- (ii) such that it is likely to be received by an end user each and every time an end user spends a total of €20 or some lesser amount, on the subscription Service, and*
- (iii) only after the full charges for that charge period have been imposed and at a time that allows an end user a reasonable period of time within which to unsubscribe before any further charges are incurred.”*

3.3 Price Threshold for Subscription PRS

3.3.1 Description of the Issue

61 In its consultation document (ComReg Document 13/84), ComReg set out the context and background which precipitated the introduction of the “double opt-in” requirements in the current Code. The “double opt-in” requires that after initially indicating their intention to subscribe to a PRS by responding to a promotion:

- a. The end user must first receive an SMS setting out the cost of the PRS and the keyword that must be sent to the PRS provider in order to subscribe, and
- b. the end user is then required to send an SMS with the PRS provider’s designated “keyword” from their handset in order to complete the subscription.

62 The purpose of these provisions is to provide a greater level of consumer protection than previously existed by:

- a. ensuring that end users are clearly made aware of the recurring cost of the PRS in the first SMS they receive from the PRS provider, and
- b. providing a verifiable audit trail that allows ComReg to determine whether an end user did, in fact, respond to the initial SMS by sending an SMS of their own, thereby confirming their intention to subscribe.

These proposals ensure that end users are provided with a standard level of price clarity for subscription PRS and that ComReg has the means to verify whether or not an end user had subscribed to a PRS.

- 63 ComReg's preliminary view was that the introduction of any threshold value and subsequent removal, or modification, of the existing "double opt-in" requirements should not have the effect of reducing the price clarity provided to consumers and the means of verifying a subscription available to ComReg, end users and PRS providers.
- 64 ComReg then set out a number of factors which influenced its preliminary position on:
- a. not introducing a price threshold below which the "double opt-in" requirements set out in the Code would not apply, and
 - b. not introducing a price threshold below which the "double opt-in" requirements might apply in a modified manner.

3.3.1.1 Various Means of subscribing

- 65 PRS can be advertised across many media platforms including TV, radio, print, online, and direct marketing messages sent ("pushed") to end user handsets. ComReg has, therefore, to consider whether it would be appropriate to introduce a threshold value below which the "double opt-in" requirements would apply or might apply in a modified manner in respect of subscription PRS that are accessed on any or all of these platforms.
- 66 **Online Subscriptions** – the provisions of the current Code addressed the difficulties that ComReg had in determining whether an end user had, in fact, subscribed to a PRS by first entering their MSISDN (i.e. mobile phone number) online. Therefore, it would not be acceptable that ComReg would revert to the wholly unsatisfactory situation that existed before the current Code was fully introduced in July 2012.
- 67 **Mobile Browsing** – some PRS providers have access to MSISDN forwarding, whereby a consumer's contracted Mobile Network Operator ("MNO") passed the consumer's MSISDN to a PRS provider in order to facilitate the end user purchasing a PRS without the end user having to enter their MSISDN into a web form. MSISDN forwarding could allow some end users to subscribe to a PRS with a click of a button but since it the facility is not available to all PRS providers, this would mean that some end users would have to:
- a. submit their MSISDN in some instances, while not in others, where the PRS provider was not afforded MSISDN facilities by the end user's MNO, and
 - b. submit their MSISDN in some instances, if the PRS exceeded any set threshold value, regardless of whether the PRS provider had MSISDN forwarding facilities available to it.

As a result of these potential inconsistencies, ComReg proposed not to introduce a threshold value below which the “double opt-in” requirements would not apply or might apply in a modified manner for subscriptions that are commenced through a mobile handset.

- 68 **Television / Radio** – ComReg set out that previous experience had shown that the pace of TV ads made it difficult for end users to extract the material information that would allow them to make an informed transactional decision. For this reason, ComReg’s preliminary position was that the current “double opt-in” requirements should apply and should not be modified, regardless of the price of a PRS promoted through TV or radio advertising.
- 69 **Print** – Although PRS promotions that appear in print would, typically, afford end users the opportunity to more closely examine the terms and conditions of the PRS than promotions on other media platforms, ComReg did not consider that it would be in the end user’s interest to have a varied, inconsistent regulatory approach were it to remove or relax the current regulatory requirements in respect of print promotions and not to other types of promotions. ComReg also felt that were it to introduce a threshold value for print promotions, below which the “double opt-in” requirements would apply in a modified manner, this could pose problems for ComReg in determining whether a breach of the Code had, in fact, occurred. For example, a PRS provider may publish the same promotion on different media platforms for which different provisions would apply i.e. if the “double opt-in” requirements were removed or relaxed in respect of PRS below a certain threshold that are promoted in the print media, it would leave ComReg in an invidious position as it would be unable to determine if the end users responded to a promotion on a media platform, such as a TV advert, to which the “double opt-in” requirements did apply.
- 70 In summary, a varied or inconsistent regulatory approach, introducing a threshold value below which the “double opt-in” requirements would not apply or may apply in a modified manner, for PRS promoted on some media platforms but not others would potentially cause confusion for end users, PRS providers and ComReg.

3.3.1.2 Recent Industry Practices

- 71 ComReg also set out recent industry practices that it considered, both individually and collectively, would not support the relaxing or removal of the current provisions which offer a reasonable level of consumer protection. ComReg expanded on the practices of affiliate marketing whereby PRS providers, in effect, outsource the promotion of their PRS to parties with which they have no direct relationship. In a similar manner to industry practices in the UK, ComReg has found that affiliate marketers have strong incentives to drive

consumers to purchase some PRS through the use of misleading digital marketing practices which are intended to mislead the end user into unknowingly engaging with a PRS, such as:

- a. Typosquatting, sometimes known as “URL hacking” or “cybersquatting”, is a practice which involves registering internet domains that are intentionally misleading to consumers. Misspelt domain names, such as “Dacebook” instead of Facebook, “Twitter” instead of Twitter and “Wikapedia” instead of Wikipedia, are registered in order to redirect consumers away from their intended destination, leading them to web pages that imitate or resemble that destination.
- b. Clickjacking which is often referred to as “User Interface (“UI”) readdress attack” and is designed to hijack mouse clicks from one webpage, redirecting users to a different webpage, possibly hosted on a different domain. Essentially, the user is unknowingly redirected away from their intended destination. Users will often be unaware of the exploit as the link to the webpage they arrive at may be disguised as something else.
- c. “*Likejacking*” is a practice that has emerged with the growth in popularity of social media platforms such as Facebook and is a form of Clickjacking aimed at tricking users into ‘liking’ something they did not intend to.
- d. Banner ads, pop-ups and pop-unders are forms of online advertising intended to attract traffic to a website where consumers can be enticed to click on a banner ad, pop-up or pop-under under false pretences with some advertisers stating that consumers have “won an iPad”, or similar, on a pop-up in order to encourage them to pursue a link when in reality they have not yet won anything.

3.3.1.3 Consumer Care Statistics

72 ComReg highlighted that there was no significant change in the total number of PRS-related issues raised with ComReg by end users of PRS. However, of those issues that warranted a formal investigation by ComReg, more than 50% are related to PRS that appear not to have a “double opt-in” mechanism in place, contrary to the requirement of the Code.

73 In the context of these statistics, where end users clearly have some difficulty identifying a PRS, ComReg stated that it is difficult to advocate why it should contemplate relaxing the current “double opt-in” provisions which guarantee a level of price transparency, albeit only in respect of subscription PRS.

3.3.1.4 Meeting the Code by Alternative Means

74 ComReg highlighted the provision of Section 3.3 of the current Code which

allows PRS providers to apply to ComReg to use an alternative means of providing the same level of consumer protection and transparency as provided for in the current Code.

- 75 In this regard, ComReg also highlighted an Information Notice¹⁴ that it published in April 2013 which allowed PRS providers to use a third party PIN verification system in lieu of the “double opt-in” requirements set out in Sections 5.13 to 5.15 of the current Code. ComReg has granted such permission to a PRS provider, details of which it published¹⁵ on its PRS-related website, www.phonesmart.ie, under the “Code of Practice” tab. This option is relevant in the context of relaxing or removing the “double opt-in” requirements set out in the Code.

3.3.1.5 Considerations in respect of setting a threshold

- 76 In the consultation document (ComReg Document 13/84), ComReg set out that the removal or modification of the current “double opt-in” requirements below a set monetary threshold would reduce the level of engagement required for an end user to subscribe to those PRS that fell on or below the threshold and, as such, could also potentially lead to greater numbers of end users inadvertently subscribing.
- 77 Introducing a threshold value below which the “double opt-in” requirements would not apply, or might apply in a modified manner, is to suggest that the cost of the PRS is sufficiently insignificant so as not to warrant the protection that is afforded to end users by these provisions. In other words, the cost of the PRS does not warrant the end user taking the time or trouble to explicitly acknowledge their intention to contract and a single-step subscription acknowledgement would suffice. This approach, however, overlooks how some end users view the cost of PRS and assumes that there is a uniform approach and attitude to PRS costs from all end users.
- 78 Previous quantitative research published by ComReg¹⁶ illustrated that end user reactions vary greatly if they feel that they have suffered harm or been wronged. As such, it is reasonable for ComReg to assume that any threshold amount, below which the “double opt-in” requirements would not apply or may apply in a modified manner, would vary from end user to end user depending on such factors as age, gender, social class, disposable income, etc. In this context, the selection of a price threshold would largely be an arbitrary exercise for ComReg.

¹⁴ Information Notice titled “The Use of Third Party PIN Verification Systems - Alternative Means of Complying with the Code of Practice”

http://www.comreg.ie/_fileupload/publications/ComReg1336.pdf

¹⁵ http://www.phonesmart.ie/Code_of_Practice/133

¹⁶ http://www.comreg.ie/_fileupload/publications/ComReg1151a.pdf

3.3.2 Views of the Respondents

- 79 Vodafone raised no objection to ComReg's proposal not to introduce a threshold value below which the "double opt-in" requirements would not apply or might apply in a modified manner. However, Vodafone again made a distinction between premium rate SMS-based services and those provided by DCB which Vodafone maintains are not "a source of significant consumer complaint." In this regard, Vodafone requested that ComReg "confirm that the Code of Practice provisions in respect of Double Opt-In are not intended to have any applicability to the types of DCB services" it previously outlined i.e. parking tolls, cinema tickets, etc.
- 80 eircom and RTE supported ComReg's proposals:
- a. not to introduce a threshold value below which the double opt-in requirements set out in the updated Code would not apply, and
 - b. not to introduce a threshold value below which the double opt-in requirements set out in the updated Code might apply in a modified manner.
- 81 Three supported ComReg's proposal not to introduce a threshold value below which the "double opt-in" requirements set out in the updated Code would not apply but would be supportive of the "double opt-in" requirements applying in a modified manner. In this regard, Three requested that ComReg consult separately on this matter and while it did not believe that any threshold must be equivalent to that in the UK (£4.50 in any seven-day period) it, nonetheless, believed that introducing some flexibility could stimulate an uptake in PRS demand at the threshold level.
- 82 The ODPC submission referred to a previous submission it had made to ComReg's last consultation¹⁷ on the Code of Practice. In this previous submission, the ODPC highlighted that:

"it would appear essential that a service provider abide by the principle of positive end-user consent in order to be able to defend themselves in any proceedings which may arise for an offence under Regulation 13 of S.I. 535 of 2003 (as amended). In that regard, it should be noted that Regulation 13(9C) of S.I. 535 of 2003 (as amended) places the onus on the defendant of establishing that a subscriber consented to the receipt of an unsolicited communication or call. The double opt-in requirements for Subscription Services would be of considerable value to a service provider who found themselves in the position of having to defend themselves in such proceedings."

¹⁷ ComReg Document 11/51

83 The ODPC submission further highlighted that S.I. 336 of 2011, which has superseded SI 535 of 2003, requires that “the onus of establishing that the subscriber or user concerned **unambiguously** consented to the receipt of the communication or call lies on the defendant” (emphasis added). The insertion of the word ‘unambiguously’ in the text above in relation to consent is intended to ensure that informed consent has been given by the subscriber or user concerned, that a record of that informed consent and how it was obtained has been kept, and that a copy of that informed consent is available if required during prosecution proceedings before a court.”

84 Finally, the ODPC expressed strong support for ComReg’s proposals not to introduce a threshold value below which the double opt-in requirements in the updated Code would not apply or might apply in a modified manner. Specifically, the ODPC stated:

“In summary, from the perspective of the ODPC, there is no credible case to be made for the dilution in any way, by the introduction of thresholds or otherwise, of the existing provisions in the Code of Practice with regard to the Double Opt-In requirements. The net effect of the introduction of threshold values would be to considerably weaken the data protection rights of those individual subscribers affected by the threshold values. Clearly there is no justification for the lessening of data protection rights on the basis of a threshold value. The ODPC therefore fully supports ComReg’s position not to introduce thresholds.”

85 Likecharity and Fundraising Ireland made similar submissions, which raised the following issues:

- a. the “double opt-in” requirements set out in the updated Code are onerous and unjustified, and
- b. there is no evidence that charitable donations through PRS pose a significant risk to consumers, and
- c. neither ComReg’s quantitative and qualitative research nor the Code of Practice considers fundraising through PRS, which has grown exponentially since both were published, and
- d. charities rely on their reputation to ensure ongoing fundraising and are not likely to risk their legitimacy by confusing or misleading donors or potential donors, and
- e. there is no evidence to support or justify charity donations being treated in the same manner as other PRS, including the provisions relating to “double opt-in”, and

- f. there is no evidence of consumer harm with regard to charitable PRS donations made following a TV or radio advert, and
- g. *“The effect of Double Opt-In on the fundraising capabilities is evident from the experience of charities that have used the LIKECHARITY platform. One well known Irish charity saw a loss of 92% of potential leads when they used the Double Opt-In mechanism. Finally if a donor has enough clarity to, in the first instance, donate then why do they need to confirm again?”*

3.3.3 ComReg’s Views and Conclusions

86 In response to Vodafone’s submission, ComReg’s previous response, set out in Section 3.2.3 above, is relevant as follows:

- a. ComReg is mindful that DCB is a relatively new development in the PRS industry and it remains to be seen what level of consumer complaints may be generated when this technology becomes more prevalent. As such, current low consumer complaint figures does not appear to ComReg an appropriate basis, at this time, for exempting DCB from the provisions of the updated Code, and
- b. Section 3.3 of the updated Code allows Vodafone, or any other PRS provider, to apply to ComReg for permission to meet the Code by alternative means if it considers that the promotion and operation of its PRS offers equivalent protections to those that exist in the updated Code, and
- c. ComReg considers that ensuring that end users provide their informed consent to subscribe to a PRS and that ComReg has a means of verifying this transaction are desirable and essential requirements and cannot be considered to be overly burdensome. Further, and having regard for ComReg’s requirement to act in a non-discriminatory manner, there are no apparent grounds to support exempting a class of PRS (i.e. DCB) from these requirements at this time, and
- d. in light of the commencement of the Consumer Rights Regulations¹⁸ in June 2014, under which ComReg has been granted enforcement powers, ComReg will review the impact that these regulations may have for PRS providers, in particular in relation to the information requirements that must be provided to consumers for distance contracts (into which category PRS generally fall), including the right of withdrawal that must be provided by traders (which includes PRS providers) and that may be used

¹⁸ Which transpose the Directive on Consumer Rights – (Directive 2011/83/EU) of the European Parliament and of the Council of 25 October 2011

by consumers to notify their withdrawal from the contract. If ComReg determines that further amendments to the updated Code are required pursuant to the commencement of these regulations, then the normal consultative process, where submissions from interested parties are sought, will be applied.

- 87 ComReg's comments on the flexibility afforded by the provisions of Section 3.3 are also relevant to the submission from Three in respect of permitting some modified approach to the "double opt-in" requirements set out in the Code below a certain threshold.
- 88 With respect to the submission from Likecharity and Fundraising Ireland, ComReg would like to emphasise the following:
- a. The double opt-in requirements were introduced to ensure that end users provided their informed consent to subscribe to a PRS and that ComReg would have verifiable evidence that such informed consent was unambiguously given. The submission from ODPC is relevant in this regard.
 - b. Despite the submissions that there is no evidence that charitable donations through PRS pose a significant risk to consumers, or that there is no evidence to support or justify charity donations being treated in the same manner as other PRS, there is also no evidence that this relatively new sector of the PRS industry will not be the source of consumer harm at some point in the future. Neither Likecharity nor Fundraising Ireland can oversee and provide assurance on the activities of all charities and/or their agents and while ComReg is amenable to positively appraising any specific proposals it may receive under the provisions of Section 3.3 of the updated Code, as to how the certain provisions may be applied to charitable donations, it is not minded to broadly dis-apply important consumer protections without some limitations or safeguards being in place.
 - c. ComReg commissioned some consumer research¹⁹ in September 2012, which included responses in relation to using PRS for charity donations. The relevant extracts from this research are included in Figures 1 and 2 below and indicate that, at the time the research was carried out, there was a discernible lack of trust among some consumers about using premium SMS for charitable donations. ComReg appreciates that, in the interim, attitudes may have changed as consumers become more accustomed to using this method of donating. However, it would be contrary to ComReg's objectives for ComReg to make a decision

¹⁹ Conducted by Ipsos MRBI - http://www.comreg.ie/_fileupload/publications/ComReg1151a.pdf
http://www.comreg.ie/_fileupload/publications/ComReg1151b.pdf

assuming that no harm will arise with this class of PRS without closer examination of the current position.

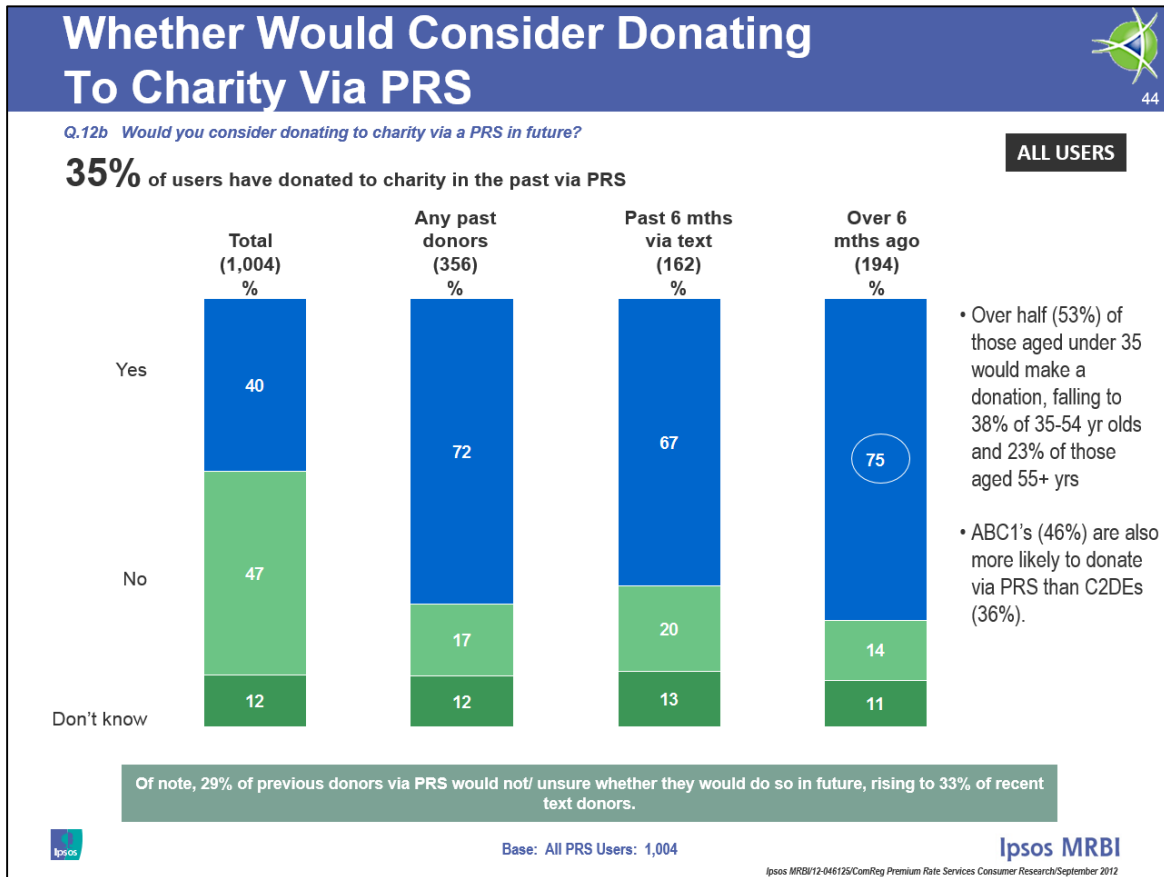


Figure 1: Whether Would Consider Donating to Charity via PRS

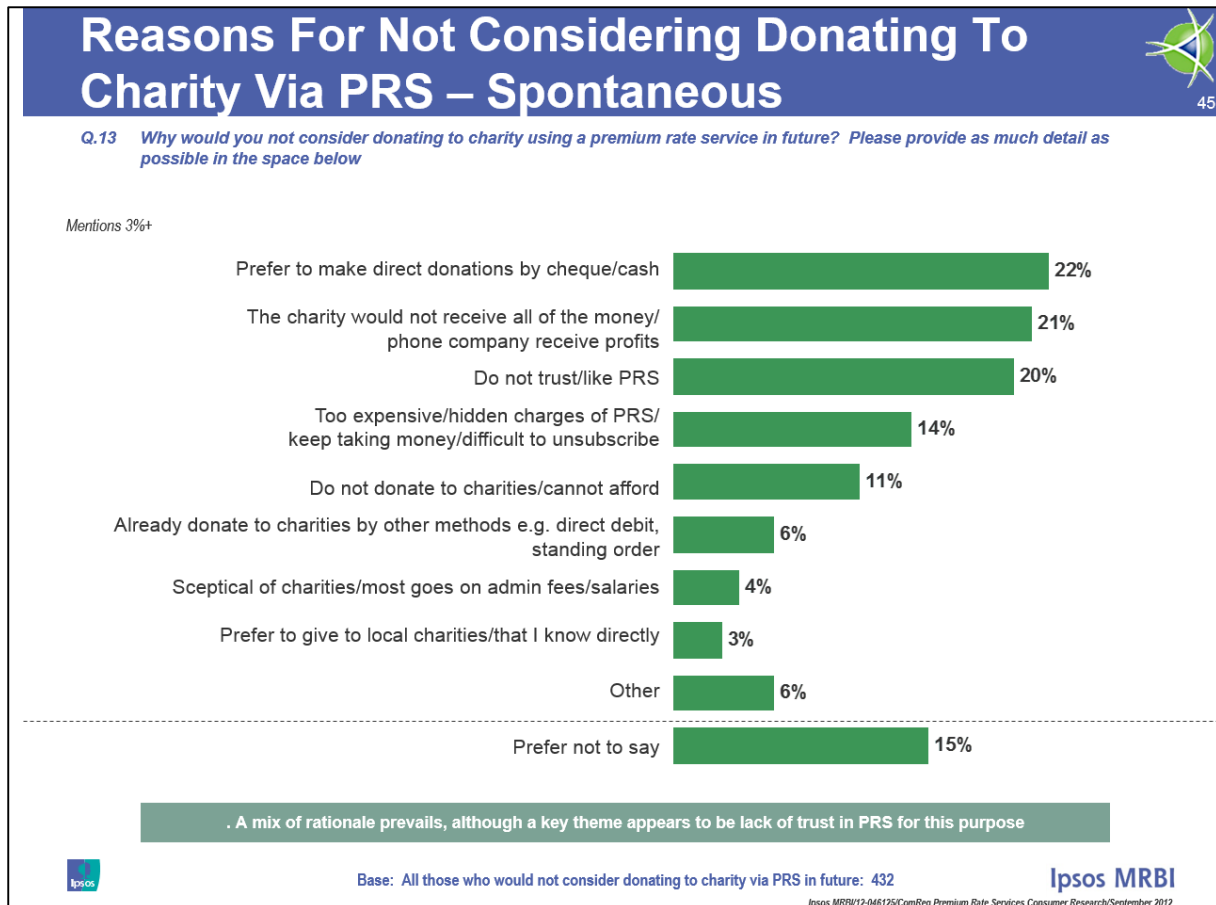


Figure 2: Reasons for Not Considering Donating to Charity via PRS

- d. ComReg is not suggesting or implying that a charity would knowingly mislead consumers but it, nonetheless, remains a clear possibility that a fundraising campaign may inadvertently omit material information that would be necessary for a consumer to make an informed transactional decision. Assuming that all charities have reasonable concerns for consumer interests, the provisions of the Code, which essentially require price transparency and providing end users with the ability to control their expenditure, cannot rationally be considered to be burdensome or onerous. It is noteworthy that PPP's market research²⁰ suggests that there is some evidence that consumers feel reassured once they know that the sector is regulated. In this regard, Likecharity and Fundraising Ireland do not appear to have considered the benefits that may accrue because consumers have confidence in a regulated market. ComReg also notes the Government's moves to establish a charities regulatory authority which ComReg will engage with to determine areas of common interest to both offices in the context of PRS having become an important fundraising channel for charities but one which may require high standards of

²⁰ Charitable Donations by Premium Rate – Research Findings PPP1203, July 2012 (ThinkTank on behalf of PhonepayPlus).

transparency and reassurance in order to persuade those who have never donated in this way.

- e. ComReg has no knowledge of Likecharity's experience with a "*known Irish charity*" which purportedly lost 92% potential leads when they used the "double opt-in" mechanism. In these circumstances, it is not possible for ComReg to comment other than to suggest that, as with any PRS, it may simply be that the end users did not wish to proceed to donate on a recurring basis rather than there being an issue with the process itself. In the absence of proper research control conditions being in place, it is incorrect to infer that those end users that did not subscribe, chose not to do so because of the additional confirmatory step required by the "double opt-in" provisions in the current Code.
- f. ComReg believes that the provisions of the current and updated Code protect the interests of end users of PRS by requiring price transparency and reasonable cost controls measures. Nonetheless, ComReg undertakes to commission further market research to elucidate consumer attitudes to charitable donations through PRS which will serve to inform any future amendments to the Code.

89 Having carefully considered all aspects of the submissions received, ComReg has decided:

- a. not to introduce a threshold below which the "double opt-in" requirements, set out in Sections 5.13 to 5.18 of the current Code would not apply, and
- b. not to introduce a threshold below which the "double opt-in" requirements, set out in Sections 5.13 to 5.18 of the current Code might apply in a modified manner.

4 Other Issues Outside the Scope of the Consultation

- 90 Likecharity has requested ComReg consider “*whether (donations) made to charities, which are by definition organisations that are not operating ‘for gain’ and are given without return consideration, come under the scope of the Regulations and the Code of Practice*”.
- 91 The scope of regulation is not addressed in this Consultation however, ComReg is currently considering a number of issues pertaining to the scope of PRS regulation, some of which were raised in its earlier consultation on the PRS levy.

5 Regulatory Impact Assessment

- 92 A RIA is an analysis of the likely effect of a proposed new regulation or regulatory change. The RIA should help identify regulatory options and should establish whether or not a proposed regulation is likely to have the desired impact. The RIA should also, in certain cases, suggest whether regulation is or is not appropriate. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 93 ComReg's approach to RIA is set out in the Guidelines published in August 2007 (ComReg Document No. 07/56 & 07/56a). In conducting this RIA, ComReg takes account of the RIA Guidelines²¹ adopted under the Government's "Better Regulation" programme.
- 94 Section 13(1) of the Principal Act²², as amended, requires ComReg to comply with certain Ministerial Policy Directions. Policy Direction 6 of February 2003 requires that before deciding to impose regulatory obligations on undertakings, ComReg must conduct a RIA in accordance with European and International best practice, and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme. In conducting the RIA, ComReg also has regard to the fact that regulation by way of issuing decisions, e.g. imposing obligations or specifying requirements, can be quite different to regulation that arises by the enactment of primary or secondary legislation.
- 95 In its consultation (ComReg Document 13/84), ComReg proposed:
- a. minor amendments to Sections 4.8 and 5.20 of the current Code. The proposed amendments do not change the original spirit or intent of the provisions but are merely aimed at providing greater clarity and transparency, and
 - b. maintaining the *status quo* by not introducing a threshold value below which the "double opt-in" requirements set out in Sections 5.15 to 5.18 of the current Code would not apply or might apply in a modified manner.
- 96 Accordingly, as ComReg did not propose to impose any regulatory obligations beyond what already existed, and for which a RIA was conducted, ComReg did not prepare a draft RIA in respect of its proposals.
- 97 In a similar manner, ComReg's decisions, set out above in this paper, do not impose any regulatory obligations beyond what already existed and, therefore, ComReg was not required to conduct a RIA.

²¹ See: http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf

²² Communications Regulation Acts 2002 to 2011

- 98 Because the changes to the current Code are for the purpose of clarifying the existing provisions, and do not introduce any new provisions or burdens, these changes have not been notified in draft to the European Commission prior to their commencement on 03 June 2014, pursuant to the provisions of Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998²³.

²³ OJ L 217, 5.8.1998

6 Next Steps

- 99 PRS providers will require a period of time to make such adjustments as are necessary to bring their PRS, and the associated promotions, into alignment with the new provisions of the updated Code. For that reason, ComReg has set aside a period of six weeks and, therefore, the updated Code will not come into effect until 03 June 2014.
- 100 The amended Sections 4.8 and 5.20, which are set out in Annex 1, will now be incorporated into the updated Code of Practice, which will be designated as “Version 2” and will bear the Decision Number 03/14, in accordance with the decisions set out in this Response to Consultation.

Annex: 1 New Provisions of the Code

Revised Section 4.8

“4.8 (a) PRS Providers must ensure that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using a PRS prior to incurring any charge.

(b) Costs must be presented in Euro, inclusive of VAT unless no VAT applies, and include the Euro symbol (€) or, where that is not possible, use the word "EUR" or "Euro". For charges less than €1, prices in cent must be presented as "€0.XX", "EUR 0.XX", "Euro 0.XX" or "cent"

(c) Without prejudice to the generality of the requirement imposed by Section 4.8(a) above, PRS providers must, where appropriate, provide the following information:

(i) any costs, additional to the cost of the service, relating to delivery or other charges,

(ii) any sign-up cost,

(iii) that additional network data charges may apply,

(iv) the price per message sent and/or received and the number of messages required to complete the transaction,

(v) the duration of any "free" or discounted period and the relevant charges that will apply thereafter, and

(vi) if it is a Subscription Service, the charge per period and that charge period,

(vii) the numerical price per minute for time based/charged services, or the total cost to the end-user and, if applicable, the minimum duration of the call necessary to participate, whichever is most relevant, and

(viii) in respect of voice services states the price relates to calls from the Eircom network and that calls from other networks may be higher.”

Revised Section 5.20

5.20 (a) For Subscription Services, PRS providers must ensure that end users receive a periodic Regulatory Update Message, containing the information set out in Sections 5.21 and 5.22

(b) Regulatory Update Messages must be sent:

- (i) via a free standard SMS,
- (ii) such that it is likely to be received by an end user each and every time an end user spends a total of €20 or some lesser amount, on the Subscription Service, and
- (iii) only after the full charges for that charge period have been imposed and at a time that allows an end user a reasonable period of time within which to unsubscribe before any further charges are incurred.

Annex: 2 Legal Basis

ComReg's Objectives and Functions

A 2.1 ComReg's functions in respect of PRS are set out in Sections 10 and 12, respectively, of the Communications Regulations Acts, 2002 to 2011 ("the Principal Act").

Functions of Commission

10.—(1) *The functions of the Commission shall be —*

[..]

(cb) to ensure compliance by premium rate service providers with their obligations in relation to the provision, content and promotion of premium rate services,

(d) to carry out investigations into matters relating to—

[..]

(ii) the provision, content and promotion of premium rate services,

(2) The Commission may carry out an investigation referred to in subsection (1) either on its own initiative or as a result of a complaint made by an end user or an undertaking.

(3) The Commission shall have all such powers as are necessary for or incidental to the performance of its functions [under this or any other Act.

Objectives of Commission

12.—(1) *The objectives of the Commission in exercising its functions shall be as follows—*

[..]

(d) to protect the interests of end users of premium rate services.

[..]

(3) In carrying out its functions, the Commission shall seek to ensure that measures taken by it are proportionate having regard to the objectives set out in this section.

The PRS Act

A 2.2 Section 15 of the PRS Act provides;

15.—(2) Before publishing a code of practice or any part of a code of practice, the Commission—

(a) shall publish in such manner as it considers appropriate a draft of the code of practice or the part of the draft code of practice and shall give premium rate service providers, other interested persons and, as it considers relevant, other regulatory bodies in the State one month from the date of publication of the draft code or the part of the draft code within which to make written representations to the Commission in relation to the draft code or the part of the draft code, or for such further period, not exceeding 2 months, as the Commission in its absolute discretion thinks fit,

(b) shall, having considered the representations, if any, publish the code or the part of the code with or without modification as the Commission in its absolute discretion thinks fit, and

(c) where the Commission publishes a code of practice or any part of a code of practice, it shall publish a notice of such publication in the Iris Oifigiúil and that notice shall—

(i) identify the code,

(ii) specify the matters concerned in respect of which the code is published, and

(iii) specify the date on which the code comes into operation.

(3) The Commission may, following consultation with premium rate service providers, other interested persons and, as it considers relevant, other regulatory bodies in the State amend or revoke any code of practice or part of any code of practice prepared and published by it under this section.

(4) Where the Commission amends or revokes a code of practice or any part of a code of practice published under this section, it shall publish notice of the amendment or revocation in the Iris Oifigiúil.

(5) The Commission shall make available for public inspection, without charge, on the Commission's website on the internet and at its principal office, during normal working hours—

(a) a copy of each code of practice, and

(b) where a code of practice has been amended, a copy of the code as so amended.

(6) It is a condition of a premium rate service licence that any code of practice is complied with.