



Commission for  
**Communications Regulation**

## General

ComReg response to the Department of Communications, Energy and Natural Resources' consultation on the liberalisation of the postal sector

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## 1 Foreword [by the Chairperson]

ComReg welcomes the opportunity to respond to DCENR's consultation document on the liberalisation of the postal sector, and the regulatory framework necessary following Full Market Opening (FMO)

As ComReg highlighted in its Postal Strategy Statement (2008-2010)<sup>1</sup> the development of e-government and e-commerce, and developments in the ICT sector generally, are having significant impacts on postal services. The challenge for postal operators is to open the door and grasp the great opportunities that exist.

ComReg believes that a competitive postal market will further stimulate innovation and value for the consumer, from which all consumers (businesses and individuals) should benefit. It is conscious that this will only be achieved if An Post's current dominant position does not foreclose on the emergence in Ireland of a fully competitive postal market.

As the new Postal Directive recognises (recital 47) 'The role of national regulatory authorities is likely to remain crucial, in particular in those Member States where the transition to competition still needs to be completed.' ComReg believes that in fostering the development of a competitive postal market it must act as an advocate for the consumer and all those interested in providing customer focused and efficient postal services, while also encouraging An Post to become more efficient and responsive to customer needs.

ComReg has statutory responsibility for ensuring that postal operators, including An Post, comply with their obligations. To do this effectively the obligations must be precise and unambiguous, and the monitoring and enforcement procedures must ensure compliance on a timely basis by all operators.

The transposition process will necessitate the repeal of legislation going back one hundred years or more and the introduction of new legislation which will establish the regulatory framework for the provision of postal services in Ireland for many decades to come. The Minister is to be commended for giving all interested stakeholders the opportunity to make suggestions about the content of the legislation before the draft texts are finalised.

This document sets out ComReg's assessment of the key issues to be addressed in transposing the new Postal Directive as well as responding to the specific consultation questions.

**John Doherty,  
Chairperson,  
Commission for Communications Regulation**

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<sup>1</sup> ComReg document 08/17 15 February 2008

## 2 Introduction and Executive Summary

Directive 2008/6/EC published on 27 February 2008 must be transposed into Irish Law no later than 31 December 2010. .

This document sets out ComReg's response to DCENR's consultation document about the liberalisation of the postal sector, and the regulatory framework necessary following Full Market Opening (FMO)

It is divided into three sections:

In section 3 there is a brief overview of ComReg's role as the national regulatory authority (NRA) for the postal sector in Ireland.

Section 4 sets out ComReg's assessment of the key issues to be addressed in transposing the new Postal Directive.

Section 5 responds to the specific consultation questions.

ComReg's statutory objective is "to promote the development of the postal sector and in particular the availability of a universal postal service within, to and from the State at an affordable price for the benefit of all users". The Postal Strategy Statement (2008-2010) sets out its strategy in relation to the transposition of the new Postal Directive as to "act as an advocate for the consumer and all those interested in providing customer focused and efficient postal services".

The main focus of the new Directive is on the provision and regulation of the universal service. The Directive is a 'framework directive' which gives member states a number of options rather than one which is prescriptive as to what is to be done. The key issues identified by ComReg relate to Universal Service, Pricing and Quality.

ComReg believes that defining the scope of Universal Service is one of the key decisions to be made in transposing the Directive. A relatively wide definition of the scope of universal service, combined with 'market provision' may offer the best prospect of ensuring a vibrant postal market in Ireland that will ensure that consumers have access to leading edge postal services.

Designation of a single universal service provider may not be appropriate in a liberalised market. The alternatives to designation are 'market provision' and 'public procurement'. The two methods can be used in combination, with public procurement being used to fill in any gaps in market provision.

Licensing will be important to control entry and exit (e.g. minimum notice) from the market and to give assurance to users of the integrity of the operators.

The directive continues the existing requirement that the tariffs for each universal service comply with the principles of 'affordability', 'cost-orientation', 'non-discrimination' and 'transparency'. A new requirement is that prices 'give incentives for an efficient universal service provision'.

A carefully designed *ex ante* price cap type of price control is therefore probably the only way of ensuring compliance with the tariff principles, while giving operators the appropriate freedom to respond to the initiatives of competitors and the incentive to improve efficiency. In the short term, however, this will need to be backed up by a detailed *ex post* review of prices and costs to ensure that such flexibility is not being used to create inappropriate cross subsidies, which might foreclose on market entry because prices in these market segments are artificially low.

There has been no change to the requirements with regard to Quality in the new Postal Directive. ComReg welcomes the new powers that the Minister has recently given to ComReg to issue Directions to An Post to improve its performance relative to the 94% target for next day delivery. ComReg believes that it is appropriate, when transposing the Directive, to ensure that the link between price and quality is explicitly recognised, and that quality includes issues such as consumer choice as well as transit time.

ComReg's responses to the specific questions develop the above points in more detail.

### 3 ComReg's role

ComReg, the Commission for Communications Regulation, was established by the Communications Regulation Act, 2002.

One of its functions is “to ensure compliance by providers of postal services with obligations in relation to the provision of postal services” (Section 10(1) (c)).

In exercising this function its statutory objective is “to promote the development of the postal sector and in particular the availability of a universal postal service within, to and from the State at an affordable price for the benefit of all users” (Section 12(1)(c)).

There is no explicit objective to promote competition, although in ComReg's view the availability of competing postal services, as envisaged in European and National Legislation, is the best way of ensuring that the Universal Service provided by An Post is fully reflective of customers needs.

In carrying out this function “the Commission shall have regard to international developments with regard to ... postal services....” (Section 12(5))

Under Section 31 of the 2002 Act ComReg must “draw up and adopt a strategy statement reflecting its statutory functions” every two years. The strategy statement for the postal sector for the period 2008 to 2010 was published on 14 February 2008 document 08/17. An extract of the strategies relevant to the current consultation is at Appendix A.

It will be noted that its strategy to “act as an advocate for the consumer and all those interested in providing customer focused and efficient postal services” in relation to the transposition of the new Postal Directive is entirely consistent with its statutory objective as set out above.

The importance of independent national regulatory authorities (NRAs) is recognised in the new Postal Directive:

The role of national regulatory authorities is likely to remain crucial, in particular in those Member States where the transition to competition still needs to be completed. In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions. .... National regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks. (Recital 47)

Due to the frequent involvement of different national bodies in the exercise of regulatory functions, it is appropriate to introduce transparency in the allocation of tasks and require the different relevant bodies charged with sector regulation, the application of competition rules and with dealing with consumer issues to cooperate in order to ensure the effective accomplishment of their tasks. (Recital 48)

The provision of parcel and express services to business customers is already very competitive and the Directive restricts regulation in these markets to very light touch registration procedures and *de minima* provisions relating to consumer protection and mail integrity.

The main regulatory focus therefore is on the provision of services within the scope of universal service, i.e. those services where competition will need to be nurtured over the medium term. Inevitably the NRAs and Competition Authorities will have overlapping concerns as postal liberalisation continues. Under European Law (the *Ahmed Saeed* case) NRAs are obliged to ensure that their decisions are consistent with Competition Law. ComReg works closely with the Competition Authority when dealing with relevant issues. LECG reported (October 2007 – ComReg document CP45e, paragraph 4.53) that

The Competition Authority suggested that a NRA is generally required to prepare the market for effective liberalisation (i.e. to define the “rules of engagement”) and to monitor the market so that the market develops in an orderly manner. The Competition Authority suggested that addressing issues of price and non-price discrimination would require detailed market knowledge, which an industry-specific regulator might be better equipped to handle.

It should be noted that in some instances the Postal Directives impose duties directly on the designated national regulatory authorities such as ComReg.

## 4 Main provision of the new Postal Directive

Directive 2008/6/EC published on 27 February 2008 must be transposed into Irish Law no later than 31 December 2010. It requires that Member States must not grant or maintain in force exclusive or special rights for the establishment and provision of postal services after that date. This section of ComReg's response to the consultation summarises the main issues which need to be addressed during transposition under two headings:

- (a) Those relating to the provision of postal services generally; and
- (b) Those relating to the provision of the universal services.

### 4.1 Provisions relating to postal services generally

There are very few rights and obligations applicable to all postal operators. The position can be summarised as follows:

- (a) The definition of 'postal services' has been satisfactorily clarified.
- (b) The existing requirement that general authorisation schemes must be limited to guaranteeing compliance with the essential requirements (confidentiality of correspondence, security of the network, data protection, environmental protection and regional planning, etc.) is maintained.
- (c) The obligation to have transparent, simple and inexpensive procedures for dealing with postal users' complaints is now mandatory, but it may be enforced by consumer protection bodies rather than postal NRAs.
- (d) There is a new obligation to supply information, including financial information, 'for clearly defined statistical purposes' to NRAs.
- (e) There is a right to receive information about the rights and obligations of the universal service provider(s) to them in respect of prices, quality and access conditions.
- (f) Finally providers of postal services cannot rely on authorisation in one member state to provide postal services in another.

### 4.2 Provisions relating to universal services

The main focus of the Directive is on the provision and regulation of the universal service. The Directive is a 'framework directive' which gives member states a number of options rather than one which is prescriptive as to what is to be done. The key issues are discussed in the following paragraph.



#### 4.2.1 Universal Service

##### 4.2.1.1 Scope.

The directive requires that member states guarantee to all users (senders and receivers, businesses and individuals) a minimum range of services for 'letters' up to 2kg, 'parcels' up to 10kg or 20kg, registered and insured items. This range of services must evolve in response to the technical, economic and social environment and to the needs of users.

A number of approaches have been adopted when defining the scope of universal service ranging from a very wide definition (e.g. France which includes virtually every service provided by the incumbent) to a narrow definition as adopted in, for example, Britain and Sweden. Best practice requires that the definition needs to be provided in the legislation to provide certainty and transparency to all stakeholders in the sector.

ComReg holds the view that this is one of the key decisions that has to be made in transposition:

- (a) It defines the services to be regulated;
- (b) It defines which operators may be regulated;
- (c) It defines who may be required to contribute to ComReg's running costs;
- (d) It influences the net cost of the universal service obligation;
- (e) It defines which operators may be required to contribute to a compensation fund to finance universal service provision (if one needs to be established);

##### 4.2.1.2 Provision.

Hitherto most member states, including Ireland, have designated the incumbent as the universal service provider. Recital 23 of the new Directive observes that for the future:

“Greater competition and choice means that Member States should be given further flexibility to determine the most efficient and appropriate mechanism to guarantee the availability of the universal service, while respecting the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market. Member States may apply one or a combination of the following: the provision of the universal service by market forces, the designation of one or several undertakings to provide different elements of the universal service or to cover different parts of the territory and public procurement of services.”

It can be concluded therefore that designation may not be appropriate in a liberalised market. The Directive emphasises this by requiring member states that wish to

continue designating a specific operator to observe the principles of transparency, non-discrimination and proportionality. Designation of a universal service provider must also be subject to a periodic review.

As noted above the alternatives to designation are 'market provision' and 'public procurement', which includes competitive dialogue and negotiated procedures without publication of a contract notice in the OJEU. The two methods can be used in combination, with public procurement being used to fill in any gaps in market provision.

#### 4.2.1.3 Financing.

This issue does not arise if 'market provision' is adopted. Otherwise this may be financed by state funds, in which case state aid rules apply. Alternatively a compensation fund may be established, funded by users' fees and/or inserting an obligation in an operators' license to make contributions. The latter only applies if there is a 'net cost' of providing universal service and this represents an unfair burden on the designated operator(s).

In calculating whether there is a 'net cost' the first step is to identify the costs that any designated universal service provider would have chosen to avoid, had there been no universal service obligation. This is to be focused on:

- (i) elements of services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards.
- (ii) specific users or groups of users who can only be served at a loss or under cost conditions falling outside normal commercial standards. This category includes those users or groups of users that would not be served by a commercial operator that did not have an obligation to provide universal service.

The net cost of each specific aspect of the universal service obligations is to be ascertained separately and when aggregated must be offset against the intangible benefits of designation as universal service operator. If this results in a positive 'net cost', it must then be considered if this represents an unfair burden on the universal service provider. The responsibility for verifying the 'net cost' lies with the national regulatory authority.

#### 4.2.1.4 Authorisation of Service Providers (including Licensing).

There is now a requirement that authorisation / licensing schemes must be transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria. There are detailed rules as to what can and what cannot be included.

#### 4.2.1.5 Statutory duty of An Post.

The memorandum of association of An Post, by law, includes the objectives:

- (a) to provide a national postal service within the State and between the State and places outside the State,
- (b) to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient postal services and, so far as the company considers reasonably practicable, to satisfy all reasonable demands for such services throughout the State.

#### 4.2.1.6 ComReg's Assessment.

A relatively wide definition of the scope of universal service, combined with 'market provision' may offer the best prospect of ensuring a vibrant postal market in Ireland that will ensure that consumers have access to leading edge postal services.

This option specifically excludes the possibility that new entrants may have to contribute to a compensation fund, thereby eliminating a significant barrier to entry. This, in turn, is likely to stimulate innovation and to ensure that services evolve in response to the technical, economic and social environment and to the needs of users.

Given that the memorandum of association of An Post provides that one of its objects is to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient postal services and to satisfy all reasonable demands for such services throughout the State it is unlikely that An Post will not provide, on a commercial basis, the range of services which Ireland must ensure is provided to its citizens.

However, if the services that An Post decides to provide on a commercial basis falls short of that required under the Postal Directives and the gap is not filled by other operators, there is always the possibility of filling the gap by public procurement.

Licensing will be important to control entry and exit (e.g. minimum notice) from the market and to give assurance to users of the integrity of the operators. Many statutes require the use of post to fulfil certain obligations (e.g. issue of speeding fines) and it would be appropriate to confine this to licensed postal operators providing universal service, rather than all postal operators most of whom would not be subject to regulatory control.

#### 4.2.2 Pricing

The directive continues the requirement that the tariffs for each of the services forming part of the universal service comply with the principles of 'affordability', 'cost-orientation', 'non-discrimination' and 'transparency'. It should be noted that these rules also apply to wholesale rates for access to parts of the incumbent's postal network. A new requirement is that prices 'give incentives for an efficient universal service provision'. Monitoring of prices for inappropriate cross-subsidisation by incumbents, e.g. to deter competitors from entering the market, is left to member states.

It follows that *ex-post* enforcement of these principles cannot, by definition, give incentives for efficiency.

On the other hand it could be argued that a detailed *ex ante* examination of every price before it is changed would impose an unacceptable burden on any operator in a market open to competition.

A carefully designed *ex ante* price cap type of price control is therefore probably the only way of ensuring compliance with the tariff principles, while giving operators the appropriate freedom to respond to the initiatives of competitors. In the short term, however, this will need to be backed up by a detailed *ex post* review of prices and costs to ensure that such flexibility is not being used to create inappropriate cross subsidies.

#### 4.2.3 Quality

The Postal Directive requires a high quality universal service in terms of daily collections and deliveries, delivery to the home, an appropriate density of access points, continuity of services, choice of services tailored to consumer needs, and transit time. As a general rule the higher the quality the higher the cost/price and over the years postal operators have tended to respond to cost pressures by reducing the quality of service.

However, performance against quality standards is an entirely different issue. In general the lower the performance the higher the cost. For example, if a letter is mis-sorted and is sent to the wrong delivery office, not only is the transit time increased by at least one day, but extra costs are incurred in correcting the mistake. This is an important point for an organisation like An Post – in 2007 23% of letters were not delivered on the next working day – if half of this was due to mis-sorting over 65 million items could be affected.

There is therefore a clear link between Quality and Performance and Price, although this is not explicitly recognised in the Postal Directive.

There is however a requirement to measure performance and ensure compliance with all quality standards.

While often the focus has been on An Post's failure to comply with Transit time targets, it must not be overlooked that the lack of consumer choice between first class/priority (D+1) and second class/non-priority (D+2/3) is also an issue. International experience would suggest that, given a free choice, 70% of consumers would opt for a second class service and only 30% for a first class service. Some commentators have suggested that only 15% of consumers will require D+1 service by 2015. However in some other aspects, e.g. collections and access points, there are indications that An Post is providing a service in excess of that required

There has been no change to these requirements in the new directive. Nevertheless it is appropriate, when transposing the Directive, to ensure that the link between price and quality is explicitly recognised, and that quality includes issues such as consumer choice as well as transit time.

## 5 DCENR CONSULTATION - Response to specific questions

### 5.1 Question 1 - Calculation of the net impact of the USO

#### 5.1.1 Question

In considering the benefits and associated costs of meeting the Universal Service Obligation, do you believe that it would, for the Universal Service Provider, result in:

- (i) A net benefit i.e. the benefits outweigh the associated costs of meeting the USO
- (ii) A net cost i.e. the costs of meeting the USO exceed the benefits
- (iii) Neither a net cost nor a net benefit i.e. the cost of meeting the USO are met by the benefits of meeting the USO
- (iv) Don't know/ no opinion

#### 5.1.2 Response

ComReg can have no prior opinion on this subject. The new Postal Directive provides that “the responsibility for verifying the ‘net cost’ lies with the national regulatory authority”. ComReg will make any decision required on this matter in accordance with the evidence submitted to it, using the methodology specified by law.

The issues relating to the scope, provision and financing of universal service are discussed in more detail in section 4.2.1.

### 5.2 Question 2 - Meeting the cost, if any, of the USO

#### 5.2.1 Question

If it is established that meeting the Universal Service Obligation constitutes an unfair financial burden for the designated USP, how should this burden i.e. provision of the service, be financed?

- (i) The Universal Service Provider should meet the costs from its own resources
- (ii) Direct Exchequer funding, by way of subvention, to the Universal Service Provider in compliance with E.U. Competition Law and State Aid and procurement rules
- (iii) Exchequer funding involving a public procurement or tender process, whereby the State would advertise the services to be provided and award

the contract to the successful bidder in compliance with E.U. Competition Law and State Aid and procurement rules

- (iv) Other postal operators, not designated as USP, should contribute to a central "Compensation fund" from which the provision of the service would be financed
- (v) Other

#### 5.2.2 Response

This is very much a hypothetical question – it assumes firstly that the Minister will decide to designate a particular operator as ‘universal service provider’ and secondly that ComReg will determine that there is a net cost of universal service obligations.

Of the four sources of financing set out above option (iv) appears to be inconsistent with the provisions of the new Postal Directive. It is only licences / authorisations issued to postal operators providing services within the scope of universal service that may be subject to an obligation to make a financial contribution to a “compensation fund” if the provision of the universal service entails a net cost and represents an unfair burden on the designated universal service provider.

Furthermore as recital 27 makes clear that acid test for deciding which operators may be required to contribute to a “compensation fund” is

“... whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. ...”

#### 5.3 Question 3 -Role of the Regulator regarding price changes

##### 5.3.1 Question

When the liberalisation of the postal market has been completed, should ComReg continue to have a role in approving price increases in the provision of postal services, as provided by An Post, which form part of the universal service?

- (vi) Yes
- (vii) No
- (viii) Don't know/No opinion

##### 5.3.2 Response

The new Postal Directive restates the existing requirement that the price of universal services must be affordable, cost oriented, transparent and non-discriminatory.

However there is a new requirement that the Price Control 'give incentives for an efficient universal service provision'.

ComReg recognises that following FMO postal operators must have the flexibility to respond quickly to competitive developments, but would suggest that this should not be at the expense of those customers who may have little choice as to which postal operator to use, or in deterring competitive entry by below cost selling.

The necessity therefore is to put in place an *ex ante* price control that gives an incentive for an efficient universal service provision, allows the operator flexibility in responding to market demands, while protecting customers and other operators from any abuse of An Post's dominant position. How this might be achieved is discussed in section 4.2.2

Two examples demonstrate what can happen absent *ex ante* price controls.

- 1.) In Ireland, the size of the reserved area was reduced to 50g on 1 January 2006. This meant that An Post, the incumbent, was free to increase the tariffs for all items weighing over 50g without seeking the regulator's prior concurrence. On 31 January 2006, An Post announced that it intended to revamp the range of service it offered, involving an increase in most tariffs, other than for the reserved services, to be implemented on 20 February 2006. Specifically, tariffs for letters weighing between 50g and 100g were increased by 25% (from 48c to 60c) if postage was prepaid with stamps, by 15% (from 48c to 55c) if postage was paid by meter franking and by 4% (48c to 50c) if postage was paid by Ceadúnas (on account). Prior to this, An Post had claimed that format rather than weight was the primary cost driver.
- 2.) On 1 January 2004, the market for international outbound mail was fully opened to competition and from the same date, An Post raised prices by as much as 57% for mail to Europe.

An example from the early years of postal liberalisation in Sweden illustrates the consequences of a poorly designed price control:

The price subject to the price cap was a hypothetical, average price. The prices for different price classes were averaged using the average weight of the product. It was then assumed that 90% of the postal items were given a discount. ....

In March 1997, Sweden Post took advantage of this loophole in the price cap to raise the normal postage for letters by 30%. As the price reduced postage was simultaneously lowered by a few percent, the average price increase (under the assumption that only 10% of the items did not receive the discount) was within the increase in the net price index.<sup>2</sup>

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<sup>2</sup> This quotation from 'Implementing a price regulation in a deregulated letter mail market - The Swedish experience in brief', PTS (Swedish NRA) August 1999,

In both the Irish and Swedish examples large scale users of the post were treated much more favourably than other customers, especially private consumers and small businesses.

In the Swedish example the Swedish post office (Posten AB) faced a competitor - CityMail – and the fear would be that by reducing prices for its largest customers it was selling 'below cost' to make it more difficult for its competitor to survive. More than 100 complaints were dealt with by the Swedish Competition Authority between 1993 and 1999 alone. Posten AB was found to have used its market power to exclude competitors from the market on a number of occasions. In one example, it was found to have engaged in predatory pricing by lowering the price for magazine distribution in three urban areas where its main competitor, CityMail, was active, thereby seeking to exclude the competitor from this market segment<sup>3</sup>.

#### 5.4 Question 4 - Role of the Regulator regarding quality of service

##### 5.4.1 Question

Should the quality of service of other postal operators also be monitored?

- (i) Yes
- (ii) No
- (iii) Don't know/No opinion

##### 5.4.2 Response

In a competitive market it is the customer who will ultimately decide whether any operator is providing the standard of service that is advertised. In the event of any misleading advertising in relation to transit time or other quality metrics the Advertising Standards Authority can deal with complaints on a voluntary basis, whilst the National Consumer Agency has specific powers to deal with misleading advertising under the European Communities (Misleading Advertising) Regulations, 1988.

It would not, therefore, be proportionate to impose a further requirement on those new entrants who fall within the scope of any licensing scheme, to measure transit time. (Under the new Postal Directive it is not permissible to impose similar requirements on other postal operators.) Imposing an obligation to comply with any decision by the Advertising Standards Authority in respects of claims about transit

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illustrates the scope there is for an operator to discriminate between different users or different services while keeping within the terms of a global price cap.

<sup>3</sup> See "Postal Services in the 21st Century - Report by LECG" ComReg document CP45e



time in respect of services provided might however emphasise the need to adhere to high standards with regard to advertising.

Whilst An Post retains its dominant position in the market, and whilst there continues to be a significant gap between the advertised standard of service and the actual performance as measured by ComReg's contractors there will be a continuing need to measure the transit time of An Post's priority service. ComReg welcomes the new powers that the Minister has recently given to ComReg to issue Directions to An Post to improve its performance.

Following FMO an issue that might be considered is whether there should be an explicit link between quality and price. A further issue that will inevitably arise in relation to An Post's transit time for priority mail is whether An Post should continue to be exempted from the requirements of Section 39 of the Sale of Goods and Supply of Services Act, 1980.

## 5.5 Question 5 - Role of the Regulator, in respect of postal operators, other than An Post, in a fully liberalised market

### 5.5.1 Question

Upon full liberalisation, and the removal of the final area reserved for An Post, what regulatory regime should apply to postal operators other than An Post?

- (i) No change from the existing arrangements save for the undertaking regarding the reserved area
- (ii) Only provisions regarding service delivery included in the Sale of Goods and Supply of Services Act 1990 should apply to the postal sector
- (iii) Other, please specify: Other, please specify:

### 5.5.2 Response

The new Postal Directive necessitates some changes to the existing arrangements for postal operators other than An Post.

As indicated in section 4 of this response the Directive distinguishes between postal operators generally and operators providing services within the scope of universal service.

With regard to postal operators generally there is already a requirement to maintain complaints procedures. However legislation will be needed to require such operators to supply information, including financial information, 'for clearly defined statistical purposes' to ComReg. Also Section 30 (2) of the Communications Regulation Act, 2002 must be amended so that such operators will no longer be required to pay a levy to meet the expenses properly incurred by ComReg in the discharge of its functions in relation to postal services.

With regard to operators providing services within the scope of universal service, provision of a high quality universal service demands that users can be assured that all service providers adhere to the highest standards with regard to mail integrity (confidentiality etc) and that performance in this regard is monitored and subject to appropriate enforcement procedures. ComReg would suggest that to give assurance to users of the integrity of the operators, to maintain public confidence in the liberalisation process and to control entry and exit (e.g. minimum notice) a Licensing Scheme will be necessary.

Many statutes require the use of post to fulfil certain obligations (e.g. issue of speeding fines) and it would be appropriate to confine this to licensed postal operators providing universal service, rather than all postal operators most of whom would not be subject to regulatory control.

## 5.6 Question 6 - Downstream access

### 5.6.1 Question

Do you see a role for Downstream Access in the Irish postal sector?

- (i) Yes
- (ii) No
- (iii) Don't know/No opinion

### 5.6.2 Response

The issue of access to the delivery networks of the incumbent universal service providers is a matter of much debate across Europe. Some operators, e.g. TNT (the Netherlands), DPAG (Germany), Posten SE (Sweden) argue that end-to-end competition is quite feasible and therefore there is no need for "access". On the other hand upstream worksharing (with a downstream monopoly) has been a fact of life for some 30-40 years in countries such as Britain, France, and the USA. However some would argue a regulatory framework based almost entirely on access competition, as in Britain, might foreclose on end to end competition to the detriment of consumers.

It is quite clear that no two countries are the same. The type of competition that emerges in each country will be determined by factors such as the efficiency of the incumbent operator, the range and quality of the services provided, the number of mail pieces per capita, the degree of urbanization, population density and the complexity of transport networks (e.g. Ireland with 4 mail centres none more than 260 km apart is not comparable to Britain with 69 mail centres up to 1000 km apart).

Postal networks are dependent on access, and since the foundation of the State a significant proportion of mail delivered by An Post (and its predecessors) originates with other operators; both universal service providers and operators such as Posten AB (Sweden), La Poste (France) and Swiss Post International which provide services between Britain and Ireland. Furthermore the Postal Directive contains

specific rules concerning the pricing of such access services – whether in regard to the universal service providers in other countries (Terminal Dues) or other domestic or cross-border operators. The issue therefore is whether the terms and conditions relating to such access should be regulated or whether it should be left to negotiation between the parties, with possibly a dispute resolution procedure being made available.

In Ireland it cannot be overlooked also that both GLS (Royal Mail) and DHL (Deutsche Post) have established an embryonic network of 'post offices' to compete with An Post in the C2C and C2B markets.

ComReg therefore suggests that the regulatory framework in Ireland must be neutral between access based competition and end to end competition, and any combination thereof.

## 5.7 Question 7 - Possible barriers to competition

### 5.7.1 Question

The removal of the reserved area or legal monopoly will remove the final legal barrier to competition in the postal sector. Do you believe that there are other barriers to the development of competition?

- (i) Yes
- (ii) No
- (iii) Don't know/No opinion

### 5.7.2 Response

ComReg believes that there are many barriers to the development of a competitive postal market in Ireland. These can manifest themselves in a range of different forms and we provide a non-exhaustive list of these below:

- (a) Economies of scale, density and scope particularly in the delivery market;
- (b) The VAT exemptions enjoyed by An Post
- (c) The lack of a postcode system
- (d) the control of national address databases
- (e) obligations in respect of Terminal Dues under the UPU convention (legitimised 'below cost' selling to potential competitors)
- (f) The ubiquity of its network, developed with state funding
- (g) "Brand loyalty" and the value of its "brand" – built up over centuries.

- (h) the size of the national market,
- (i) customer inertia,
- (j) the availability of free capital – An Post has not paid a dividend since it was formed, despite significant retained earnings and cash on its balance sheet,
- (k) exemption from many legal obligations, e.g. parking and planning Regulations, and the limitation of liability set out in Section 64 of the Postal and Telecommunications Act, 1983 including the exemption Section 39 of the Sale of Goods and Supply of Services Act, 1980.
- (l) the right to initiate enforcement proceedings against other operators (e.g. Regulation 8(3) of S.I. 616 of 2002).
- (m) the low percentage of industrialized mail in Ireland compared with other countries,
- (n) low population density (even in urban areas) and the low level of urbanization compared with other developed countries

## 6 Conclusion

The main focus of the new Directive is on the provision and regulation of the universal service. The Directive is a 'framework directive' which gives member states a number of options rather than one which is prescriptive as to what is to be done. The key issues identified by ComReg relate to Universal Service, Pricing and Quality.

ComReg believes that defining the scope of Universal Service is one of the key decisions to be made in transposing the Directive. A relatively wide definition of the scope of universal service, combined with 'market provision' may offer the best prospect of ensuring a vibrant postal market in Ireland that will ensure that consumers have access to leading edge postal services.

Designation of a single universal service provider may not be appropriate in a liberalised market. The alternatives to designation are 'market provision' and 'public procurement'. The two methods can be used in combination, with public procurement being used to fill in any gaps in market provision.

Licensing will be important to control entry and exit (e.g. minimum notice) from the market and to give assurance to users of the integrity of the operators.

The directive continues the existing requirement that the tariffs for each universal service comply with the principles of 'affordability', 'cost-orientation', 'non-discrimination' and 'transparency'. A new requirement is that prices 'give incentives for an efficient universal service provision'.

A carefully designed *ex ante* price cap type of price control is therefore probably the only way of ensuring compliance with the tariff principles, while giving operators the appropriate freedom to respond to the initiatives of competitors and the incentive to improve efficiency. In the short term, however, this will need to be backed up by a detailed *ex post* review of prices and costs to ensure that such flexibility is not being used to create inappropriate cross subsidies, which might foreclose on market entry because prices in these market segments are artificially low.

There has been no change to the requirements with regard to Quality in the new Postal Directive. ComReg welcomes the new powers that the Minister has recently given to ComReg to issue Directions to An Post to improve its performance relative to the 94% target for next day delivery. ComReg believes that it is appropriate, when transposing the Directive, to ensure that the link between price and quality is explicitly recognised, and that quality includes issues such as consumer choice as well as transit time.

## Appendix A - Extract from Postal Strategy Statement (2008-2010)

### 5 Objectives – Consumer

#### *High Level Goal*

To ensure all consumers are relevantly informed and protected and have easy access to a wide range of competitively-priced quality products and services.

#### **Objectives**

**1. Engage with DCENR to ensure that, following the opening of postal markets to competition, the regulatory framework for postal services will give consumers access to innovative, customer focussed and efficient postal services throughout the state, and provide adequate safeguards against excessive pricing and failure to comply with advertised quality standards.**

#### *Strategies*

- Evaluate options for effective light-handed regulation
- Ensure all stakeholders are aware of implications for consumers
- Act as an advocate for the consumer and all those interested in providing customer focused and efficient postal services.

### 6 Objectives - Competition

#### *High Level Goal*

To create the conditions for sustainable, dynamic and innovative competition in the Irish postal sector

#### **Objectives**

**1. Engage with DCENR to ensure that, following the opening of postal markets to competition, the regulatory framework for postal services will provide a level playing field for all existing and new operators, protect other operators from below cost pricing and inappropriate cross-subsidisation by any dominant operator and ensure that all operators co-operate in terms of access to basic infrastructure – redirection information, address databases etc.**

#### *Strategies*

- Evaluate options for effective light-handed regulation
- Ensure all stakeholders are aware of implications for development of postal market
- Act as an advocate for the consumer and all those interested in providing customer focused and efficient postal services.