Commission for
Communications Regulation

Response to Consultation and Decision on how to assess and finance any unfair financial burden on the universal postal service provider

Response to Consultation and Decision

Reference:	ComReg 13/116 and D15/13
Date:	4 December 2013

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
Abbey Court Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 Fax +353 1 804 9680 Email info@comreg.ie Web www.comreg.ie

Content

Section **Page**

Annex

Section **Page**

1 Introduction

1 The Communications Regulation (Postal Services) Act 2011 ("2011 Act") provides that a designated universal postal service provider (“USP”) (currently An Post) may submit a request in writing to the Commission for Communications Regulation (“ComReg”) to seek to receive funding for the net costs (if any) of efficiently providing a universal postal service.

2 The 2011 Act requires that any such request shall be made in such form and manner as ComReg determines and shall be accompanied by such supporting information as may be reasonably required by ComReg. ComReg, in D09/13[1], made its determination on the form and manner of any such request. Based on the information provided to ComReg by a USP in any net cost request, including any additional information required by ComReg, ComReg shall determine whether provision of the universal postal service represents a net cost to the USP and whether, in the opinion of ComReg, represents an unfair financial burden on the USP.

3 Where ComReg makes a determination that the net cost of a universal postal service does represent an unfair financial burden on the USP it shall apportion that net cost among providers of postal services within the scope of the universal postal service, who shall make a contribution in accordance with the cost apportioned to each of them for the purpose of meeting that burden. The assessment, apportionment, collection and distribution to the USP of such contributions shall be carried out in accordance with a “sharing mechanism”, provided for in regulations made by ComReg.

4 ComReg set out its preliminary views on how to assess and finance any unfair financial burden on the universal postal service provider in Consultation 13/83[2], having had regard to the applicable statutory provisions set out in Chapter 5 of the 2011 Act and the recommendations made by ComReg’s independent consultants, Frontier Economics.

5 There were four responses to Consultation 13/83, from An Post, the Communications Workers’ Union (“CWU”), DX Ireland (“DX”), and Nightline Logistics Group (“Nightline”). Having considered those responses, this document sets out ComReg’s decisions on:

- how ComReg will determine whether any net cost request represents an unfair financial burden on the USP; and

[1] ‘Response to Consultation and ComReg’s determination on the form and manner of any net cost request by the universal postal service provider under section 35 of the 2011 Act’ dated 25 July 2013
[2] ‘Consultation on how to assess and finance any unfair financial burden on the universal postal service provider’ dated 6 September 2013

- if ComReg should determine that the net cost of provision of a universal postal service does represent an unfair financial burden on the USP concerned, how it would apportion that net cost among providers of postal services within the scope of the universal postal service.

2 Executive Summary

6 Chapter 5 (section 35 and 36) of the 2011 Act sets out provisions related to possible financial support for the universal postal service. A designated USP (currently An Post) may submit a request in writing to ComReg to seek to receive funding for the net costs (if any) of efficiently providing a universal postal service. Any such request shall be made in such form and manner as ComReg determines[3] and shall be accompanied by such supporting information as may be reasonably required by ComReg. Based on the information provided to ComReg by a USP in any net cost request, including any additional information required by ComReg, ComReg shall determine whether provision of the universal postal service in a cost-efficient manner does represent a net cost to the USP and whether, in the opinion of ComReg, it represents an unfair financial burden on the USP.

7 In determining whether a universal postal service represents a net cost to the USP, ComReg shall take into account any market benefit which accrues to the USP, calculated in accordance with Annex I to the Directive[4], the text of which is set out in full in Schedule 4 of the 2011 Act.

8 As required by the 2011 Act, where ComReg determines that the net cost does represent an unfair financial burden on the USP, it shall apportion that net cost among providers of postal services within the scope of the universal postal service. The assessment, apportionment, collection and distribution to the USP of such contributions shall be carried out in accordance with a "sharing mechanism", provided for in regulations made by ComReg.

9 Section 36(5) of the 2011 Act requires that the sharing mechanism shall operate:

a. in an objective, proportionate, and transparent manner

b. in a manner that does not involve or tend to give rise to any undue discrimination against:

   i. particular postal service providers or a particular class or description of postal service providers, or

   ii. particular postal service users or a particular class or description of postal service users.

[3] See ComReg Decision D09/13 'Response to Consultation and ComReg's determination on the form and manner of any net cost request by the universal postal service provider under section 35 of the 2011 Act' dated 25 July 2013

[4] Directive 97/67/EC, as amended, on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended.

10 In Consultation 13/83, ComReg sought views on how to assess and finance any unfair financial burden on the universal postal service provider. Responses to Consultation 13/83 were received from An Post, the CWU, DX, and Nightline.

11 Having considered the views of the four respondents to Consultation 13/83, and the recommendations of its independent expert advisors[5], this Response to Consultation sets out ComReg's decision on:

- how ComReg will determine whether any net cost request represents an unfair financial burden on the USP; and
- if ComReg should determine that the net cost of provision of a universal postal service does represent an unfair financial burden on the USP concerned, how it would apportion that net cost among providers of postal services within the scope of the universal postal service.

2.1 Assessing whether any net cost request represents an unfair financial burden on the USP

12 In Consultation 13/83, ComReg proposed that it would apply a three criteria test, as described in that paper and below, in order to assess whether the net costs of a universal postal service represents an unfair financial burden on the USP, the three criteria being the following:

(1) **Absolute net cost of the USO**

A consideration of the absolute positive net cost of providing a universal postal service, in order to assess whether this net cost is material compared to the potential administrative costs of establishing and implementing a sharing mechanism. If the positive net cost is material, compared to the potential administrative costs, then ComReg will proceed to criteria 2 and 3 which would be assessed together.

(2) **Impact of the net cost on the profitability of the USP**

An assessment of whether the net cost of efficiently providing a universal postal service significantly affects the USP's profitability and/or ability to earn a fair return on its capital employed in the prevailing market conditions, carried out at the level of universal services as a whole[6].

[5] Document No. 13116a
[6] This assessment will focus only on the profitability of universal postal services. Revenues from non-universal postal services using the universal postal service network, along with any costs

(3) **Impact of the net cost on the competitiveness of the USP**

An assessment of whether the net cost of efficiently providing a universal postal service has a material negative impact on the competitiveness of the USP. This would be closely linked to the assessment under criterion 2 of whether the net cost significantly affects the USP's profitability. More specifically, it is unlikely that any net cost could be considered to cause a significant competitive disadvantage to the USP unless it also materially undermines the USP's profitability and/or ability to earn a fair return on its capital employed to provide the universal postal service in the prevailing market conditions.

13 In order for a net cost to be determined to be an unfair financial burden:

a. The net cost must be material compared to the potential administrative costs of establishing and implementing a sharing mechanism as assessed under criterion 1.

AND

b. The net cost must have a material impact on either the profitability (as assessed under criterion 2) or the competitiveness of the USP (as assessed under criterion 3) or a material impact on both criteria. This means, by way of examples, that a net cost could be considered to be an unfair financial burden if:

   - it has a material impact on the profitability of the USP and the competitiveness of the USP

     OR

   - it has a material impact on the profitability of the USP but the impact on the competitiveness of the USP is less material

     OR

   - it has a material impact on the competitiveness of the USP but the impact on the profitability of the USP is less material.

---

appropriately allocated to these services for using the universal postal service network, will therefore be excluded from this assessment

14 If ComReg should determine that the net cost of providing a universal postal service does represents an unfair financial burden on the USP, having applied the three criteria test outlined above, the next step, pursuant to section 36 of the 2011 Act, would be to use a sharing mechanism to apportion the net cost among providers of postal services within the scope of the universal service[7].

2.2 Financing any net cost (if unfair financial burden)

15 ComReg's decision on the form and operation of the sharing mechanism to finance any unfair financial burden on the USP, established by Regulations made pursuant to section 36(2) of the 2011 Act, is set out in Chapter 6 and in the Regulations set out in Chapter 9.

16 Before it would apply such a sharing mechanism, ComReg would first assess whether contributions from other postal service providers[8], gathered through a sharing mechanism, would be greater than the administrative costs of establishing and implementing the sharing mechanism. If ComReg should determine that total contributions would be less than the cost of collecting and distributing those contributions, then no such sharing mechanism would be established, as it would serve little or no practical purpose. This would mean that An Post, as USP, would fund any unfair financial burden in its entirety. However, if ComReg should determine that total contributions would be greater than the cost of collecting and distributing those contributions, then a sharing mechanism will be established.

17 A sharing mechanism will use a pro-rata contribution approach based on the revenues of providers of postal services within the scope of universal postal service. Also, a sharing mechanism will allow for the capping of the proportion of revenues that small postal service providers or new entrants must contribute in certain circumstances, in order to reduce the risk that the sharing mechanism may have an adverse effect on nascent or emerging competition in the market for the provision of postal services within the scope of the universal postal service. In the event of a cap on contributions, the shortfall would be covered by a pro-rata contribution based on revenue market share from all other providers of postal services within the scope of universal postal service[9], not subject to the cap.

[7] As a result of the 2011 Act, this is the only method available to ComReg to share any unfair financial burden

[8] That is, excluding An Post as the main postal service provider providing postal services within the scope of universal postal service and the current designated USP

[9] This includes An Post as a provider of both universal postal services and non-universal postal services within the scope of universal postal service

2.3 Conclusion

18 The 2011 Act provides that ComReg would determine whether the provision of a universal postal service represents an unfair financial burden on the USP. Chapter 5 sets out ComReg's decision as to how it would make this determination. In order to make such a determination, ComReg would require detailed evidence based information from a USP (currently An Post) and the 2011 Act empowers ComReg to obtain such additional information as it may require.

19 The 2011 Act provides that if ComReg should determine that there is an unfair financial burden, a sharing mechanism, established by regulations made by ComReg, shall provide for the assessment, apportionment, collection, and distribution to the USP of the contributions from other authorised providers of postal services within the scope of the universal postal service. These Regulations are published as SI 469 of 2013 and are also set out in Chapter 9 of this decision document.

20 Finally, if a written submission is received by ComReg from the USP seeking to receive funding for the net cost (if any) of providing a universal postal service, this would be assessed by ComReg in accordance with ComReg Decision D09/13 and this Decision (D15/13) and ComReg would make its preliminary views on the USP's submission known through a public consultation[10] before any final determinations by ComReg are made.

[10] In accordance with section 15 of the 2011 Act and ComReg's Consultation Procedures (Document No. 11/34)

3 Background

21 In forming its preliminary views on how to assess and finance any unfair financial burden on a USP, as may exist, ComReg has taken into account the relevant provisions of the 2011 Act. This is discussed further below.

3.1 Chapter 5 of the 2011 Act

22 The relevant statutory provisions are contained in Chapter 5 of the 2011 Act and are set out in full in Annex 1.

3.2 Postal service providers providing postal services within the scope of the universal postal service

23 The 2011 Act provides that if the net cost of a universal postal service does represent an unfair financial burden on the USP then it shall be apportioned among providers of postal services within the scope of the universal postal service. Section 37(1) of the 2011 Act sets out when a postal service is deemed to fall within the scope of the universal postal service and ComReg has published guidelines in relation to same as required by section 37(2) (ComReg Document No. 12/81).

24 Other than An Post, only DX Ireland and Eirpost (a division of Nightline) have to date notified ComReg that they are providing, or intending to provide, postal services within the scope of the universal postal service. Therefore, at this time, there are only three postal service providers, including An Post, that could be part of any sharing mechanism. Also, and of particular importance in regard to any sharing mechanism, An Post currently provides 35 postal services within the scope of the universal postal service, DX provides 1 such service, and Eirpost (a division of Nightline) intends to provide 1 such service in the future. Furthermore, An Post’s turnover on its postal services within the scope of the universal postal service is considerably higher than the respective turnovers of DX Ireland and Eirpost. ComReg considers that this is likely to remain the case for the foreseeable future, though ComReg will continue to keep abreast of developments in the sector.

4 Assessing any unfair financial burden on the USP

25 The information provided to ComReg in support of any request by a USP for funding for what it asserts is the net cost of efficiently providing a universal postal service, and ComReg's subsequent analysis of that information, should inform ComReg of both:

- the extent to which there is a verified direct net cost associated with the efficient provision of the universal postal service; and
- the extent to which any benefits of providing the universal postal service outweigh such verified net cost (i.e. whether there is a positive net cost associated with the USO).

26 If ComReg should determine that either the net cost has not been verified or that the net cost is outweighed by benefits accruing to the USP that are associated with the efficient provision of the universal postal service, then there would be no need to proceed to an assessment of whether the universal postal service represents an unfair financial burden.

27 If ComReg should determine that a positive net cost is associated with the efficient provision of the universal postal service, then, pursuant to section 35(4) of the 2011 Act, it must then determine whether that net cost represents an unfair financial burden to the USP. To be clear, this means that the 2011 Act provides that ComReg could determine that a universal postal service does represent a net cost, but may then determine that that net cost does not represent an unfair financial burden – i.e. that the net cost may be absorbed by the USP and the USP does not require any financial support in respect of same.

28 Although section 35(4) of the 2011 Act specifies that ComReg shall determine whether any net cost represents an unfair financial burden on the USP, it does not explicitly define the term "unfair financial burden". Similarly, Annex 1 of the Directive 97/67/EC, which is set out in full in Schedule 4 of the 2011 Act, also does not specify what constitutes an unfair financial burden, or how to identify it.

29 As highlighted by the European Regulators Group for Postal Services (ERGP)[11], some guidance comes from legal precedent around the definition of an 'unfair burden'. In particular, the ERGP notes the judgement of the Court of Justice in "European Commission v Kingdom of Belgium"[12], in which the Court defined an "unfair burden" as "*a burden which, for each undertaking concerned, is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share*". However, the Court also states that "*it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the threshold beyond which … a burden may be regarded as unfair*".

4.1 How to assess whether any net cost represents an unfair financial burden on the USP

30 In Consultation 13/83, ComReg set out its preliminary views as to how to assess whether a positive net cost represents an unfair financial burden on the USP and ComReg sought the views of interested parties on this by asking the following question:

Q. 1 Do you agree or disagree with ComReg's preliminary views on how to assess any unfair financial burden on the USP? Please explain your response.

31 The key views raised by respondents and ComReg's corresponding response position are as follows.

Views of respondents

32 In relation to the three criteria test, **An Post** believes that some guidance in relation to the term "material" is required.

33 An Post believes that Criterion 3 (impact of the net cost on the competiveness of the USP) is not precisely or clearly stated; in particular, An Post seeks clarification as how "*significant competitive disadvantage*" would be assessed. An Post also believes that Criterion 3 appears to contradict Criterion 1.

[11] ERGP report 'Net Cost Calculation and Evaluation of a Reference Scenario' @ http://ec.europa.eu/internal_market/ergp/docs/documentation/ergp-11-17-rev-1_en.pdf

[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0222:EN:HTML

34 The **CWU** is concerned that the cumulative nature of the three criteria tests would mean that the second and third criteria, which examine the impact on the net cost on the profitability and competitiveness of the USP, respectively, would not be given any consideration. In particular, according to the CWU, the second test (impact of the net cost on the profitability of the USP) is very important. The CWU states in its response: "*The estimated cost of the universal service obligation is €60m. An Post announced an operating loss for the first time in ten years of €17.5m for 2012 due in no small part to the funding of the USO. In a context where core mail volumes are declining, electronic substitution is increasing (and being promoted by ComReg) and where there is still significant uncertainty in the general business environment, An Post described this burden at the time as 'unsustainable'.*"

35 An Post and CWU both maintain that there is an important relationship between any unfair financial burden assessment and any price control determination.

36 **Nightline** agrees with the three criteria test. However, Nightline believes that it is counter-intuitive that Nightline would have to fund the cost, in some way, of proving whether there was a burden on any USP.

ComReg's position

37 In response to An Post's request for guidance on what is "material", material relates to the significance of the amount and defines the threshold or cut-off point. A definitive definition of materiality cannot be provided as it is dependent on the particulars under review at the time of any application by the USP. In this respect, it is worth noting that the term "material" is also used in the 2011 Act without definition. ComReg will assess materiality for each case in a proportionate and fair manner. For example, An Post claims that under Criterion 1 any net cost above the administrative costs of establishing and maintaining a sharing fund should be considered material. ComReg disagrees with this; for example, if the net cost was €1 above the administrative costs then this would not be material.

38 In response to An Post's request for clarification as to what would constitute a "significant competitive disadvantage", under Criterion 3, ComReg notes the factors that would be considered were, and are, set out in the text relating to Criterion 3 (see paragraph 54 of this document). Also, ComReg does not consider that there is any contradiction between Criterion 3 and Criterion 1; Criterion 1 provides that ComReg will first assess whether a net cost is material compared to the potential administrative costs of establishing and implementing a sharing mechanism. If ComReg finds a net cost to be material under Criterion 1, it would then make its respective assessments as to the impacts on profitability and competitiveness, under Criterion 2 and Criterion 3.

39 In response to the CWU, ComReg notes that An Post has not made any formal application to seek to receive funding for the net costs (if any) of providing a universal postal service pursuant to section 35 of the 2011 Act. Absent such an application, ComReg cannot substantiate any estimate as to the net cost, or otherwise, of the universal postal service. Furthermore, ComReg cannot agree with CWU's claim that the provision of the universal postal service contributed to An Post's operating loss in 2012; according to An Post's 2012 Annual Report, there are a number of factors that resulted in its operating loss[13]. Moreover, ComReg would again note that the 2011 Act only allows An Post to receive funding for the net costs (if any) of providing a universal postal service in a cost-efficient manner. ComReg also notes the CWU's reference to An Post having described universal service obligation at this time as "unsustainable"; if the CWU is suggesting that the universal postal obligation is generally unsustainable then ComReg can only note that the scope of the universal postal service is mainly set down by the 2011 Act. Therefore, any reduction in the scope of the universal postal service would be a policy matter for the State and would require new legislation – it would not fall within ComReg's power or statutory remit. The only statutory discretion which ComReg could potentially utilise lies in section 16(1)(a) of the 2011 Act, which provides that the universal postal service shall consist of one clearance and one delivery to the home or premises of every person in the State "*except in such circumstances or geographical conditions as the Commission considers to be exceptional* …". ComReg has never formally considered whether the financial unsustainability of the universal service obligation would constitute an "exceptional circumstance" for the purposes of section 16(1) – for ComReg to do so would require, at the very least, a formal application by An Post for derogation of its clearance and delivery obligations, and a public consultation.

40 In relation to An Post's and the CWU's respective comments on the relationship between any unfair burden and the price cap control to be implemented under section 30 of the 2011 Act, ComReg discusses this matter in paragraph 52 below.

41 In response to Nightline, ComReg notes that if it should determine that there is an unfair financial burden associated with the provision of the universal postal service, Nightline, as a postal service provider providing postal services within the scope of universal postal service, would only finance that burden to the amount determined by ComReg (see Chapter 6).

[13] http://www.anpostmedia.com/AnPostAnnualReport2012Commentary.pdf

5 ComReg's Decision on how to assess an unfair financial burden

5.1 Three criteria test

42 Taking account of responses to Consultation 13/83, the applicable provisions of the 2011 Act, and the recommendations[14] made by ComReg's independent consultants, Frontier Economics, the following sets out ComReg's decision as to how it will assess whether any net cost represents an unfair financial burden on the USP.

43 Where ComReg has made a determination under section 35(4)(a) of the 2011 Act that provision of a universal postal service does represent a net cost to the universal postal service provider concerned, for the relevant time period to which the request for funding under section 35(1) relates, then ComReg, in order to form an opinion as to whether that net cost represents an unfair financial burden on the universal postal service provider, shall apply the following three criteria test:

(1) **Absolute net cost of the USO**

A consideration of the absolute positive net cost of providing a universal postal service, in order to assess whether this net cost is material compared to the potential administrative costs of establishing and implementing a sharing mechanism. If the positive net cost is material, compared to the potential administrative costs, then ComReg will proceed to criteria 2 and 3.

(2) **Impact of the net cost on the profitability of the USP**

An assessment of whether the net cost of efficiently providing a universal postal service significantly affects the USP's profitability and/or ability to earn a fair return on its capital employed in the prevailing market conditions, carried out at the level of universal services as a whole.

[14] See ComReg Document No. 13/116a

(3) **Impact of the net cost on the competitiveness of the USP**

An assessment of whether the net cost of efficiently providing a universal postal service has a material negative impact on the competitiveness of the USP. This would be closely linked to the assessment under criterion 2 of whether the net cost significantly affects the USP's profitability. More specifically, it is unlikely that any net cost could be considered to cause a significant competitive disadvantage to the USP unless it also materially undermines the USP's profitability and/or ability to earn a fair return on its capital employed to provide the universal postal service in the prevailing market conditions.

44 Consequently, in order for ComReg to form an opinion that a net cost, as determined, is an unfair financial burden:

a. the net cost must be material compared to the potential administrative costs of establishing and implementing a sharing mechanism as assessed under criterion 1;

AND

b. the net cost must have a material impact on either the profitability of the USP (as assessed under criterion 2) or the competitiveness of the USP (as assessed under criterion 3) or a material impact on both of these criteria. This means, by way of examples, that a net cost could be considered to be an unfair financial burden if:

- it has a material impact on the profitability of the USP and the competitiveness of the USP;

  OR

- it has a material impact on the profitability of the USP but the impact on the competitiveness of the USP is less material;

  OR

- it has a material impact on the competitiveness of the USP but the impact on the profitability of the USP is less material.

45 These criteria are explained in more detail below.

Criterion 1: Absolute net cost of the USO

46 The first criterion is to consider whether the positive total net cost of providing a universal postal service, a determined by ComReg under section 35(4)(a) of the 2011 Act, is material compared to the potential administrative costs of establishing and implementing a sharing mechanism under section 36.

47 If ComReg's assessment should indicate that the net cost of a universal postal service is less than the administrative costs associated with a sharing mechanism, then ComReg would determine at that point that the net cost does not represent an unfair financial burden on the USP.

48 This criterion is one of the conditions highlighted by the ERGP for the net cost to be an unfair financial burden. Likewise, in fixed telecommunications, ComReg has specified that "*if the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net costs of the USO).*"[15]

49 If, on the other hand, ComReg's assessment should indicate that the positive net cost of a universal postal service is materially greater than the administrative costs associated with a sharing mechanism, then ComReg would proceed to apply the second and third criteria in order to determine whether the net cost does represent an unfair financial burden on the USP.

Criterion 2: Impact of the net cost on the profitability of the USP

50 The second criterion is an assessment of whether any positive net cost associated with the efficient provision of the universal postal service significantly affects the USP's profitability and/or ability to earn a fair return on its capital employed in the prevailing market conditions, carried out at the level of universal services as a whole. This assessment will focus only on the profitability of universal postal services. Revenues from non-universal postal services using the universal postal service network, along with any costs appropriately allocated to these services for using the universal postal service network, will therefore be excluded from this assessment.

[15] At page 63, ComReg Document 11/42 (D04/11) – 'Report on Consultation and Decision on the Costing of Universal Service Obligations Principles and Methodologies' dated 31 May 2011

51 ComReg Decision D09/13[16] determined that the Profitability Cost ("PC") methodology is to be used to calculate the net cost of the USO, and that this should be based on efficient costs as required by the 2011 Act. Under the PC methodology, the net cost is the difference in operating profits with and without the USO. Consequently, the profitability assessment will be a comparison of the net cost of efficiently providing the universal postal service against the operating profits of the efficient USP providing the universal postal service reference scenario[17] as set by An Post in its net cost submission and as verified by ComReg.

52 A key issue to take into account at this stage is the relationship between an unfair financial burden assessment and any price control determination. Section 30 of the 2011 Act requires ComReg to regulate prices for the USP's postal services within the scope of universal postal service, through a price cap in the form of CPI –X%, where ComReg has formed the opinion that there is no effective competition in the market for the supply of these services. ComReg has formed this opinion in D13/13[18]. Regulating the USP's prices in this manner requires an estimate of the revenue that the USP would need to finance an efficiently run universal postal service. A consistent approach would be adopted to assess efficient universal postal service provision in any net cost application by the USP.

Criterion 3: Impact of the net cost on the competitiveness of the USP

53 The final criterion is to assess whether any net cost associated with the efficient provision of the universal postal service causes a significant competitive disadvantage for the USP. This would be closely linked to the assessment under criterion 2 of whether the net cost significantly affects the USP's profitability. More specifically, it is unlikely that any net cost associated with the efficient provision of the universal postal service could be considered to cause a significant competitive disadvantage unless it also materially undermines the USP's profitability and/or ability to earn a fair return on its capital employed from the provision of the universal postal service.

[16] ComReg Document 13/69 'Response to Consultation and ComReg's determination on the form and manner of any net cost request by the universal postal service provider under section 35 of the 2011 Act' dated 25 July 2013

[17] As noted in D09/13 a reference scenario represents a reduced universal postal service obligation, based on an assumed determination by ComReg under section 16(1)(a) of the 2011 Act that exceptional circumstances or geographic conditions exist which warrant that there shall not be one clearance and one delivery on every working day to the home or premises of every person in the State (such determination having been made on foot of an application made to ComReg by An Post);

[18] Document No, 13/82 'Response to Consultation on scope and form of proposed price cap control' dated 6 September 2013

54 Nevertheless, given that ComReg's statutory objectives include facilitating the development of competition and innovation in the market for postal service provision, it is important to ensure that any unfair burden test includes consideration of whether the USP is placed at a significant competitive disadvantage. Having regard to this requirement, the following factors would be considered under this criterion:

- changes in market share of the USP – if the USP is able to maintain high market shares of postal services within the scope of universal postal service, it would seem unlikely that the USP is being placed at a competitive disadvantage by any positive net cost; and

- market entry barriers – if there is large market entry barriers for the provision of postal services within the scope of universal postal service, it would seem unlikely that the USP is being placed at a competitive disadvantage by any positive net cost.

55 Further, ComReg would also assess what impact (if any) competition by postal service providers within the scope of universal postal service is having on the USP's profitability (linked to assessment under criterion 2) or whether the USP's profitability is more affected by factors other than competition by postal service providers within the scope of universal postal service.

56 Also, consistent with the requirements of the 2011 Act, any unfair burden assessment would relate only to the same period as the net cost funding request. As such, ComReg would only consider whether any net cost caused a significant competitive disadvantage for the USP in the particular period concerned, and ComReg would not forecast potential future impacts that may arise.

6 Financing any unfair financial burden on the USP

57 Section 36(1) of the 2011 Act requires that where ComReg has made a determination, under section 35 of the 2011 Act, that the positive net cost of provision of a universal postal service does represent an unfair financial burden on the USP, ComReg shall then apportion that net cost among providers of postal services within the scope of the universal postal service, who shall contribute in accordance with the cost apportioned to each of them.

58 In Consultation 13/83 ComReg set out its preliminary views as to how to finance any unfair financial burden on the USP and ComReg sought the views of interested parties on this by asking the following question:

Q. 2 Do you agree or disagree with ComReg's preliminary views on how to finance any unfair financial burden on the USP? Please explain your response.

59 The key views raised by respondents and ComReg's corresponding response position are as follows.

Views of respondents

60 **An Post** disagrees with ComReg's preliminary views and makes the following points:

- An Post notes that only two other postal service providers have notified ComReg of providing, or intending to provide, postal services within the scope of universal postal service, therefore being potentially liable to fund any net cost that may found to be an unfair financial burden on An Post. An Post is concerned that this self assessment regime has the potential to be circumvented with ad hoc product definitions. Consequently, An Post contends that an objective system of oversight backed by appropriate enforcement measures must be put in place by ComReg, on the grounds that some postal service providers may seek to escape liability from their statutory obligation to make a contribution.

- An Post disagrees with the use of a pro-rata contribution based on revenue market share. An Post believes that An Post may have some market share which no other postal service provider will want (as postal service providers will only pick profitable routes) and that this market share will then count against An Post in apportioning the unfair financial burden. According to An Post, the USP will not only have to service the unprofitable routes but will also be penalised in the calculation to apportion the net cost because of the fact that it is servicing the unprofitable routes.

- An Post disagrees with a contribution cap for smaller providers and/or new entrants. An Post notes that “smaller” and “new entrant” postal service providers are not defined which leaves it potentially open to ComReg to provide protection on the grounds that certain postal service providers are small compared to An Post as the USP. An Post further submits that smaller postal service providers could deliberately remain small to avoid a potential liability to contribute. An Post also submits that there is a real possibility that new entrants could be either a subsidiary of an existing cash rich business in Ireland or a foreign postal operator. Also, An Post contends that smaller postal service providers / new entrants are likely to only serve the more lucrative routes which may impact on relative profitability. An Post does not believe any protection for these types of postal service providers is required.

61 The **CWU** agrees with ComReg that as a point of principle all postal service providers, including new entrants, should make contributions to the net cost if it is found to be an unfair financial burden. However, the CWU disagrees with the contribution cap. The CWU notes that this could mean that universal postal service users could find themselves funding other postal service providers as An Post, as the USP, would be required to cover any shortfall in the contributions to the unfair financial burden fund. Also, the CWU maintains that the development of competition should not be and cannot be to the detriment of the availability of the universal postal service at an affordable price and, according to the CWU, expecting An Post to cover any shortfall from its competing postal service providers is in contravention of this.

62 The CWU notes that Consultation 13/83 does not address a particular scenario which, according to the CWU, could arise. According to the CWU, it is unclear what would happen if the establishment of a sharing mechanism or fund is determined to be impractical due to the lack of other postal service providers providing postal services within the scope of universal postal service. The CWU states that how the USO will be funded in the absence of a sharing mechanism has been ignored by Consultation 13/83.

63 Also, the CWU believes that in circumstances where volumes are declining and per unit costs are rising; and where, according to the CWU, An Post is aggressively pursuing a cost reduction programme; and where, according to the CWU, the financial loss on USO services has run to over €60m; and where, according to the CWU, Ireland has the second lowest stamp price in Europe; and where, according to the CWU, An Post is viewed internationally as one of the most efficient operators in the European Union; and in a country where the USO is a vital public service, that in the absence of a functioning sharing mechanism ComReg must introduce an adequate pricing mechanism. The CWU maintains that it is vital that ComReg takes steps to address this issue and to do otherwise would be in conflict with its statutory obligations under the 2011 Act.

64 **DX** claims that the main factor currently driving declining mail volumes and thereby potentially damaging the universal postal service is electronic substitution. Therefore DX claims it would be unfair to apply a levy solely on postal service providers when the damage has been caused by an entirely different media. DX contends that any levy on postal service providers must be limited to the amount of any net cost that is directly attributable to the effects of competition from their services and any resultant shortfall made up using another method, including Government support.

65 DX welcomes the contribution cap. DX suggests it is necessary to provide some guidance about the likely level of the cap. DX believes that a minimum threshold is needed in order to avoid uneconomic administrative expenditure.

66 **Nightline** states that An Post has previously stated that its preference is to fund the provision of the universal postal service through price adjustments. Nightline sees no reason why that should change at present.

ComReg's position

67 In response to An Post, ComReg notes the following:

- In relation to authorisations to provide a postal service, section 38(1) of the 2011 Act provides that a person who intends to provide a postal service shall, before doing so, make a notification to ComReg of his or her intention to provide a service. Upon receipt of such a notification, the person making the notification is deemed to be a postal service provider authorised to provide the postal service concerned. Such a notification must include a declaration, under section 38(6) of the 2011 Act as to whether the postal service concerned is, or is not, within the scope of the universal postal service. A person who makes a notification or a declaration which is to his or her knowledge false or misleading in any material respect commits an offence and is liable on summary conviction to a class A fine. Aside from the publication of the 2011 Act by the State, ComReg has also taken the additional steps of making all postal service providers and all potential postal service providers aware of this through (1) direct correspondence (2) advertisements in the national newspapers. Further, section 37(1) of the 2011 Act sets out the main characteristics of "a postal service within the scope of the universal postal service" while ComReg has also, following public consultation, published guidelines in respect of same as required by section 37(2) of the 2011 Act (ComReg Document No. 12/81a). Consequently, the ability of any person to attempt to avoid being categorised as a provider of "a postal service within the scope of the universal postal service" would be much constrained by the above legislative provisions.

- In relation to the pro-rata contribution based on turnover market share, ComReg remains of the view that this approach is appropriate, for the following reasons:

    - The use of turnover appears to be envisaged by the 2011 Act as section 39(2)(d) of the 2011 Act requires postal service providers providing postal services within the scope of universal postal service to provide ComReg with information relating to their *turnover* from the provision, by them, of services within the scope of universal postal service and it specifies that this information is to provided for the purpose of the assessment and apportionment of any unfair burden.

    - Postal routes with higher economies of scale are more likely to be profitable, and more profitable routes are more likely to have higher turnovers. Also, if there is some market share which An Post believes no other postal service provider wants, these are accounted for by An Post, in accordance with the 2011 Act, by its submission to seek to receive funding for the net cost (if any) of providing the universal postal service.

    - A number of factors drive profitability, including efficiency. Therefore, to use relative profitability as an approach to apportioning contributions to any net cost could penalise postal service providers that are more efficient.

- o Furthermore, to determine profitability would require more information from postal service providers, for example, detailed information on cost and cost allocation. The processing of this increased information requirements would inevitably increase the administrative costs.

68 In response to concerns about the contribution cap, expressed by the both An Post and the CWU, ComReg remains of the view that it is important that any sharing mechanism does not have an adverse effect on competition in the market for postal services within the scope of the universal postal service; this is explained further in the Regulatory Impact Assessment. In line with ComReg's statutory objective to facilitate the development of competition and innovation in the market for postal service provision, any sharing mechanism created under section 36 of the 2011 Act should not have an adverse effect on competition in that market. ComReg therefore considers it appropriate to include some measure of protection in the sharing mechanism, for smaller existing postal service providers or new entrants. ComReg does not agree that smaller postal service providers are likely to deliberately remain small in order avoid any potential liability in respect of the net cost of the universal postal service. The contribution cap, if it is to apply, would be established and set on a case by case basis and would be based on the particular circumstances and on the information available to ComReg at the time of any application for funding by the USP. In other words, at this time, there is no set threshold for any contribution cap and there is no guarantee that a contribution cap would be established, such decisions are dependent on the circumstances and information available to ComReg at the time of any application by the USP. Furthermore, if ComReg does establish any contribution cap, this would be based on the information available to ComReg at the time of any application by the USP and ComReg's preliminary views on any contribution cap would be set out in public consultation at that time thereby allowing any interested parties to make any views known to ComReg before ComReg sets any contribution cap.

69 In response to the CWU's concerns that if a contribution cap is established then users of the universal postal service would have to fund any shortfall through higher prices, ComReg does not accept that this would always be the case. Also, ComReg considers that any shortfall as a result of a contribution cap is likely to be so small as to be immaterial. Furthermore, having considered further the financing of any shortfall arising from any contribution cap, ComReg in the Regulations has set that any shortfall in contributions as a result of any contribution cap, will be shared on a pro-rata basis between the USP and other postal service providers (that are not subject to a contribution cap) providing postal services within the scope of the universal postal service.

70 In response to the CWU's comment on the importance of the price cap control, ComReg has commenced the consultation process which will result in specifying price caps for one or more baskets of postal services within the scope of the universal postal service. Implementing any price cap control is critically dependent on ComReg obtaining robust and detailed information from An Post as the price cap will take into account expected declines in volumes over the period of the price cap. Also, as required by the 2011 Act, any price cap decision must ensure that the price cap provides incentives for efficient universal postal services provision. Therefore, against the background of declining volumes as noted by the CWU and the 2011 Act requirement for the efficient provision of the universal postal service, it is critical that An Post appropriately aligns its costs with its projected volume reductions in order to ensure its continued financial viability.

71 In response to the CWU's expressed view that Consultation 13/83 ignored how the USO would be funded if the sharing mechanism is impractical, due to a lack of other providers of postal services within the scope of universal postal service, ComReg notes that it can only take the steps set down for it by the 2011 Act. While there may be alternative approaches for funding the universal postal service these are a matter for Government and the legislature, as the policy and law makers. ComReg can and only acts within its statutory remit as set down by the 2011 Act, which is to apportion any unfair financial burden, as may be found to exist, among providers of postal services within the scope of the universal postal service.

72 In response to DX's point that any contribution by postal service providers must be limited to the amount of any net cost directly attributable to the cost of postal competition, ComReg notes that the 2011 Act is clear that where ComReg makes a determination that the net cost of providing a universal postal service represents an unfair financial burden on the USP, ComReg shall apportion that net cost among providers of postal services within the scope of the universal postal service.

73 In response to DX's request for guidance on the level of any contribution cap, it is noted above that the level of any contribution cap would be based on the information available to ComReg at the time of any request for funding of by the USP. Also, ComReg's preliminary views on any contribution cap would be set out in public consultation at that time thereby allowing any interested parties to make any views known to ComReg before ComReg sets any contribution cap.

74 In response to Nightline's comment that the universal postal service should be funded by price adjustments, ComReg notes the provisions of section 30 and section 35 of the 2011 Act.

ComReg's Decision on financing any unfair financial burden on the USP:

75 Taking account of responses to Consultation 13/83, the applicable provisions of the 2011 Act, the recommendations[19] made by ComReg's independent consultants, Frontier Economics, the following sets out ComReg's decision on how to finance any unfair financial burden on the USP which as required by the 2011 Act is set out in Regulations (SI 469 of 2013).

Initial consideration before establishing a sharing mechanism

76 If ComReg should determine that the net cost of a universal service represents an unfair financial burden on the USP, based on the three criteria test as set out in the previous chapter, then the next step, pursuant to section 36 of the 2011 Act, would be to apportion that net cost among providers of postal services within the scope of the universal service, by means of a sharing mechanism provided for in regulations made by ComReg pursuant to section 36(2) of the 2011 Act.

77 Before establishing any such sharing mechanism, an initial assessment would be carried out as to whether the total contributions from other postal service providers (that is, excluding An Post), collected through such a sharing mechanism, would be greater than the potential administrative costs of establishing and implementing that mechanism. In other words, if the cost of setting up and operating a sharing mechanism are likely to be greater than the total contributions gathered through the mechanism from other postal service providers, no such sharing mechanism would be established as it would serve little or no practical purpose.

78 To illustrate the rationale for this, consider the following hypothetical example. The net cost of the universal postal service has been found by ComReg to be €2 million. This total net cost has been found by ComReg to be greater than the administrative costs of setting up a sharing mechanism, and therefore a mechanism has been designed to attribute the net cost to operators in proportion to their revenue market share. Now, assume An Post has a revenue market share of 99.5% of the postal services within the scope of the universal postal service. In this scenario, the net cost attributed to postal service providers other than An Post would be €10,000 (0.5% of €2m) which, in this example, would be less than the administrative costs of establishing and maintaining the sharing mechanism. In such a case, it would not make sense to implement such a sharing mechanism and this is reflected in the regulations in Chapter 9 (SI 469 of 2013).

[19] See ComReg Document No. 13/116a

79 Also, if a sharing mechanism should be established, it is worth noting that the administrative costs of establishing and maintaining a sharing mechanism would be covered by the postal levy payable to ComReg by postal service providers providing postal services within the scope of universal postal service. Because An Post currently pays most of ComReg's postal levy (as it currently provides most of the postal services within the scope of universal postal service) it would contribute most of the cost of establishing and maintaining any sharing mechanism that was established.

Method of apportioning any net cost (that is an unfair financial burden)

80 In making its decision on the sharing mechanism, ComReg considered whether it is more appropriate to apportion any net cost amongst postal service providers using lump sums or pro-rata contributions. In particular, ComReg considered which approach best ensures that the sharing mechanism:

- operates in an objective, transparent and proportionate way;
- does not give rise to any undue discrimination;
- does not create significant administrative costs; and
- does not have an adverse effect on competition for the provision of postal services within the scope of universal postal service.

81 These are considered in the RIA set out in this document.

82 For the reasons set out in the RIA, where a sharing mechanism is established a pro-rata contribution based approach would be used. A pro-rata contribution approach meets all of the desired criteria, whilst the lump sum contribution based approach may be considered discriminatory and may result in an adverse effect of competition given the large variations in size between current providers of postal services within the universal service. Frontier Economics notes in its supporting report that the pro-rata contribution approach has also been used by other national regulatory authorities in designing/implementing sharing mechanisms.

83 Furthermore, the pro-rata contribution approach would be based on revenue market share arising from the provision of postal services within the scope of universal postal service. This view is consistent with section 39(d)(ii) of the 2011 Act, which requires an authorised provider of postal services within the scope of the universal service to provide information to ComReg relating to its revenues from the provision of services within the scope of the universal postal service.

Protection for smaller postal service providers

84 ComReg considers it important that any sharing mechanism does not have an adverse effect on competition in the market for postal services within the scope of universal postal service. As set out above and in the RIA, the use of a pro-rata approach to apportion any net cost, based on share of market revenue, is preferable as this should minimise the risk of any such adverse effect on competition.

85 However, for a postal service provider with low turnovers and high costs (actual or expected), such as those who have just entered or are looking to enter the market for provision of postal services within the scope of the universal service, this approach could still put these providers at a competitive disadvantage, or deter entry into the market because the sharing mechanism (without an appropriate safeguard) could act as an additional and unpredictable cost that, by itself, results in a negative return on a postal service provider's investment. This would be contrary to ComReg's statutory objective to facilitate the development of competition and innovation. Therefore, as recommended by Frontier Economics, and for the reasons set out in the RIA, ComReg considers that some measure to protect smaller providers of postal services within the scope of the universal service should be included within the design of a sharing mechanism, which would be utilised by ComReg where ComReg considered it appropriate to do so.

86 ComReg considers, as a point of principle, it is appropriate that all postal service providers providing postal services within the scope of universal postal service, including new entrants, should make some contribution to the net cost if it is found to be an unfair financial burden. Furthermore, ComReg notes that the 2011 Act makes no provision for some postal service providers to be excluded. Moreover, so long as the required contribution is at an appropriate level, ComReg considers that it is unlikely to induce exit or deter entry.

87 However, ComReg has a concern due to the current asymmetry in size between new entrants (and possibly the current postal service providers providing postal services within the scope of universal postal service) and the USP. For example, if the net cost identified by ComReg were large, then even if a new entrant were paying a small proportion of that net cost, it could be very significant compared to its total turnover.

88 Consequently, as a protection for small existing postal service providers or new entrants, and if ComReg considers it to be appropriate, ComReg has decided that the contribution they pay should be capped at an appropriate percentage of their turnover from the provision of postal services within the scope of universal postal service. It is difficult to set any pre-determined rules for the level at which contributions should be capped, as it would largely depend on an assessment of the entrant's ability to pay and an assessment of the likely impact of the sharing mechanism on the development of competition in the sector. Similarly, setting an absolute revenue market share threshold above which postal service providers would be expected to make a full contribution could act as a barrier to entry/expansion.

89 Consequently, for each net cost claim made by the USP (if it is found to be an unfair financial burden), ComReg would carry out an assessment to determine the level at which contributions might be capped. The exercise would consider:

- the net cost of the USO as determined by ComReg (and if an unfair financial burden on the USP) to be recovered;
- the proportion to be recovered from non-USP postal service providers providing postal services within the scope of universal postal service;
- the impact of recoverability on the sustainability and profitability of non-USP postal service providers providing postal services within the scope of universal postal service; and
- the impact on the development of competition for the provision of postal services within the scope of universal postal service.

Collection and distribution of contributions to fund any unfair financial burden

90 Section 36 of the 2011 Act sets out requirements in relation to the collection and distributions of contributions from postal service providers providing postal services to fund any unfair financial burden. ComReg has elaborated further on these requirements in its Regulations as required by the 2011 Act.

91 In the interests of proportionality, the USP does not need to send its contribution to fund any unfair financial burden to ComReg (which ComReg would then return to the USP under the sharing mechanism). As the USP accounts for the vast majority of the postal services within the scope of universal postal service it is likely that the USP itself would be funding most of any unfair financial burden. If the net cost determined by ComReg is a large amount (for example €5 million), requiring the USP to contribute its share of this net cost by cash (say €4.9m) to ComReg, for ComReg to shortly send back as cash to the USP under the sharing mechanism could result in unnecessary cost (for example, cash transaction and insurance costs for both ComReg and the USP) and short-term negative cash-flow implications for the USP.

7 Other comments

7.1 Comments on the draft Regulatory Impact Assessment (RIA)

92 In Consultation 13/83, ComReg asked the following question:

Q.4 Do you have any views on this draft Regulatory Impact Assessment and are there other factors ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Views of respondents

93 **An Post** makes the following points in relation to the RIA:

- An Post disagrees with a pro-rata contribution mechanism based only on revenue market share. An Post contends that the difference in profitability between the USP and that of other postal service providers must form part of the mechanism in apportioning any net cost.

- In An Post's opinion, ComReg's obligation under section 36 of the 2011 Act to establish a sharing mechanism cannot be diluted in any way by its secondary objective to facilitate the development of competition under section 10 of the 2011 Act.

- According to An Post, there is nothing in the 2011 Act which would impose an obligation on An Post to make up any "shortfall" in the net USO cost as a result of measures aimed at the protection of smaller postal service providers. According to An Post, if it was the legislators' express objective to cater for the contingency of a deficit in the funding arrangement they would have made the necessarily provision in an explicit manner in the 2011 Act.

94 **Nightline** maintains that the cost of implementing the regime needs to be specifically subject to a Cost Benefit Analysis.

ComReg's position

95 In response to An Post's first two points these have already been addressed by ComReg earlier in this document.

96 In response to An Post's point on the obligation on An Post to make up and "shortfall" as a result of measures aimed at the protection of smaller postal service providers, the 2011 Act is clear that:

- The assessment and apportionment of the net cost among postal service providers within the scope of universal postal service is made by ComReg.
- ComReg's statutory objectives include facilitating the development of competition and innovation in the market for postal service provision.

97 Also, the Regulations set out that any shortfall in contributions as a result of any contribution cap, will be shared on a pro-rata basis using revenue market shares[20] among the USP and other postal service provider(s) (that are not subject to a contribution cap) providing postal services within the scope of the universal postal service. The impact of this shortfall in contributions on the other postal service providers should be minimal.

98 In response to Nightline, ComReg refers to paragraph 77 of this document.

99 Having considered the responses to Consultation 13/83, ComReg considers that no changes are required to the RIA which was set out in draft form in Consultation 13/83.

7.2 Comments on the draft Regulations

100 In Consultation 13/83, ComReg asked the following question:

Q.4 Do you have any comments on the draft Regulations? Please explain your response and provide details of any amendments that should be considered by ComReg.

Views of respondents

101 **An Post** strongly urges ComReg to re-consider its proposals in relation to a pro-rata adjustment based on revenue market share. An Post strongly believes that the references to a contribution cap and An Post's obligation to make good any shortfall should be removed from the draft Regulations and provides a revised working of the draft Regulations reflecting its proposed changes.

102 The **CWU** rejects the contribution cap in the draft Regulations. According to the CWU, the application of a cap in circumstances where An Post is expected to make up any shortfall in the funding of the unfair financial burden is unacceptable and anti-competitive.

ComReg's position

103 ComReg has addressed the points raised earlier in this document.

[20] From providing postal services within the scope of universal postal service; in the case of the USP this includes revenue from the universal postal services

104 Having considered the responses to Consultation 13/83, ComReg has made a change to the draft Regulations which was set out in draft form in Consultation 13/83. This change clarifies that any shortfall in contributions as a result of any contribution cap, will be shared on a pro-rata basis using revenue market share[20] among the USP and other postal service provider(s) (that are not subject to a contribution cap) providing postal services within the scope of the universal postal service.

8 Regulatory Impact Assessment

105 ComReg's published Regulatory Impact Assessment ("RIA") Guidelines[21] (Doc 07/56a), in accordance with a policy direction to ComReg[22], state that ComReg will conduct a RIA in any process that may result in the imposition of a regulatory obligation, or the amendment of an existing obligation to a significant degree, or which may otherwise significantly impact on any relevant market or any stakeholders or consumers. However, the Guidelines also note that in certain instances it may not be appropriate to conduct a RIA and, in particular, that a RIA is only considered mandatory or necessary in advance of a decision that could result in the imposition of an actual regulatory measure or obligation, and that where ComReg is merely charged with implementing a statutory obligation then it will assess each case individually and will determine whether a RIA is necessary and justified.

106 In making its decisions set out in this document, ComReg considers that it is not imposing a discretionary regulatory obligation but is acting in accordance with the statutory obligation imposed by sections 35 and 36 of the 2011 Act. Therefore, for the most part, there were not options open to ComReg that can be assessed by the RIA. However, there are some options open to ComReg in setting the sharing mechanism and therefore a RIA is prepared below for this purpose.

8.1 Steps involved

107 In assessing the available regulatory options, ComReg's approach to RIA follows five steps as follows:

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

Step 3: determine the impacts on stakeholders

Step 4: determine the impacts on competition

Step 5: assess the impacts and choose the best option

[21] Which have regard to the RIA Guidelines issued by the Department of An Taoiseach in June 2009

[22] Ministerial Policy Direction made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February, 2003

Step 1: Describe the policy issue and identify the objectives

108 Pursuant to section 36(2) of the 2011 Act, ComReg is required if it finds a net cost to be an unfair financial burden on the USP to establish a sharing mechanism to assess, apportion, collect, and distribute contributions to the USP concerned from postal service providers providing postal services within the scope of universal postal service. As required by section 36(5) of the 2011 Act, ComReg's sharing mechanism, must operate:

- in an objective, proportionate, and transparent manner
- in a manner that does not involve or tend to give rise to any undue discrimination against:
  - i. particular postal service providers or a particular class or description of postal service providers
  - ii. particular postal service users or a particular class or description of postal service users

Step 2: Identify and describe the regulatory options

Option: Lump sum or pro-rata contribution to net cost (if unfair burden)

109 There are essentially two methods that are available to ComReg to carry out the apportionment under the sharing mechanism. Each provider of postal services within the scope of the universal service could pay either:

(1) a lump sum, i.e. dividing the net cost equally amongst providers; or

(2) a pro-rata amount of the net cost according to some measure of the size of that particular provider relative to other providers, e.g. revenue market share.

Option: Contribution cap or not for smaller postal service providers

110 In order to promote the development of competition in the market for postal services within the scope of universal postal service, ComReg considers that it is important that any sharing mechanism does not have an adverse effect on competition in the market for postal services within the scope of universal postal service.

111 For providers with a low turnover and high costs (actual or expected), such as those who have just entered (or are looking to enter) the market for provision of postal services within the scope of the universal service, the required contribution for a large net cost may risk putting these providers at a competitive disadvantage, or even deter entry completely. Therefore, to protect these particular postal service providers, ComReg could set a contribution cap.

Steps 3, 4 and 5: Determine and assess the impacts on stakeholders and competition and choose the best option

Option: Lump sum or pro-rata contribution to net cost (if unfair burden)

112 ComReg considers that both a lump sum and pro-rata contribution based mechanism could operate in an objective and transparent way. However, a lump sum contribution may not be considered proportionate as all providers would pay the same amount, regardless of their size or the proportion of relevant services they provide – so, a new entrant could be expected to contribute the same amount as An Post, an operator with revenues of c.€365 million per annum arising from the provision of universal postal services.

113 In considering how well each option meets the non-discrimination criterion, ComReg considers that it is important to bear in mind that for a mechanism to be truly non-discriminatory, providers with similar levels of provision of universal postal services would need to be contributing a similar amount. Therefore, a lump sum contribution could be considered to be discriminatory against particular providers.

114 In relation to the impact on competition, as the lump sum approach would lead to all providers contributing the same monetary amount, there is a significant risk that this approach could lead to an adverse effect on competition. This risk comes from the current structure of the market for postal services within the scope of universal postal service, in that there are extremely large variations in size between current providers of postal services within the scope of the universal service. Such an approach may therefore:

- put some smaller existing providers at a significant competitive disadvantage by weakening their financial position, possibly resulting in them ceasing provision of postal services within the scope of the universal postal service altogether (depending on the size of the net cost identified by ComReg);
- put upward pressure on prices charged by existing providers, as a lump sum, which would act as a significant sunk cost which may be passed onto postal service users; and/or

- prevent potential providers from entering the market for postal services within the scope of universal postal service through a significant reduction in their expected financial return, even perhaps resulting in a loss when the contribution to any unfair financial burden is taken into account (again, depending on the size of the net cost identified by ComReg).

115 The ultimate impact on competition in the market for postal services within the scope of universal postal service would depend upon the total size of the net cost, and therefore the size of the per provider contributions under this approach.

116 On balance, a pro-rata contribution based approach is the best option. This proposed approach meets all of the desired criteria, whilst the lump sum contribution based approach may be considered discriminatory and may result in an adverse effect of competition given the large variations in size between current providers of postal services within the scope of universal postal service.

Option: Contribution cap or not for smaller postal service providers

117 ComReg considers, as a point of principle, it is appropriate that all postal service providers providing postal services within the scope of universal postal service, including new entrants, should make some contribution to the net cost if it is found to be an unfair financial burden and a sharing mechanism is required. Furthermore, ComReg notes that the 2011 Act makes no provision for some postal service providers to be excluded. Moreover, so long as the required contribution is at an appropriate level, ComReg considers that it is unlikely to induce exit or deter entry.

118 However, ComReg has a concern due to the current asymmetry in size between new entrants (and possibly the current postal service providers providing postal services within the scope of universal postal service) and the USP. For example, if the net cost identified by ComReg was large, then even if a new entrant were paying a small proportion of that net cost, it could be very significant compared to its total turnover. Consequently, as a protection for small existing postal service providers or new entrants, the contribution each pays could be capped at an appropriate percentage of their turnover from the provision of postal services within the scope of universal postal service.

119 Therefore, on balance, a contribution cap for smaller postal service providers is the most appropriate option. It is difficult to set any pre-determined rules for the level at which contributions should be capped, as it would largely depend on an assessment of the entrant's ability to pay and an assessment of the likely impact of the sharing mechanism on the development of competition in the sector. Similarly, setting an absolute revenue market share threshold above which operator's would be expected to make a full contribution could act as a barrier to entry/expansion.

9 Regulations

S.I. No. 469 of 2013

COMMUNICATIONS REGULATION (FINANCING OF PROVISION OF UNIVERSAL POSTAL SERVICE) REGULATIONS 2013

The Commission for Communications Regulation, in exercise of the powers conferred on it by section 36(2) of the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011), hereby makes the following Regulations:

Citation
1. These Regulations may be cited as the Communications Regulation (Financing of Provision of Universal Postal Service) Regulations 2013.

Interpretation / Definitions
2. (1) In these Regulations, unless the context otherwise requires:

"Act of 2002" means the Communications Regulation Act 2002 (No. 20 of 2002);

“Act of 2011” means the Communications Regulation (Postal Services) Act 2011 (No.21 of 2011);

“applicable undertaking” means a postal service provider providing a postal service within the scope of the universal postal service;

“Commission” means the Commission for Communications Regulation;

"contribution cap" means a cap on the contribution to the unfair financial burden in order to promote the development of the postal sector for the provision of postal services within the scope of universal postal service and to promote the interests of postal service users availing of postal services within the scope of universal postal service;

“fund” has the meaning set out in section 36 of the Act of 2011;

“net cost” has the meaning set out in section 35 of the Act of 2011 and shall be calculated in accordance with ComReg Decision D09/13 dated 25 July 2013;

“postal service” has the meaning set out in section 6 of the Act of 2011;

“postal service provider” has the meaning set out in section 6 of the Act of 2011;

“postal service user” has the meaning set out in section 6 of the Act of 2011;

“postal service within the scope of the universal service” has the meaning set out in section 37 of Act of 2011;

"relevant financial year" means, in relation to an applicable undertaking, the financial year of the applicable undertaking;

"relevant turnover" means, in relation to an applicable undertaking, the gross revenue, excluding value added tax, paid or payable, of the applicable undertaking in respect of the provision of postal services within the scope of universal postal service in its relevant financial year;

"sharing mechanism" has the meaning set out in section 36 of the Act of 2011;

"unfair financial burden" has the meaning set out in section 36 of the Act of 2011 and ComReg D15/13;

“universal postal service” has the meaning set out in section 6 of the Act of 2011;

“universal postal service provider” has the meaning set out in section 6 of the Act of 2011.

(2) In these Regulations:

(a) a reference to an enactment or regulation shall be construed as a reference to the enactment or regulation as amended or extended by or under any subsequent enactment or regulation;

(b) a reference to a Regulation is to a Regulation of these Regulations, unless it is indicated that a reference to some other enactment is intended; and

(c) a reference to a paragraph or subparagraph is to the paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

(3) A word or expression that is used in these Regulations and that is also used in the Act of 2011 has, unless the context otherwise requires, the same meaning in these Regulations that it has in that Act.

(4) A word or expression that is used in these Regulations and that is also used in the Act of 2002 has, unless the context otherwise requires, the same meaning in these Regulations that it has in that Act.

(5) The Interpretation Act 2005 (No. 23 of 2005) applies to these Regulations.

Applicability

3. These Regulations apply to applicable undertakings following any determination by the Commission under section 35(4)(b) of the Act of 2011 that the net cost of provision of the universal postal service represents an unfair financial burden on the universal postal service provider concerned.

Assessment

4. The Commission shall assess the contributions of providers of postal services within the scope of the universal service for the purposes of meeting the unfair financial burden referred

to in Regulation 3 on the basis of the statements of relevant turnover provided by applicable undertakings to the Commission as required by Regulation 6(1) of the Communications Regulation Act 2002 (Section 30) Postal Levy Order 2013 (S.I. No. 181 of 2013) and this Regulation.

Apportionment

5. The Commission shall apportion the verified net cost determined to be an unfair financial burden among applicable undertakings as follows:

(1) an apportionment amongst applicable undertakings based on the relative revenue-based market shares of applicable undertakings determined from the statements of relevant turnover from applicable undertakings under Regulation 4, subject to any contribution cap determined by the Commission to apply to any applicable undertaking in accordance with this Regulation;

(2) the Commission shall determine whether a contribution cap is to apply to each applicable undertaking other than the universal postal service provider having regard to:

(a) the impact of apportioning the net cost on the basis of Regulation 5(1) on the sustainability and profitability of each applicable undertaking other than the universal postal service provider; and

(b) the impact of apportioning the net cost on the basis of Regulation 5(1) on the development of competition in the provision of postal services within the scope of universal postal service; and

(3) if a contribution cap is determined by the Commission to apply to an applicable undertaking other than the universal postal service provider, the universal postal service provider and other applicable undertakings that are determined not to have a contribution cap applied shall cover, based on their relative revenue-based market shares, any shortfall between the contribution that would have applied to that applicable undertaking based on Regulation 5(1), and the actual contribution to be made by that applicable undertaking under the contribution cap determined by the Commission to apply to that applicable undertaking under Regulation 5(2).

Collection

6. (1) If the Commission determines that the total contributions from applicable undertakings other than the universal postal service provider under Regulation 5 would be less than the cost of establishing and maintaining the sharing mechanism, then no sharing mechanism will be established and the universal postal service provider will fund the unfair financial burden in full, and the Commission shall make this publicly known by way of an information notice.

(2) If Regulation 6(1) does not apply, each applicable undertaking, except for the universal postal service provider, shall pay to the Commission its contribution to the fund as determined by the Commission under Regulation 5.

(3) The Commission shall inform each applicable undertaking in writing of its contribution as specified in Regulation 6(2) and contributions shall be paid to the Commission within 30 days by way of banker's draft or such other means and on such other terms, if any, as the Commission may decide.

(4) A request by the Commission to an applicable undertaking under this Regulation may be delivered or sent by post to the applicable undertaking at the last address notified to the Commission of the applicable undertaking.

(5) In accordance with section 36(4) of the Act of 2011, the sharing mechanism and fund can be administered by the Commission or by any person appointed on such terms and conditions as the Commission determines, possessing, in the opinion of the Commission, the requisite degree of independence from a universal postal service provider and the applicable undertakings and who shall be under the supervision of the Commission.

(6) In accordance with section 36(6) of the Act of 2011, any amount payable by way of a contribution pursuant to these Regulations that remains unpaid by an applicable undertaking may be recovered by the Commission as a simple contract debt in any court of competent jurisdiction and any such amount shall include interest at the rate for the time being standing specified in section 26 of the Debtors (Ireland) Act 1840, on the amount or part thereof remaining unpaid in respect of the period between the date when the amount or part thereof fell due and the date of payment of such amount or part.

Distribution to the universal postal service provider

7. (1) All contributions from applicable undertakings other than the universal service provider collected by the Commission pursuant to these Regulations shall be distributed by the Commission to the universal postal service provider within 60 days of receipt of the contributions from such applicable undertakings.

(2) All distributions to the universal postal service provider, including the notional distribution by the universal postal service provider to itself, will be recorded by ComReg and published in its annual report.

GIVEN under the Official Seal of the Commission for Communications Regulation this
4 December 2013

____

Kevin O’Brien,

Commissioner.

on behalf of the Commission for Communications Regulation

10 Conclusion

120 In accordance with the 2011 Act it is ComReg that will determine whether the provision of a universal postal service by the universal postal service provider concerned represents an unfair financial burden on the USP. In this document, ComReg has decided how it will make this determination. Also, in order to make that determination, ComReg would require detailed evidence based information from the USP and the 2011 Act empowers ComReg to obtain such information from the USP where it is not provided.

121 Furthermore, in accordance with the 2011 Act, if ComReg finds that there is an unfair financial burden, it is the sharing mechanism provided for in regulations made by ComReg that sets out the apportionment, collection, and distribution to the USP to finance that unfair financial burden. ComReg has now set these Regulations on how any such financing should apply.

122 Finally, if a written submission is received by ComReg from the USP seeking to receive funding for the net cost (if any) of providing a universal postal service, this would be assessed by ComReg in accordance with ComReg Decision D09/13 and this Decision (D15/13) and ComReg would make its preliminary views on the USP's submission known through a public consultation[23] before any final determinations by ComReg are made.

[23] In accordance with section 15 of the 2011 Act and ComReg's Consultation Procedures (Document No. 11/34)

Annex: 1 Chapter 5 of the Communications Regulation (Postal Services) Act, 2011

Communications Regulation (Postal Services) Act 2011

Chapter 5

Financial support for universal postal service provision

35. Net cost of provision of universal postal service

(1) A universal postal service provider, designated under section 17 or 18, which seeks to receive funding for the net costs (if any) of providing a universal postal service may submit a request in writing to the Commission.

(2) A request under subsection (1) shall be—

> *(a) made in such form and manner as the Commission determines,*
>
> *(b) submitted no earlier than after the end of the first financial year immediately following the designation under section 17 or 18 and thereafter no later than 6 months after the accounts for the financial year concerned have been audited, unless the Commission agrees otherwise, and*
>
> *(c) accompanied by such supporting information as may reasonably be required by the Commission for the purposes of subsection (4).*

(3) Where a request is made under subsection (1), the Commission may require, in writing, the universal postal service provider concerned to give to the Commission such additional information as the Commission specifies in the requirement for the purposes of subsection (4) within 21 days from the date of the requirement or such longer period as the Commission may specify.

(4) The Commission shall, on the basis of the information given to it under subsection (2) and any additional information given to the Commission under subsection (3), determine whether the provision of a universal postal service by the universal postal service provider concerned—

> *(a) represents a net cost to the universal postal service provider in the period to which the request made under subsection (1) relates, taking into account any market benefit which accrues to the universal postal service provider,*

calculated in accordance with Annex I to the Directive, the text of which Annex is, for ease of reference set out

in Schedule 4, and

(b) in the opinion of the Commission, represents an unfair financial burden on the universal postal service provider.

(5) For the purpose of making a determination under subsection (4), the Commission shall—

(a) take into account—

(i) the methodology used by the universal postal service provider with respect to the information given to the Commission under this section,

(ii) the extent to which the universal postal service provider is, in the Commission's opinion, complying with the obligations imposed on it by or under the Communications Regulation Acts 2002 to 2011 relating to the provision of a universal postal service in a cost-efficient manner, and

(iii) any other information which the Commission considers relevant,

and

(b) as appropriate—

(i) audit or verify, or

(ii) appoint a person possessing, in the opinion of the Commission, the requisite qualifications and degree of independence from the universal postal service provider, to audit or verify, the calculation of the net cost referred to in subsection (4).

(6) The Commission shall, subject to the protection of any information which it considers confidential (within the meaning of section 24 of the Principal Act), publish the conclusions of any audit or verification undertaken pursuant to subsection (5)(b).

(7) The Commission shall notify the universal postal service provider in writing of its determination as soon as practicable.

(8) Where the Commission determines that the universal postal service provision does not represent an unfair financial burden it shall notify the universal postal service provider of the reasons for the determination as soon as practicable after the determination is made.

36. Financing of provision of universal postal service

(1) Where the Commission makes a determination under section 35 that the net cost of provision of a universal postal service represents an unfair financial burden on the universal postal service provider concerned it shall apportion the net cost among providers of postal services within the scope of the universal postal service and such providers shall make a contribution, in accordance with the cost apportioned to each of them, for the purposes of meeting that burden.

(2) The assessment, apportionment, collection and distribution to the universal postal service provider concerned of contributions referred to in subsection (1) shall be carried out in accordance with a mechanism (in this Part referred to as a "sharing mechanism") provided for in regulations made by the Commission.

(3) The contributions referred to in subsection (1) shall be paid into a fund (in this section referred to as the "fund") established for that purpose by regulations made by the Commission and maintained and, subject to subsection (8), accounted for in accordance with those regulations.

(4) The regulations referred to in subsections (2) and (3) may provide for—

> *(a) the sharing mechanism and fund to be administered—*
>
> > *(i) by the Commission, or*
> >
> > *(ii) by a person specified in the regulations, appointed on such terms and conditions as the Commission determines, possessing, in the opinion of the Commission, the requisite degree of independence from a universal postal service provider and the postal service providers referred to in subsection (1) and who shall be under the supervision of the Commission,*

and

> *(b) the making of contributions to the fund by a particular class or description of postal service providers referred to in subsection (1).*

(5) In making regulations under subsections (2) and (3) for the purposes of this section, the Commission shall ensure that the sharing mechanism operates—

> *(a) in an objective, proportionate and transparent manner, and*
>
> *(b) in a manner that does not involve or tend to give rise to any undue discrimination against—*
>
> > *(i) particular postal service providers or a particular class or description of postal service providers, or*

(ii) particular postal service users or a particular class or description of postal service users.

(6) Any amount payable by way of a contribution pursuant to regulations made under subsections (2) and (3) that remains unpaid may be recovered by the Commission as a simple contract debt in any court of competent jurisdiction and any such amount shall include interest at the rate for the time being standing specified in section 26 of the Debtors (Ireland) Act 1840, on the amount or part thereof remaining unpaid in respect of the period between the date when the amount or part thereof fell due and the date of payment of such amount or part.

(7) Where a sharing mechanism is established, the Commission shall, subject to the protection of any information which it considers confidential (within the meaning of section 24 of the Principal Act), publish an annual report—

(a) setting out the calculated net cost of the provision of a universal postal service audited or verified, as the case may be, under section 35(5)(b), and

(b) including information relating to the performance of the fund and the total amount of contributions collected and distributed from the fund to the universal postal service provider concerned during the period to which the annual report relates.

(8) The Commission shall—

(a) cause to be kept all proper and usual accounts relating to such fund as may be established pursuant to regulations made under subsection (3), and

(b) as soon as may be after the end of each financial year, submit the accounts to the Comptroller and Auditor General for audit and those accounts when so audited shall, together with—

(i) the report of the Comptroller and Auditor General thereon, and

(ii) a report of the Commission to the Minister in relation to the performance of its functions relating to the fund in the previous year, be presented as soon as may be after the end of the financial year to the Minister, who shall cause copies of the accounts and the reports referred to in subparagraphs (i) and (ii) to be laid before each House of the Oireachtas