



Commission for  
**Communications Regulation**

# **Consultation and draft procedures**

## **Dispute procedures for access by a postal service provider to the postal network of a universal postal service provider**

### **Consultation**

**Reference:** ComReg 12/82

**Date:** 26/07/2012

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# 1 Introduction

- 1 The Commission for Communications Regulation ('ComReg') recently consulted on the regulatory framework for the postal sector<sup>1</sup>. In a submission to that consultation one respondent suggested that it would be helpful for ComReg to publish at an early date the procedures to be established by ComReg under section 33 of the Communications Regulation (Postal Services) Act 2011 (the "2011 Act") in respect of resolving disputes concerning access by a postal service provider to a universal postal service provider's postal network.
- 2 ComReg considers that it is in the interest of both the postal service provider concerned and the designated universal postal service provider to reach a mutually acceptable agreement concerning access to the postal network, rather than to have an agreement imposed upon them. All parties engaged in a negotiation process under section 33 of the 2011 Act will of course have to be cognisant at all times of their legal obligations under Irish and EU competition law (as applicable). ComReg does not expect that access to a universal postal service provider's postal network will be unreasonably withheld. ComReg envisages that these procedures to resolve disputes will be only used as a last resort. Nevertheless ComReg appreciates that postal service providers might wish to have, at an early date, an understanding of what procedures are envisaged.
- 3 This consultation outlines the procedures that ComReg intends to establish and seeks the views of interested parties before making a final decision and publishing the procedures that it adopts. ComReg will consider all submissions to this consultation in finalising the procedures. Based on current timelines, ComReg plans to publish the procedures in September 2012.

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<sup>1</sup> ComReg Consultation Document No, 12/38 'Postal Regulatory Framework: Implementation of the Communications Regulation (Postal Services) Act 2011' dated 30 April 2012

## 2 Executive Summary

- 4 As a result of the liberalisation of the provision of postal services in Ireland, and the coming into operation of the 2011 Act, it is possible that *postal service providers*, and undertakings providing services outside the scope of the statutory definition of "*postal services*", might wish to negotiate agreements to access the *postal network* of the designated *universal postal service provider*.
- 5 In normal circumstances these are commercial agreements and as such it is primarily competition law that regulates the right to enter into such an agreement, and the negotiation process.
- 6 Notwithstanding this, ComReg is required by the 2011 Act to establish and maintain procedures in the certain cases where ComReg's is invited to intervene to resolve disputes concerning access to the *postal network* of the *universal postal service provider* by a *postal service provider*.
- 7 Consequently, in this Consultation, ComReg is setting out, for the views of interested parties, the procedures it is minded to establish and maintain for the addressing of disputes relating to access to a *universal postal service provider's postal network* by a *postal service provider*.
- 8 The draft procedures set out in this Consultation are based on the requirements placed on ComReg by section 33 of the 2011 Act.
- 9 Having considered the views of respondents to this consultation, together with any other relevant evidence, final procedures will be established and will be maintained by ComReg in accordance with section 33 of the 2011 Act.

## 3 Background

10 Section 6(1) of the 2011 Act defines “*postal network*” as

*“the system of organisation and resources of all kinds used by a universal postal service provider for the purposes, in particular, of—*

*(a) the clearance of postal packets,*

*(b) the routing and handling of those postal packets from the access point to the distribution centre, and*

*(c) the distribution to the addresses shown on postal packets;”*

11 Section 33(1) of the 2011 Act, confirms that a *postal service provider* has the right to enter into negotiations with a *universal postal service provider*, currently An Post, with a view to concluding an agreement to access the *postal network* of the *universal postal service provider*.

12 Section 33(2) of the 2011 Act provides for ComReg, if so requested by either party to the negotiations, to specify the period within which the negotiations shall be completed.

13 Section 33(3) of the 2011 Act requires ComReg, where agreement is not reached within the period specified by ComReg, to take such steps as are necessary to resolve the dispute in accordance with procedures established and maintained by it.

14 Section 33(4) of the 2011 Act gives some discretion to ComReg as to whether or not to intervene. In particular it need not intervene where it:

*considers that—*

*the request for intervention is trivial or vexatious, or*

*the person making the request has not taken reasonable steps to reach an agreement on access to a universal postal service provider’s postal network.*

15 Sections 33(5) to 33(7) of the 2011 Act require ComReg to make and publish the procedures it will follow and give it specific powers to impose or amend the conditions relating to access to a universal postal service provider's postal network, including

*(a) the price of access,*

*(b) terms and conditions relating to matters other than price, and*

*(c) rules for the separation of accounts relating to access to the postal network.*

16 Section 33(8) of the 2011 Act sets out the factors ComReg must take into account when making any decisions about the dispute. These are:

*(a) the reasonableness of the terms and conditions relating to access to the postal network concerned,*

*(b) the interests of postal service users,*

*(c) the need to ensure and maintain the efficient provision of a universal postal service,*

*(d) the availability of alternatives to the access sought,*

*(e) the development of competition in the market for postal services,*

*(f) the feasibility of granting the access sought,*

*(g) the capital investment in the postal network made by the universal postal service provider concerned, and*

*(h) any requirements imposed by any enactment.*

### **3.1 Access to postal networks**

17 As a result of the liberalisation of the provision of postal services in Ireland, and the coming into operation of the 2011 Act, it is possible that *postal service providers*, and undertakings providing services outside the scope of the statutory definition of "*postal services*", might wish to negotiate agreements to access the *postal network* of the designated *universal postal service provider*.

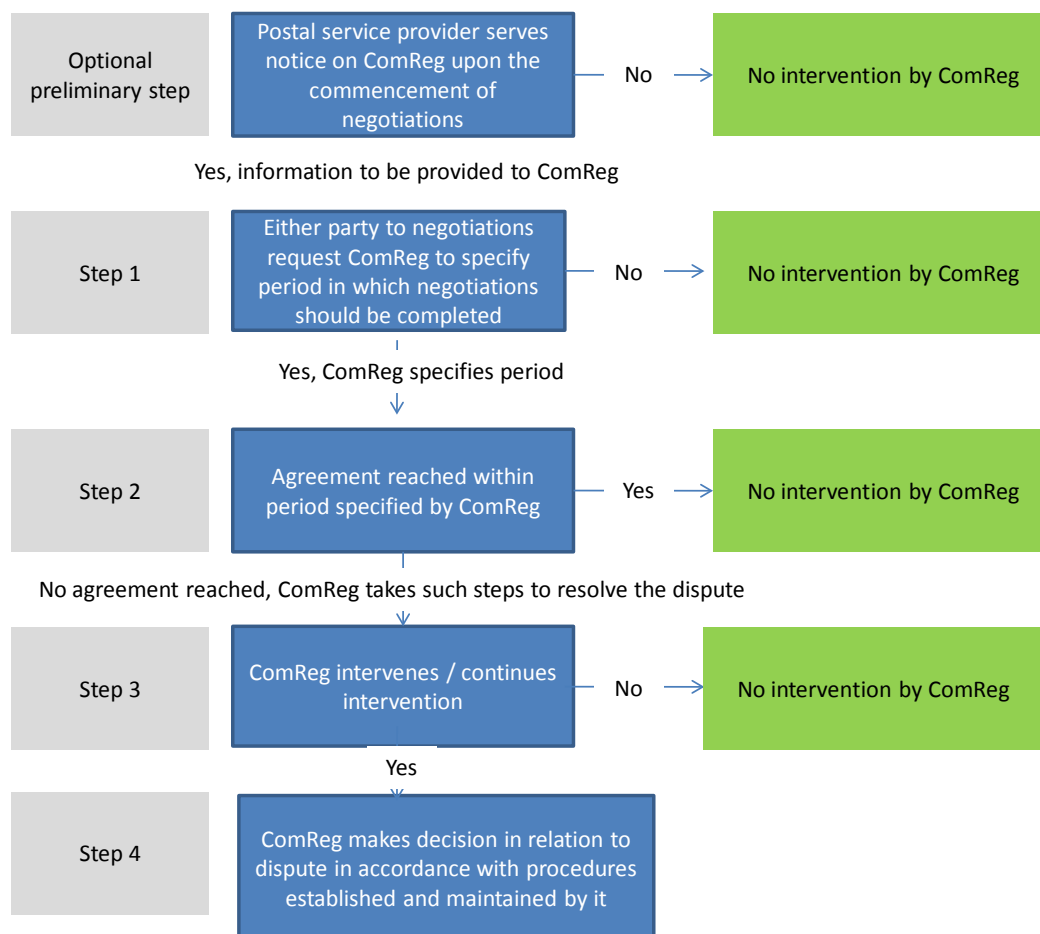
18 In normal circumstances these are commercial agreements and as such it is primarily competition law that regulates the right to enter into such an agreement, and the negotiation process. Section 33 of the 2011 Act notes that a *postal service provider* has a right to enter into negotiations with a *universal postal service provider* with a view to concluding an agreement with that provider to access the *postal network* of the *universal postal service provider*.

- 19 ComReg considers that it is in the interest of both the *postal service provider* concerned and the *designated universal postal service provider* to reach a mutually acceptable agreement concerning access to the *postal network*, rather than to have an agreement imposed upon them. ComReg does not expect that access to a universal postal service provider's *postal network* will be unreasonably withheld but rather that both parties will engage constructively with a view to concluding an early agreement. Therefore, ComReg expects that the procedures to resolve disputes will be sparingly used.
- 20 Nevertheless ComReg appreciates that *postal service providers* might wish to have, at an early date, an understanding of what procedures are envisaged, and therefore a draft of these are set out in the following chapter.



## 4 Draft procedures

- 21 Subject to the views of respondents, the following are the procedures ComReg proposes to establish and maintain in relation to disputes under section 33 of the Act 2011.
- 22 The proposed procedures are presented graphically as follows with further details provided in the sections below



### 4.1 Optional preliminary step: Serving of notice upon commencement

- 23 As noted earlier, ComReg considers that it is in the interest of both the *postal service provider* concerned and the designated *universal postal service provider* to reach a mutually acceptable agreement concerning access to the *postal network*, rather than to have an agreement imposed upon them. ComReg does not expect that access to a *universal postal service provider's postal network* will be unreasonably withheld but rather that both parties will engage constructively with a view to concluding an early agreement. Therefore, ComReg expects that the procedures to resolve disputes will be sparingly used.

- 24 However, under section 33(1) of the Act 2011, a *postal service provider* may serve notice on ComReg upon the commencement of negotiations with a *universal service provider* to access their *postal network*. While there is no obligation to do so, any such notice served must be in writing and sent by registered post to ComReg's postal section. The notice should set out:
- (a) The reasons why the *postal service provider* is serving notice on ComReg
  - (b) The length of contract being sought with detail of start date being sought
  - (c) The type and number of postal packets it is proposed will access the *universal postal provider's network*
  - (d) What part of the *universal postal service provider's postal network* would be involved, e.g. the part used for clearance, the part used for routing and handling and / or the part used for distribution
  - (e) The proposed geographical scope
  - (f) The proposed time of deposit and the proposed time of completion
  - (g) The proposed basis for remuneration of the designated *universal postal service provider*, e.g. a flat rate fee; or a per item rate subject to minimum and / or maximum amounts; or a cost sharing based on the actual use of the part(s) of the *postal network* concerned
  - (h) Any other relevant material the *postal service provider* wishes to provide.

#### **4.2 Step 1: Either party requests specification of period within which negotiations must be completed**

- 25 Under section 33(2) of the Act 2011, either party to these negotiations can request ComReg to specify the period within which the negotiations must be completed.
- 26 If either party to the negotiations requests ComReg to specify the period within which the negotiations shall be completed it will do so taking into account:
- (a) The complexity of the access requested, and in consequence the amount of time necessary for the designated *universal postal service provider* to consider and make an offer; and
  - (b) The time that has elapsed between the initiation of the negotiations and the request for ComReg to specify a date for completion.

- 27 In order for ComReg to specify the period within which the negotiations must be completed, the party making the request must set out full details of the access being sought as specified in paragraph 24. ComReg will also require full details as to areas of negotiation where there is agreement with the universal postal service provider concerned and full details as to areas of negotiation where there is not agreement with the universal postal service provider concerned.
- 28 It will be appreciated that no two postal service providers will have the same requirements so it is not appropriate for ComReg to be unduly specific as to what should be included. Furthermore, it is not for ComReg to get involved in any part of the negotiation process unless invited to by one or other of the parties involved.
- 29 Upon receipt of the details from the requesting party, ComReg may write to the other party seeking its views.
- 30 ComReg may also require additional information before making its decision and may seek this additional information under section 13F(1) of the Communications Act 2002 to 2011.
- 31 ComReg will then set out in writing to both parties the period within which the negotiations must be completed or it will advise that it has decided not to intervene which is set out in Step 3 below.

### **4.3 Step 2: Agreement not reached within the period specified**

- 32 In accordance with section 33(3) of the Act 2011, where agreement is not reached within the period specified by ComReg, ComReg will take such steps as necessary to resolve the dispute in accordance with the procedures set by it.

#### **Preliminary Examination**

- 33 To carry out a preliminary examination of any matter under 33(4) of the Act 2011, ComReg will require the following (at a minimum) from the person making the request and within the time period specified by ComReg:
  - 33.1 Full details on the access being requested as set out in paragraph 24, including full details as to areas of negotiation where there is agreement with the universal postal service provider concerned and full details as to areas of negotiation where there is not agreement with the universal postal service provider concerned

- 33.2 Clear supporting evidence that the person making the request has taken all reasonable steps to reach an agreement on access to a universal postal service provider's postal network
- 34 ComReg reserves its right to obtain the required information from the person making the request, who is postal service provider, under section 13F(1) of the Communications Act 2002 to 2011.
- 35 In carrying out a preliminary examination, ComReg may seek expert assistance of an independent advisor. Such advisor will have signed an appropriate confidentiality agreement with ComReg in advance.
- 36 ComReg will endeavour to give both parties an indication of the period of time that will be required to make its decision whether to intervene or not. Any such indication of the period of time required will be based on the particulars of the information provided for the preliminary examination. Consequently, a general indication of the period of time required cannot be provided in advance of the required information being presented.
- 37 Following consideration of the information provided by the person making the request under the preliminary investigation, ComReg within a reasonable period of time will decide whether or not to intervene in the matter.

#### **4.4 Step 3: ComReg intervenes or not**

- 38 In accordance with section 33(4) of the Postal Act 2011 with regard to any intervention by ComReg to:
- (1) Specify the period within which negotiations are to be completed.
  - (2) Where agreement is not reached within the period specified by ComReg, ComReg takes such steps as are necessary to resolve the dispute.
- 39 ComReg may decide
- (1) Not to intervene in the negotiations concerned, having carried out a preliminary examination of the matter which is set out in paragraph 33 above.
  - (2) To discontinue any intervention where ComReg considers that the request for intervention is trivial or vexatious; or the person making the request has not taken reasonable steps to reach an agreement on access to a universal postal service provider's network.

## **4.5 Step 4: ComReg decision in accordance with procedures established and maintained by it**

- 40 Where ComReg intervenes and takes such steps as are necessary to resolve the dispute, ComReg will require (at a minimum) the following information from both parties, by separate submissions, and within the time period specified by ComReg:
- 40.1 Full details on the access being requested as set out in paragraph 24, including full details as to where there is agreement and full details as to where there is not agreement.
  - 40.2 Clear supporting evidence that both parties making the request have taken all reasonable steps to reach an agreement on access to the universal postal service provider's postal network concerned.
  - 40.3 Full details of the proposed terms and conditions relating to access to the postal network concerned so that ComReg can take into account their reasonableness as required by section 33(8)(a) of the 2011 Act.
  - 40.4 Full details on how the interests of postal service users will be served in the completion of this negotiation so that ComReg can take this into account as required by section 33(8)(b) of the 2011 Act.
  - 40.5 The universal postal service provider to provide full details as to the impact of completion of this negotiation will have on the need to ensure and maintain the efficient provision of universal postal service so that ComReg can take this into account as required by section 33(8)(c) of the 2011 Act.
  - 40.6 Full details as to the availability of alternatives to the access sought so that ComReg can take this into account as required by section 33(8)(d) of the 2011 Act.
  - 40.7 Full details as to the impact of completion of this negotiation will have on the development of competition in the market for postal services so that ComReg can take this into account as required by section 33(8)(e) of the 2011 Act
  - 40.8 Full details as to the feasibility of granting the access sought so that ComReg can take this into account as required by section 33(8)(f) of the 2011 Act.
  - 40.9 Full details as to the capital investment in the postal network known by each party, that is, the postal service provider sets out its own capital investment in postal network and the universal postal service provider sets out its own capital investment in the postal network concerned so that ComReg can take this into account as required by section 33(8)(g) of the 2011 Act.

- 40.10 Full details of any requirements imposed by enactment so that ComReg can take this into account as required by section 33(8)(h) of the 2011 Act.
- 40.11 Full details from the universal postal service provider in question as to any costs avoided by granting such access to its network so that ComReg can take this into account as required by section 33(9) of the 2011 Act.
- 40.12 Full details from the universal postal provider in question as to the postal network costs involved in granting such access so that ComReg can take this into account as required by section 33(9) of the 2011 Act.
- 41 ComReg may decide to ask either or both parties to provide the required information, who are postal service providers, under section 13F(1) of the Communications Act 2002 to 2011.
- 42 ComReg may seek the expert assistance of an independent advisor. Such advisor will have signed an appropriate confidentiality agreement with ComReg in advance.
- 43 Upon receipt of the information from both parties, ComReg will endeavour to give both parties an indication of the period of time that will be required to make its decision. Any such indication of the period of time required will be based on the particulars of the information provided. Consequently, a general indication of the period of time required cannot be provided in advance of the required information being presented.
- 44 Within a reasonable period of time, ComReg will consider the submissions and make a draft report setting out its initial findings and recommendations. The submissions of both parties and ComReg's draft report will be sent to both parties with a request under section 13F(1) of the Communications Act 2002 to 2011 to submit such additional information as is necessary to enable to ComReg to decide how to bring the dispute to a conclusion, within the framework set out in section 33(7) of the 2011 Act.
- 45 ComReg will then make its decision in accordance with these procedures established and maintained by it and notify both parties in writing of same.

Q. 1 Do you agree or disagree with ComReg's draft procedures as set out? Please document clearly what part(s) you are in agreement or disagreement with by providing a detailed response with supporting information / data where appropriate to support your view.

## 5 Conclusion

- 46 ComReg will consider all submissions to this consultation, together with any other relevant evidence, in finalising its procedures relating to disputes to access to a universal postal service provider's network as required under section 33 of the 2011 Act.
- 47 ComReg considers that a Regulatory Impact Assessment is not required as a new regulatory obligation is not being imposed; ComReg is simply elaborating on the requirements already mandated by section 33 of the 2011 Act.
- 48 Subject to no extensions to the consultation period being required, ComReg plans to publish its final procedures in September 2012.

## 6 Submitting Comments

- 49 The consultation period will run until 5pm on 27 August 2012, during which time ComReg welcomes written comments on any of the issues raised in this consultation. It is requested that comments be referenced to the relevant question numbers and/or paragraph numbers from this document. Where views are provided, please provide a supporting rationale for your comments, including if possible, an indication on the broader impact of any changes proposed.
- 50 As it is ComReg's policy to publish all responses in order to make them available for inspection, responses to consultations should be provided as non-confidential documents, with any information for which confidentiality is claimed (e.g. commercially sensitive information) supplied in a separate annex. In this respect, please refer to ComReg's Consultation Procedures - ComReg 11/34 and ComReg's guidelines on the Treatment of Confidential Information - ComReg 05/24.
- 51 We request that electronic submissions be submitted in an unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.
- 52 All responses to this consultation should be clearly marked:- "Reference: Consultation 12/82" as indicated above, and sent by post, facsimile or e-mail to arrive on or before 5pm, 27 August 2012, to:

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# Questions

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Q. 1 Do you agree or disagree with ComReg's draft procedures as set out? Please document clearly what part(s) you are in agreement or disagreement with by providing a detailed response with supporting information / data where appropriate to support your view. ....	14
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