

# alto

alternative operators in the communications market

**Response to Consultation - Articles 19 and 22 of Directive 2011/83/EU on Consumer Rights.**

**Submission By ALTO**

**Date: November 9<sup>th</sup> 2012**

ALTO is pleased to respond to the Department of Jobs Enterprise and Innovation Consultation – on Articles 19 and 22 of Directive 2011/83/EU on Consumer Rights.

## **About ALTO**

ALTO – The Association of Licensed Telecommunication Operators / Alternative Telecommunications Operators group, is a highly respected, member led, sector trade association representing the interests of new entrant communications companies in the fixed, wireless and cable sector in Ireland and the EU since 1998.

## **Preliminary Comments**

ALTO welcomes the opportunity to respond to the Department of Jobs Enterprise and Innovation – DJEI (“the Department), consultation (“the consultation”) on Articles 19 and 22 (“Articles”) of Directive 2011/83/EU on Consumer Rights (“the Directive”).

ALTO members are aware of the State’s obligation to transpose EU Directives in a timely manner and in particular their obligation to maintain or uphold the spirit or intention of any measures such as Articles 19 and 22 of this particular Directive. As is customary with the transposition of all EU Directives, Member States are afforded a period of time or grace, before the provisions of the Directives are required to take effect in national law.

The Irish Government has until June 2014 to implement this Directive, which is clearly a significant amount of time.

The Minister with responsibility for the Department of Enterprise has stated in the current consultation, and in the Oireachtas, that he intends to bring forward transposition of these two Articles such that they will take effect by the end of 2012.

The currently proposed timeframe for transposition by the Department relating to these the two new Articles causes ALTO members some concern on commercial and operational grounds.

ALTO members' concerns can be summarised as follows:

The Department has yet not undertaken a full Regulatory Impact Assessment – RIA, which is, in accordance with Guidelines recently issued by the Department of the Taoiseach, required before any laws of substance can be implemented. While the Department in subsequent correspondence to industry confirmed it intended to undertake a RIA, there is no information as to when this will happen, whether it will be the subject of public consultation and also, if it will be undertaken in advance of the Articles taking effect.

The Department proposes to grant criminal and civil powers of enforcement to the National Consumer Agency – NCA, a suggestion which is somewhat concerning, given that the future of the NCA is uncertain. The conferring of certain powers on a Government body that has an uncertain future is of concern and if concluded in a hasty manner, may fall foul of challenge pursuant to Article 15 of the Constitution.

The consultation paper fails to provide clear insights as to whether and how, a trader or commercial undertaking, can expect the NCA to issue guidelines that will give direction on how traders might ensure compliance. Compliance guidelines are, and will be necessary to provide clarity to traders or undertakings as to what costs can be legitimately attributed to methods of payment.

Without such guidance, there is the risk of differences in interpretation that will create inconsistencies in compliance. This will have the effect of creating uncertainty, delay and potentially competitive disadvantage.

Finally, the absence of clear guidelines will result in the NCA deciding on a case-by-case basis whether traders are in compliance with its regulations. Bilateral engagement, as we have observed in the communications sector, does not operate in the best interests of ensuring consistent and transparent application of measures across all sectors and industries.

Operationally, a number of concerns arise:

The DJEI has not exhibited credible or sufficient evidence justifying why the two provisions/Articles should be brought in prior to the other provisions of the Directive, or indeed why this has to happen by the end of 2012

The publication of the consultation paper does not in of itself constitute adequate notice to traders and commercial undertakings – particularly since the timing with respect to the introduction of these Articles is unclear (i.e., whether they will indeed take effect in national law in the coming two months; or whether the Department will consider a stay in their enforcement).

It is of paramount concern that the Department has not given due consideration to the operational impacts on traders and commercial undertakings, and whether they would even be in a position to ensure compliance by the proposed timeline.

It is ALTO's view, that the time required for members to firstly undertake a review of its payment methods and any fees associated with these methods and then make adjustments (if any) to its financial, billing and IT systems would mean the company would require **at a minimum, six months** from the date of enactment of these provisions.

Further, it should be noted that ComReg is the regulatory authority of import for all telecommunications providers and it has strict consumer notification requirements that have to be adhered to where there is a change to consumer's product pricing.

These sector specific regulations require that consumers have to be notified on an individual basis and one month in advance of any change taking effect (regardless if the change is to the consumer's benefit). This one-month notification would have to be included in the planning for any operational changes that might occur further to a review of compliance with these provisions.

In summary, while ALTO supports the introduction of this Directive or its provisions, it would strongly argue in favour of the need for the Department to undertake a RIA which will ensure the Department and NCA have a clear understanding of the operational and commercial impact of transposing these two provisions or Articles in the coming months. This will enable the Department to develop an informed view as to when it would be reasonable and practicable to require traders to be in compliance and also ensure they are complied with in a timely and consistent manner by all concerned.

It is ALTO's view and respectful submission, that any changes to its members companies' IT infrastructures will require a minimum of six months from the date of enactment of the proposed legislation, in order to make the requisite changes to member company systems.

**We recognise and thank the DJEI officials and the Minister for consenting to an extension of time for the submission of responses to this consultation paper.**

**The communications sector had a number of concurrent Market Review and ongoing operational consultations at the time of issue of this consultation paper.**

**Response to Consultation Questions:**

**Q. 1. Are you aware of direct payment charges applied to consumer transactions by traders other than those listed in Box 1? If so, please give details.**

A. 1. ALTO expresses no view in relation to this question.

**Q. 2. Are you aware of administration, service, booking or handling charges in the passenger transport or other sectors (other than those referred to in paragraph 28) that are avoidable by the use of a specified method of payment? If so, please give details?**

A. 2. ALTO expresses no view in relation to this question.

**Q. 3. Should a provision along the lines proposed in paragraph 36 be included in the Regulations to give effect to Article 19 in order to encompass the payment-related charges applied by some airlines and ferry companies? If not, why not?**

A. 3. ALTO expresses no view in relation to this question, other than the concluding sentence from the consultation paper, which appears to suggest a reasonable approach. The question relates, in the main to other unrelated sectors.

**Q. 4. Should consideration be given to adopting a provision similar to Article 23(1) of the Air Services Regulation for sea carriers and/or other sectors. If so, which other sectors should be covered? If the provision should not be extended in this way, why not?**

A. 4. ALTO expresses no view in relation to this question.

**Q. 5. Are you aware of administration, service, booking, or handling charges not avoidable by the use of a specified payment method (other than those referred to in paragraphs 41-43) that apply to event tickets or in other sectors? If so, please give details.**

A. 5. ALTO expresses no view in relation to this question. ALTO members are acutely aware of sector regulations that simply add to the cost of undertaking business in Ireland.

**Q. 6. Should a provision along the lines proposed in paragraph 46 be included in the Regulations to give effect to Article 19 in order to encompass the charges applicable to tickets for entertainment and other events? If not, why not?**

A. 6. ALTO expresses no view in relation to this question, given the sector specific nature of the question.

**Q. 7. Are the figures on the costs of payment to traders cited in paragraphs 57 and 60 broadly accurate? Information on these costs would be welcomed in responses to this consultation and will be treated in confidence.**

A. 7. ALTO states that this question could be answered positively, but expects the Department and the Minister to undertake the required RIA, which would provide more granular details in relation to these costs. The implementation and activation

of these Articles, through regulation, must be dealt with in the detail required by industry and the Department of An Taoiseach's Better Regulation guidelines.

**Q. 8. Do you agree that only costs arising directly from the use of a given means of payment should be taken into account in determining the 'cost borne by the trader' for the purposes of Article 19. If not, what other costs should be taken into account in your view?**

A. 8. See answer to Q. 7.

**Q. 9. Are you aware of cases where traders seek extra payment in addition to the payment agreed for their main contractual obligation without seeking the consumer's express consent? If so, please give details.**

A. 9. ALTO expresses no view in relation to this, save for the fact that it should feature in the RIA that we now call for.

**Q. 10. Are you aware of cases where traders use default payment options, such as pre-ticked boxes, which the consumer is required to reject in order to avoid having to make a payment in addition to that agreed for the main contractual obligation? If so, please give details.**

A. 10. ALTO expresses no view in relation to this question. Please see remarks relating to RIA.

**Q. 11. Should Article 19 and/or Article 22 be applied to all of the sectors excluded from the scope of the Consumer Rights Directive other than**



**financial services? If not, why not?**

A. 11. ALTO calls on the DJEI to publish a RIA in relation to the market impacting aspects addressed in this question. We reserve our position in relation to any suggestion of blanket including of markets where independent and sector specific regulation and legislation is extant.

**Q. 12. Should the National Consumer Agency be empowered to apply for prohibition orders in respect of breaches of Articles 19 and 22 in the District Court as well as the Circuit Court? If not, why not?**

A. 12. ALTO remarks that prohibition orders, which may act as a form of injunction, should arise only from Courts of competent jurisdiction. The District court is a court of summary jurisdiction and does not currently have full, or even partial equitable jurisdiction.

To that end, ALTO suggests that the minimum jurisdiction applicable should be the Circuit Court, operating alongside the normal confines and principles of equity.

It is our current preference that the High Court be selected for such orders. The reason for this suggestion is that prohibition orders and orders which are of an injunctive nature (even with a genesis in codified and clear legislation) will often need to be accompanied by undertakings as to damages, should the NCA, or the State bring an application on foot of incorrect or erroneous data, to the detriment of the trader or undertaking who was in fact been operating lawfully.

**Q. 13. Should consumers be given a private right of redress for payment charges in breach of Article 19 and additional payments in breach of Article 22. If not, why not?**

A. 13. ALTO submits that the analysis in the consultation paper does not allow respondents to adequately form a view on this.

A RIA, again is called for including an assessment of private remedies, and reforms to the Court Rules is appropriate in the circumstances.

ALTO suggest that the likelihood is that private enforcement could be appropriate through Courts of competent jurisdiction, e.g., District Court (small claims and claims up to €6,348.69), Circuit Court (claims above €6,348.69 and below €38,092.14 – or where the parties consent to unlimited jurisdiction) and the High Court (claims with unlimited jurisdiction).

**Q. 14. Should a reversal of the burden of proof along the lines proposed in paragraphs 81-82 apply in civil and criminal proceedings involving breaches of Articles 19 and 22? If not, why not?**

A. 14. ALTO agrees with the DJEI proposal in the circumstances. Reverse onus clauses will be challenging for most respondents to this consultation paper and the detail provided in the consultation at paragraphs 81 – 82 is not enough for most to adequately respond, in the absence of legal advice.

ALTO suggests that these questions may need to be consulted upon again, once more details proposals are available in conjunction with a RIA, and will undoubtedly create hurdles for Applicants and Respondents in the context of legal proceedings which may arise in the future.

The DJEI should be aware that the imposition of criminal sanction is now possible in legislation delegated by the European Institutions by virtue of section 2 the

European Communities Act, 2007, amending section 3 of the European Communities Act 1972.

## **Conclusion**

ALTO welcomes the DJEI consultation, though members have concerns which can be seen from a perusal of the preliminary comments set out above. In the main, we call on the DJEI to undertake the required Regulatory Impact Assessment – RIA, and consider the real business and cost impacts of rushing through legislation to facilitate reporting agendas.

ALTO members are happy to make themselves available to the DEJI or any persons who will later conduct studies on behalf of the Department.

**Ronan Lupton B.L.**

**Chairperson**

**ALTO**

**9<sup>th</sup> November 2012**