



**Consultation by the Department of Jobs, Enterprise and Innovation (the “DJEI”) on the early implementation of a ban on above cost payment surcharges**

**Sky Response**

1. This is the response by British Sky Broadcasting Group PLC (“**Sky**”) to the DJEI’s consultation on the early transposition of the legislation intended to ban above cost payment surcharges (the “**Consultation**”).
2. Sky welcomes this opportunity to respond to the Consultation. We have not responded to all of the consultation questions, but we hope that the DJEI will find our observations helpful.
3. Sky is the UK and Ireland’s leading pay TV operator. With Sky Broadband and Sky Talk, Sky is also the UK’s fastest growing broadband and telephony provider. As at 30 September 2012, Sky had 10.3 million subscribers to its satellite TV business, Sky Broadband had reached 4.1 million customers, and Sky Talk had over 3.8 million telephony customers. Sky will soon be launching Sky Broadband and Sky Talk in Ireland. This summer, Sky also launched NOW TV, a brand new internet TV service that provides Sky Movies titles (with more entertainment and sport to come later this year) streamed through a broadband connection.
4. The DJEI intends to transpose Articles 19 and 22 of Directive 2011/183 on Consumer Rights (“**the CRD**”) in advance of the deadline required for its transposition. Whilst Sky is supportive of the early implementation of the ban on above cost surcharges (as required by the CRD) we would ask the DJEI to set a realistic timeframe for implementation, taking into account the systems developments and updates that would be required and that traders will need to undertake in order to ensure timely compliance with the new requirements. Operators will also need to ensure that their customer communications are up to date and these will have a lead time for print runs and website updates. Sky suggests that a minimum of six months, from the date of the transposition of the legislative measures necessary to give effect to Articles 19 and 22 of the CRD, would be required to make the necessary changes.



**Question 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?**

5. Sky notes that DJEI does not propose to define in domestic legislation the costs borne by the trader. Instead, the DJEI proposes to address this issue by way of guidance to traders. For the purposes of such guidance, Sky believes that for card payments, the following costs should be recoverable:
  - a. The merchant service charge;
  - b. IT, risk management, fraud, and operational costs;
  - c. Fees to intermediaries;
  - d. Costs to businesses of carrying out intermediary functions internally; and
  - e. Other potential costs.
  
6. Sky notes that in relation to card payments, the DJEI proposes to include such operating costs as can be shown to result directly from the processing of these payments. Sky also notes that the DJEI believes that it is less clear cut that costs arising from fraud losses or penalties imposed by card companies should be considered as direct costs borne by a trader. Sky further notes the DJEI's view that indirect costs, such as the costs of training staff to process payments, should not be considered as costs borne by the trader.
  
7. In relation to the merchant service charge, it is Sky's view that traders should be able to apply an averaged transaction charge across all card transactions, given that it is not possible for traders to determine which type of payment card is being used and when each payment card carries different processing costs.



**Question 12: Should off-premises transactions below €50 be subject to Articles 19 and 22. If not, why not?**

8. The CRD permits Member States to exempt low-value off-premises transactions. Sky notes that the DJEI proposes not to exempt such transactions. Sky notes the DJEI's view that: "...*permitting off-premises traders to apply large payment surcharges to transactions under €50 in particular would undermine the whole purpose of the provision.*" Sky agrees that off-premises contracts of all values should be covered by the legislation on excessive payment surcharges. We consider that to do otherwise would penalise those consumers who make low-value purchases as against consumers who are able to spend more.

**Question 13: Should Article 19 and/or Article 22 be subject to both criminal and civil enforcement? If not, why not?**

9. We believe that in principle, the enforcement regime chosen by the DJEI should recognise the potential difficulties in proving infringements of Articles 19 and 22 of the CRD (as transposed into domestic legislation). For example, if infringements of a ban on excessive charges for payment methods are criminalised, it may be difficult to prove an offence to the requisite standard in criminal proceedings i.e. beyond reasonable doubt. This is conceivable if proof of an infringement calls for evidence of the costs that may reasonably be recovered by a trader, as there may be no "right" or "wrong" answer to the question of whether the costs borne by the trader are reasonable or not in a given case. If in practice it was shown to be too difficult to prosecute such offences, this may undermine the purpose of the proposed legislation and possibly bring it into disrepute. The DJEI should therefore be cautious in its approach to this issue.
10. Subject to what we say in relation to allowing a reasonable time for operators to make the necessary adjustments, Sky does not object to the early transposition of Article 19 and 22 into domestic law.



11. However, at a more fundamental level, and as a matter of legal principle, we do have important observations to make on the enforcement of Articles 19 and 22 the CRD—as distinct from its transposition into domestic legislation.
  
12. Under Article 28 (1) of the CRD, Ireland must transpose the CRD by 13 December 2013. Ireland can of course transpose well in advance of this date and indeed, could have done so before now had it wished. The Consultation does not indicate which method will be used to transpose Articles 19 and 22 of the CRD. However, it does not appear that primary legislation will be used, as there is currently no relevant Bill before the Oireachtas. Even if there were, there would presumably not (in view of the Minister’s intention to transpose so soon) be sufficient time for such a Bill to pass through all stages of the law making process in the normal course. Therefore, it seems most likely that the Articles 19 and 22 of the CRD will be transposed by way of Ministerial Regulations, made under the European Communities Act, 1972. This is the only alternative to primary legislation that is available, as there does not appear to be another power to make secondary legislation under any other Act of the Oireachtas for the purpose of transposing Articles 19 and 22 of the CRD.
  
13. Article 28 (1) of the CRD obliges Member States to: *“...adopt and publish **by 13 December 2013** the laws, regulations and administrative provisions necessary to comply with this Directive.”* Article 28 (1) provides that: *“Member States...shall **apply** those measures **from 13 June 2014.**”* Article 28 (2) provides that: *“The provisions of this Directive shall **apply** to contracts concluded **after 13 June 2014.**”* (Our emphasis. Note: Article 28(2) does not use the words “by” or “by no later than”).



14. Unless primary legislation is used as the vehicle for transposition, it does not appear that Ministerial Regulations made under the European Communities Act, 1972, can be used to *enforce* the provisions of Articles 19 and 22 **prior to 13 June 2014**.<sup>1</sup> 13 June 2014 is the date from which the measures may be applied not the date by which they must be applied. Thus, 13 June 2014 is the “starting block” for application, as distinct from 13 December 2013, which is the “finishing tape” for transposition.
  
15. If it is proposed that Ministerial Regulations made under the European Communities Act, 1972, are used to *enforce* the provisions of Articles 19 and 22 prior to 13 June 2014, such a proposal must be considered in the context of Article 29.4.10° of Bunreacht na hÉireann and section 2 of the European Communities Act, 1972.<sup>2</sup> Article 29.4.10° ensures that Ireland can fully comply with its obligations under EU law, without fear of breaching the Constitution. However, it also defines the legal limits pursuant to which a legislative provision can withstand constitutional challenge. Only laws, acts, and measures that are “necessitated” by virtue of Ireland’s membership of the EU are constitutionally immune. However, a domestic law that allowed for the enforcement of Articles 19 and 22 of the CRD in the criminal or civil Courts, prior to 13 June 2014 would not seem “necessitated” by the CRD, or Ireland’s membership of the EU. In fact, there must be doubt as to whether it is even permitted.
  
16. Sky suggests that the additional date of 13 June 2014 was inserted in the CRD in order to allow traders sufficient time to make the adjustments to become compliant with the novel requirements of the CRD, such as Articles 19 and 22.

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<sup>1</sup> It may be questioned whether even primary legislation could achieve this purpose, given the references in the CRD to 13 June 2014 as the date from which to apply its provisions and given the full harmonisation character of the CRD as an EU legislative instrument.

<sup>2</sup> And in the context of the common law principle against doubtful penalisation.



17. Sky broadly supports the principles underlying Article 19 and 22 of the CRD. However, Sky suggests that an alternative approach for the DJEI would be to transpose Articles 19 and 22 of the CRD by way of Regulations made under the European Communities Act, 1972 and to make provision in those Regulations for them to become operative from 13 June 2014. Of course, pending that date, the DJEI would have sufficient time to draft robust, well-informed guidance on the application of the Regulations (possibly following further consultation with traders and the wider public). If that guidance was published relatively soon after the making of the Regulations, there should also be sufficient time for traders (and the enforcing body) to become acquainted with the Regulations and the guidance, and to prepare for compliance. This approach should provide legal certainty for all stakeholders and ensure that the enforcement regime has integrity.

***Paragraphs 47-50: Payment by means other than by direct debit***

18. The DJEI does not ask a specific question on the issue of charges for payment by means other than by direct debit. However, the DJEI itself notes that this practice is common in the utilities sector and it cites the practice of a particular utility provider in Ireland who imposes a “payment administration charge” to customers who pay by means other than direct debit.<sup>3</sup>

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<sup>3</sup> See paragraph 47 of the Consultation. The DJEI discusses the obverse of this scenario i.e. the practice of some traders who offer price rebates/discounts for payment **by** direct debit). See paragraphs 47-50 of the Consultation.



19. Sky, like many other utility companies, charges a fee if customers do not pay their monthly subscription by direct debit. This is because we incur additional costs to achieve payment from those customers. As the DJEI will be aware, non-direct debit charges are currently subject to regulation in the UK by Ofcom under its November 2010 guidance on unfair terms in contracts for communications services.<sup>4</sup> Ofcom's position is that if a non-direct debit charge is made clear and transparent to the customer, so that it is considered part of the price the consumer must pay for the package of goods and services they receive, then the amount of the charge is likely to be an exempt matter under Regulation 6 (2) of the UK's Unfair Terms in Consumer Contracts Regulations 1999 (the "**UK Regulations**"). If the non-direct debit charge is not made clear to customers so that it is assessable for fairness under the UK Regulations, then Ofcom states that providers should only be able to recover the cost components which reflect the provider's increased cost of taking payment by a means other than direct debit.
20. We note that the transposition of Article 19 of the CRD will mean that irrespective of whether the non-direct debit charge is transparent, the charge must not "*exceed the cost borne by the trader for the use of the payment method*". This will mean that (in the UK at least) the implementation of the CRD will require Ofcom to revise its guidance.
21. In terms of the costs that a trader bears for the use of a payment method, as noted by the DJEI, the CRD does not define "costs borne by the trader". In the UK, the equivalent consultation on the transposition of the CRD, undertaken by the Department of Business, Innovation and Skills (the "**BIS**") states that:

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<sup>4</sup> See: <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/Guidance.pdf>



*“The Government believes that only the direct costs to a trader of using a means of payment will be surchargeable. It does not envisage that indirect costs, such as general administrative overheads or staff training, should be included in the calculation of costs borne to the trader. Indirect costs should be reflected in the headline price of goods and services, as they are for any general cost categories.”<sup>5</sup>*

22. Sky notes that the DJEI (like the BIS) proposes to issue Guidance on the costs that businesses may recover. In formulating its guidance, Sky considers that the DJEI should not draft the meaning of “direct costs” too narrowly. The costs of processing non-direct debit payments are very different from card processing payments and require significant additional staffing costs which would not otherwise be needed. For example, the additional administrative costs associated with processing non-direct debit payments include, but are not necessarily limited to, the following:

- Manual keying of invoice/payment details that otherwise would not be required;
- Incremental IT related costs for processing that otherwise would not be required;
- Printing and postage costs associated with preparing and distributing invoices, plus any follow up communications;
- Incremental inbound/outbound call costs – invoice customers have a much higher propensity to call than customers paying by direct debit. The significant additional cost incurred of dealing with these calls should be recovered from the customers using this payment method rather than increasing the headline price for *all* customers; and

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<sup>5</sup> See paragraph 61 of the BIS consultation: <http://www.bis.gov.uk/assets/BISCore/consumer-issues/docs/C/12-1008-consultation-ban-above-cost-payment-surcharges.pdf>





- Incremental bad debt charge – invoice customers are more likely to result in bad debt customers on a per customer basis than those customers paying by direct debit. Sky considers that it is equitable to recoup these costs from the customers that incur the costs.

**Sky**

**9 November 2012**