



Commission for
Communications Regulation

Non-confidential submissions by An Post

Reference: ComReg 15/135f

Content

Section

- 1: An Post's submission of 27 November 2015
- 2: An Post's submission of 9 December 2015 (including advice from Matheson)

1: An Post's submission of 27 November 2015

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Stephen Brogan
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27 November 2015

**Reference: Regulatory Accounts Template
General Recommendations and specific reference to
Frontier Economics Draft Proposal**

Dear Stephen

The current format of the Regulatory Financial Statements (RFS) was established back in 2008. An Post has recommended frequently that this be revisited and an exercise undertaken to change and meet industry best practice. We therefore welcome the current exercise.

In order to bring the discussion forward we have proposed a format for the RFS. In arriving at this proposal we have taken on board the Frontier Economics draft proposal, reviewed best practice in the postal sector abroad and taken advice from Deloitte who have experience in this field and have provided guidance from a professional accounting perspective and incorporated regulatory experiences.

In this correspondence we include a commentary on the detail of the Frontier draft templates. We have taken the recommendations very seriously and we believe our proposal meets the requirements of all stakeholders e.g. ComReg, Department of Communications, Energy and Natural Resources etc.

We committed to provide a draft of what we believe to be the appropriate RFS. The primary responsibility lies with the Directors of the Company to provide RFS. We believe our recommendations facilitate this as well as providing to ComReg what is provided for under legislation.

As per our responses of 17th and 2nd of September last, we request that Frontier provide details of the legal basis supporting each of the recommendations made in their draft Accounting Templates as this is not clear to An Post.

A primary objective is to have RFS that can be subject to audit by a professional auditor, we believe we can achieve this with our proposal. A second objective is to have a set of RFS that is available to the public that can be read in a meaningful way by readers and is readily available.

In addition to this is the objective of adhering to regulatory practices and providing information to ComReg which is, of necessity, very much more detailed. This objective is similar in other jurisdictions. Our proposal is that this requirement be met by having two documents, a Short Form which will contain the critical information, be subject to audit and be made available widely, such as published on the website of the organisation. A second document, a Long Form, would also be subject to audit and would contain significantly more detail. This would be made available by An Post to ComReg and to other stakeholders to whom this data would be relevant, on a confidential basis and for a limited purpose consistent with the recipient's relevant statutory objectives. This proposition is very much in line with proposals in other jurisdictions, the UK being one such case.

The attachments to this correspondence set out our proposal for a set of RFS and we suggest this is a valuable contribution to the debate.

It is imperative that the design of RFS does not make the mistake of crowding the RFS with too many detailed schedules which would limit the usefulness of such a document to the reader. For example, the UK's public RFS is 27 pages long, while the latest draft report proposed by Frontier Economics contains 79 pages of reporting templates.

In line with international best practice An Post proposes that two documents are produced:

- A Long Form version (confidential version), which will include an accompanying schedule as appendix. The Long Form version will be audited in its entirety and will be shared with ComReg annually. A version of the Long Form RFS, but excluding the accompanying schedule, may be shared by An Post with stakeholders; and
- A Short Form (published version), containing a subset of the information included in the Long Form version and shared publically by An Post.

An Post believes that it is important that the Long Form version of the RFS is submitted in a format which provides clarity of information to all key stakeholders, and not only ComReg. At the same time, we recognise the need for ComReg to receive more detailed information than that required by other stakeholders. For this reason, An Post believes that some information should only be included in an appendix to the Long Form version of the RFS, for ComReg's use only.

We are available to meet with ComReg/Frontier at your convenience should you wish to avail of this opportunity.

Yours sincerely


Damian Quinn
Head of Regulatory Affairs

Review of Frontier Economics draft proposed RFS Templates

Note: The document sections mirror the sections in Frontier's draft RFS.

1 Financial Summary and Business Review

The inclusion of financial liquidity measures in the RFS is unusual, it is normal practice to leave it to the user of a set of accounts to carry out their own analysis and derive from the provided data the statistics they require. Further, gathering a complete understanding of the liquidity position of a company requires the analysis of a number of metrics. Thus this would be better done through separate discussions between ComReg and An Post.

2 Financial Review

Frontier proposes to add an annual figure of net assets including pension liability to the financial review. The addition of this metric is beneficial to completeness in both the Short Form and Long Form RFS. This information is already included in the An Post Annual Report.

3 USO Performance

An Post proposal is to include a high-level financial review of USO services in the Short Form and Long Form RFS. An Post believe that the split by geography (domestic, inbound intra-community, inbound rest of the world, and outbound international) is best included in the schedules accompanying the Long Form RFS. We consider that the proposal from Frontier is being met in our recommendation.

Royal Mail under Ofcom RFS guidelines is not required to produce a similar split of USO performance in its accounts, we need to reflect on whether Frontier's requirements are in line with best practice.

4 Statement of Directors' Responsibilities

There are legal and other obligations to be met in such statements. We believe we are adhering to best practice at present. There is no change to the Statement of Directors' Responsibilities proposed by Frontier.

5 Report of the Independent Auditor to the Directors' of An Post and ComReg

Consultation with the professional bodies will be required in finalising the audit report formats. We believe that we are currently in line with best practice and will continue to be so.

6 Regulatory Accounting Principles and Basis of Preparation

An Post propose that commentary be included in the Regulatory Financial Statements on any large adjustments to be made to produce the Regulatory Accounts, the impact of changes in accounting policies, methodologies and estimation techniques and, internal trading and transfer charging.

7 Profit and Loss Account for Universal Service and Mails Business Segment

An Post suggest that all Profit and Loss format is kept consistent across the Short Form and Long Form RFS. An Post propose to expand the Profit and Loss format in this section so as to include inter-segment revenues, directly attributable revenue and revenue allocated using sampling, and direct, indirect and common costs, thus providing an enhanced version of the Frontier recommendation.

8 Profit and Loss Account for each Business Segment

The Profit and Loss account by Business Segment recommended by Frontier is in line with that which has been published. An Post propose that such an account should be included in both the Short Form and Long Form RFS.

Frontier's draft template also includes detailed symmetric tables on inter-segment revenues and costs, split by business segments (Mail, Retail and Subsidiaries) and Mail inter-segments (USO and Non USO).

The proposal is that these tables are included in the appendix to the Long Form RFS. The Profit and Loss account in section 11 already includes inter-segment revenues and costs at the aggregate level for business segments and Mail inter-segments. We propose that the Mail inter-segment breakdown is excluded from the RFS, as An Post believe it is too invasive and not particularly insightful.

9 Per Unit Revenue, Cost and Profit/(Loss) details for each USO service

Aggregate information on volumes, revenues and costs are available in section 11 of the Long Form RFS, and thus unit figures can be calculated by users as necessary. This position is in line with Royal Mail practice, both the public and the private accounts, in which the aggregate figures are presented, but no unit figures are provided.

The Frontier recommendation that unit cost, revenue and profit figures are included in the RFS for each USO service is, we believe, adding data that is superfluous and risks crowding the RFS with too many detailed schedules which would limit the usefulness of such a document to the reader.

10 Balance Sheet for each Business Segment

Frontier proposes the balance sheet to include a breakdown at business segment level, with the Mail segment being further split between USO and Non USO. We agree on the recommended format of the balance sheet and that it should be included in both the Short Form and Long Form RFS,

We believe that the split into USO and Non USO Mail is unnecessarily invasive. We propose to present figures for the Mail segment aggregated.

This is also in line with what is requested by Ofcom of Royal Mail whereby they to provide the balance sheet at Group level and at Reported Business level.

11 Detailed Profit and Loss Account for Mails Business Segment

Frontier recommends that the RFS include a series of detailed Profit and Loss accounts split by business operating process, in order to give a “pipeline” view of An Post’s business. The proposed accounts are to be provided by category for USO and Non USO Mail services. Frontier proposes that separate accounts are created for domestic, international inbound intra-EU, international inbound to the rest of the world and international outbound.

Such detail should only be included in the Long Form version of the RFS, so as not to harm An Post by making available commercially sensitive information to other market players. This is especially true for Non USO services, in whose markets An Post competes with other players.

The level of detail requested by Frontier is too granular. We believe that including the tables suggested by Frontier would make the Long Form RFS overly complex, and thus less user friendly, while the additional information would not be particularly insightful to any stakeholder other than ComReg. Instead, An Post propose that a summarised version of the at Group level, broken down by USO services, is included in the Long Form RFS, with a breakdown by geographical segment (domestic, inbound international and outbound international) included in the appendix to the Long Form RFS.

The proposed solution is in line with UK procedures. Under the reporting obligations for the Reported Business, Royal Mail is not required by Ofcom to include the mail’s Business Segment by group of service. In the public RFS, Ofcom does not require the service cost to be reported separately for each business operating activity, nor requires a split by geographic segments. Royal Mail is required to confidentially share with Ofcom a breakdown of costs into Collection/Delivery and Processing, and a breakdown of volumes and revenues by geography.

12 Detailed Profit and Loss Account for Each Universal Service

Frontier recommends that the accounts report at service level for domestic and outbound international USO services. These should be split by business operating processes in order to give a “pipeline” view of the An Post business.

We believe that such detailed information would result in crowding the Short Form and Long Form RFS, while not providing insightful information to the public. Therefore, we propose that the detailed accounts as proposed by Frontier are included in the appendix to the Long Form RFS.

Royal Mail is only required to produce summarised accounts for selected products as requested by Ofcom. These are only provided to Ofcom and are not shared more widely. Ofcom currently requests an account for three products only.

13 Estimated cost of providing USO services by price point

Frontier recommends that the average cost to provide USO services is provided for each price point, for domestic (both fully paid price and bulk products) and international outbound services.

An Post does not believe that this breakdown is provided for in the Communications Regulation (Postal Services) Act 2011 and furthermore note that this information is not currently provided to ComReg. Thus, An Post propose this to be removed completely from the RFS.

Additionally, An Post note that the Accounting Manual submitted annually to ComReg, has for several years, contained the following text in section 3.5 Format of the Regulatory Accounts:

“The Regulatory Accounts Templates were designed in October 2008 and agreed with ComReg that they fully comply with the requirements of the Direction.”

In addition, An Post believes this information to be commercially sensitive in nature and indeed it is not best practice to provide this information in other jurisdictions, such as the UK.

14 Notes to the Regulatory Financial Statements

We propose a reconciliation of turnover, costs and profits/loss with the figures reported in the Statutory accounts is included in both the Short Form and Long Form RFS.

In addition, we propose information on fixed assets, debtors, creditors, and capital employed schedules is included in both versions of the RFS, at the Group level of detail (which is in line with the 2014 An Post RFS).

An Post propose that the same level of disaggregation included in the An Post Statutory Accounts is adopted for both the payroll costs and the staff numbers, and that the information is reported in the Long Form RFS only. Frontier recommends that the RFS include detailed accounts of staff numbers and payroll costs, split by cost type (payroll costs only) and area of employment (both payroll and staff). This level of detail is believed to be too invasive and unnecessary for the RFS.

15 Supplementary Information – reconciliation of revenue-derived and operational volumes

As stated by An Post in its Response to the Draft Report for ComReg on 17 September 2015, the reconciliation of revenue and operational derived volumes suggested by Frontier is inappropriate and irrelevant in an audited set of accounts. As such, An Post believe that this should not be included in the RFS.

As already outlined in the Response, An Post has put systems in place leveraging the operational systems used to facilitate the reconciliation currently shown in the Regulatory Accounts. Carrying out this reconciliation, as recommended by Frontier, would require additional operational resources

and systems be put in place purely to facilitate such a reconciliation. Addition of such resources will increase costs and may shorten the mail processing time window, with associated impact on service to our customers. In addition, it is not clear to An Post what benefits would arise from such a reconciliation. An Post request that Frontier clarify exactly what perceived issue they expect that this recommendation will rectify.

16 Supplementary Information – reconciliation of Mail Centre and Delivery Service Units volumes

As stated by An Post in its response to the Draft Report for ComReg on 17 September 2015, recommending that An Post should provide four different volume measurements is inconsistent with international best practice, in addition to being unnecessarily cumbersome – generating new and extra costs and necessitating system changes. An Post thus reiterate that the reconciliation of Mail Centre (MC) and Delivery Service Units (DSU) volumes should not be included in the Accounting Direction.

There is no current operational need for reconciling DSU and Mail Centre volumes. The creation of such estimates at the sole aim of being reconciled and included in the RFS appears to be an expensive and irrelevant exercise. Frontier has not fully explained the perceived benefits of this proposal and An Post requests that this is provided.

There is no evidence from other jurisdictions that this type of information is included in the audited RFS. In the UK, for example, Royal Mail only uses one set of volume estimations (revenue based volumes), in accordance with Ofcom. Further, mail volumes counted at DSU which are not at the outward phase of the postal pipeline are outside the scope of the RFS.

17 Cash balance

Frontier recommends that an account of cash at bank and in hand at the end of each quarter is reported when the figure in the current quarter is below €100 million. An Post believe the frequency of the cash balance submission proposed by Frontier to be unnecessary. The annual figure of cash at bank and in hands already included in An Post KPIs in the section 1 of the RFS is sufficient. Putting in place a process, additional to existing processes, such as quarterly reporting, would be burdensome for An Post and is not clear that the likely burden would be proportionate to any possible benefits.

Frontier has not fully explained the perceived benefits of quarterly reporting, and in particular why quarterly reporting will improve ComReg's ability to perform its statutory duties. An Post requests that this is provided.

The shareholder in a business makes the decisions as to how a business should be financed and the absence of excess cash is not, in and of itself, determinative of the financial position of the business. Many public utility and USO providers have no excess cash and indeed have extended debt. Many of the most profitable and well run mail and other logistic operators do not have excess cash on their balance sheet and would have a finance structure with a mix of debt. Information on cash held provides only a partial view of An Post's

financial position, therefore An Post is concerned with the requirement to include this metric as part of a regulatory submission. An Post consider the issue of the cash balance is more appropriately dealt with under the existing forum of regular meetings between the Commissioner and the An Post Chief Executive.



30/11/2015

Mr Damian Quinn
Head of Regulatory Affairs
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Dublin 1

Ref: Proposed Regulatory Account templates and other material for ComReg's public consultation on a Proposed Accounting Direction pursuant to section 31 of the 2011 Act

Dear Damian

I refer to your letter dated 27 November 2015 regarding the proposed Accounting Direction which would issue pursuant to section 31 of the Communications Regulation (Postal Services) Act 2011 ("Proposed Accounting Direction").

As you are aware, the matters raised in your letter will be the subject of a forthcoming public consultation on the Proposed Accounting Direction which we expect to commence this December, subject to an internal review process which commenced last week which is expected to be completed by c. 9 December.

As your letter has been submitted to ComReg in the context of a matter which will require public consultation, and as that consultation is imminent, we require that you please advise as to how you wish to proceed in relation to the content of your letter. In this regard, the two options are as follows.


- Option 1 is that your letter will be published by ComReg, together with this response and all other relevant correspondence, as part of the forthcoming public consultation on the Proposed Accounting Direction. This would be done in accordance with ComReg's published Consultation Procedures (Doc 11/34) and Guidelines on the treatment of confidential information (Doc 05/24).

OR

- Option 2 is that, at your request, ComReg will not publish your letter as part of its forthcoming public consultation, but that An Post will instead submit the content of the letter as it sees fit as part of its response to the public consultation, once published. If you should choose this option then ComReg will not consider the content of your letter further unless or until it has been received in response to the public consultation (notwithstanding that we note that most of the content of the letter has been raised by An Post in past meetings / correspondence with us, such that most of the content of your letter has been already considered by us in drafting the forthcoming public consultation paper).

As noted above, ComReg's internal review process in relation to the public consultation has now commenced and for that reason we require you to respond, indicating your preferred option, by this Wednesday, 2 December at the latest.

Yours sincerely



Stephen Brogan,
Postal Policy Manager

Stephen Brogan
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1 December 2015

**Reference: Regulatory Accounts Template
General Recommendations and specific reference to
Frontier Economics Draft Proposal**

Stephen

I refer to your letter of 30 November 2015 on the above subject.

Please note that An Post's response to the accounts template proposed by Frontier is an important document and should be included in ComReg's forthcoming consultation on this subject.

Yours sincerely


Damian Quinn
Head of Regulatory Affairs

2: An Post's submission of 9 December 2015 (including advice from Matheson)

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9 December 2015

Reference: Review of Accounting Direction

Dear Stephen

An Post has for a number of years suggested an engagement with ComReg in order to make changes to the format of the Regulatory Financial Statements (RFS) to reflect up to date thinking, professional standards and industry best practice. We therefore welcome and consider the current review a positive development.

We prepared and submitted for consideration, on 27 November 2015, an alternative format for the RFS – we consider this to be a very constructive proposal and we would like to have it discussed and given serious review. As stated in our correspondence of 27 November, we have taken on board the Frontier Economics draft proposal, reviewed best practice in the postal sector internationally and have taken advice from Deloitte who have experience in this area. We believe that our proposal takes on board many of the proposals from Frontier and that it would bring the RFS in line with the best professional practices and standards in other jurisdictions.

Financial Statements are the responsibility of the Directors of the Company and in this regard An Post is committed to the highest professional standards. We are of the view that the design of Financial Statements rests with the Company, and in consultation with the Regulator, we believe this is the best manner in which to proceed.

In our previous correspondences with ComReg, we have stated that the legal basis supporting each of the recommendations made in Frontiers' draft reports and schedules is not clear to An Post and we have requested clarification of the legal basis.

There are legislative guidelines in this area and we have sought advices from our legal advisors, Matheson. The advices are attached. It is our view that the Regulator ought to consider the content of same and take notice to ensure that the best outcome under regulation is achieved.

We are available to meet with Frontier/ComReg on these points should you wish to avail of this opportunity.

Yours sincerely



Damian Quinn
Head of Regulatory Affairs

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Our Ref
1957/26

9 December 2015

Legally Privileged and Confidential

Dear Hugh

Proposal for New Accounting Direction

1 Background

We understand that ComReg intends to make An Post subject to a new Universal Postal Service Accounting Direction ("**Direction**"). ComReg plans to consult publicly on a proposal for a new Direction by the economics consultancy Frontier (the "**Proposal**"). An Post believes that the Proposal is seriously flawed in a number of important respects. In order to progress matters, An Post has submitted for ComReg's consideration an alternative option involving template 'Long Form' and 'Short Form' regulatory accounts that would be workable for An Post. ComReg has not yet responded on whether it will amend the Proposal (prior to consultation) to reflect the suggestion made in An Post's submission.

You have asked us to advise on whether the Proposal, if implemented in its current form, is compliant with applicable laws. We have identified a number of serious legal concerns and we set these out below.

2 No legal basis

ComReg is empowered to make An Post subject to a Direction pursuant to Section 31 of the Communications Regulation (Postal Services) Act 2011 (the "**2011 Act**"), the text of which is included in Annex 1 to this letter. The common law doctrine of *ultra vires* requires that a public body may not go beyond the limits of its statutory powers (*vires*) in exercising its functions.

It is not clear to us that Section 31 of the 2011 Act allows for the implementation of the Proposal. We set out further details of our analysis under two separate headings below.

Dublin

London

New York

Palo Alto

Managing Partner: Liah Quirk, Chairman: Michael Jackson, Partners: Brian Paddy, Chris Quinn, Tim Scallen, Helen Kelly, Sharon Daly, Ruth Hunter, Tony O'Grady, Harold Madigan, Michael O'Donnell, Tara Doyle, Anne-Marie Bolan, Patrick Spicer, Turough Gavin, Patrick Mulvey, George Brady, Eirik Skjonnely, Robert O'Shea, Joseph Beahel, Deirdre Ann Barr, Sara O'Hagan, Qualla Counihan, Neil Hogan, Doreen Dunne, Aileen Payne, Fergus Butler, Constan Donogh, Bryan Dunne, Lidya Galwey, Shane Hogan, Peter O'Brien, John O'Connor, Thomas Hayes, Nicola Dunne, Julia Murphy-O'Connor, Mark O'Sullivan, Alan Connet, Brian Doran, John Gil, Alan O'Sewick, Joe Duff, Pat English, Carra Lewis, Shay Lyden, Alan Fary, Niamh Counihan, Gerry Thornton, Liam Collins, Darren Maher, Michael Byrne, Philip Lovgrove, Rebecca Ryan, Aidan Kirk, Faina Mellitt, Catherine O'Meara, Huabeth Drake, Deirdre Connors, Alet Keating, Peter McKeever, Aime Campbell, Brendan Colgan, Gina Conroy, Gareth Farrelly, Michael Finn, Rhona Henry, April McClements, Gillian Dever, Tax Principals: Greg Lockhart, John Kelly, Catherine Galvin, Head of London Office: Stanley Watson, Head of U.S. Office: John Ryan, Of Counsel: William Prudence, Paul Gerfield, Patrick Sweetman, Consultants: Don McIlwain, Stuart Magrison, Anthony Walsh, Rodric Enor

We understand that An Post has made written requests to ComReg asking what legal basis it would rely on in implementing the Proposal and that ComReg has not answered these requests to date.

(a) **The pre-conditions for exercise of ComReg's power are not met**

ComReg is entitled to issue a Direction only where one of the pre-conditions under Section 31(2)(a)-(c) of the 2011 Act are met. At present, the pre-conditions set out in Sections 31(2)(a) and 31(2)(b) are not met. Therefore, ComReg is not in a position to issue a Direction unless it can meet the pre-condition under Section 31(2)(c), which requires it to be "*satisfied that competition in the market for postal services is not fully effective*".

In our view, ComReg could only have this level of satisfaction after completing a full review of current conditions of competition and determining that competition is currently less intense than a realistic benchmark of 'fully effective competition'.

We understand that An Post has seen no evidence that ComReg has completed a full review of current conditions of competition. For example, ComReg's opinion on the state of competition in Summer 2013 (prior to introducing a price cap) is now out-dated and Frontier's May 2015 report only considered competition in the "packets and parcels sector in Ireland", although it is noteworthy that this report concluded that "*the parcel market appears highly competitive*"¹.

Therefore, it is not clear to us that the necessary pre-condition for exercise of ComReg's power to issue a Direction is met.

(b) **The proposed content of the Direction is *ultra vires***

It is not clear to us that there is a legal basis for ComReg to issue a Direction with the features proposed by Frontier. Section 31(3) of the 2011 Act delimits the permissible content of a Direction. We set out below our view on why certain Frontier recommendations that form part of the Proposal have no clear legal basis under Section 31(3) of the 2011 Act.

First, we understand that the Proposal involves the inclusion in a Direction of prescriptive rules on the format of An Post's Regulatory Accounts. For example, we understand that the Proposal would require the inclusion of the following calculations: (i) separate accounts for each product / service and price point ("**Segmentation Proposal**"); (ii) reconciliations between revenue-derived and operationally-derived volumes ("**Volume Reconciliation Proposal**"); and (iii) the quarterly cash balance held by An Post for its overall activities ("**Cash Proposal**"). For the following reasons in particular, Section 31(3) of the 2011 Act does not provide a clear legal basis for these aspects of the Proposal:

- Sections 31(3)(a)-(c) empower ComReg to include in a Direction guidelines to be followed in An Post's cost accounting systems (ie, the internal processes that measure the figures to be used in preparing An Post's accounts). The words in these sub-sections do not empower ComReg to include in a Direction rules on the accounts format that must be used and / or rules on what calculations must be included in accounts.

1. See section 2.3 of the report: http://www.comreg.ie/_fileupload/publications/ComReg1547.pdf.

- ComReg cannot rely on Sections 31(3)(d)-(f) as a legal basis for making rules on the format and content of An Post's accounts because these sub-sections provide, in clear and simple terms, for powers regarding the auditing and publication of accounts only.
- The general power under Section 31(3)(g) for ComReg to provide for "*such other matters...as the Commission considers appropriate*" is insufficiently precise to be relied upon as a legal basis for depriving a company such as An Post of its ability to set the format of its own accounts, in particular because:
 - Principles of statutory interpretation require that Section 31(3)(g) be interpreted in accordance with Section 31(1) (to which it refers), which makes clear that An Post and not ComReg has responsibility for accounts preparation by referencing "*the keeping by a universal service provider [emphasis added]...of separate accounts*"; and
 - The legal power that would be required to implement the Proposal cannot be said to be incidental to or necessary for the effective exercise of any express power granted to ComReg and therefore Irish case law on the 'implied powers doctrine', including *Howard v OPW*², holds that no such power should be read into the 2011 Act.

Second, we understand that ComReg proposes to include in a Direction a provision allowing ComReg to appoint the firm that audits An Post's Regulatory Accounts (the "**Auditor Proposal**"). For the following reasons in particular, Section 31(3) of the 2011 Act does not provide a clear legal basis for this aspect of the Proposal:

- ComReg has no express power to include in a Direction a power for it to appoint an auditor or to specify that auditor's engagement terms. While Section 31(3)(d) of the 2011 Act (quoted below) empowers ComReg to include auditing requirements in a Direction, it does not mention any role for ComReg. As all other requirements in a Direction are to be performed by An Post (and not ComReg), Section 31(3)(d) should be interpreted as providing for the appointment of an auditor to be made by An Post (and not ComReg):

"A direction given under subsection (1) shall provide for— (d) the verification by a statutory auditor or statutory audit firm of compliance with internal cost accounting systems"

- A power for ComReg to appoint an auditor would be most exceptional in nature taking into account the relevant circumstances. These relevant circumstances include that:
 - There is a presumption against ComReg having a role in this area as directors have legal responsibilities in relation to the preparation and auditing of accounts under Part 6 of the Companies Act 2014 and Section 31(6) of the 2011 Act is expressly stated to be without prejudice to the provisions of the Companies Acts relating to the preparation of accounts and their audit;
 - An appointment of a separate auditor by ComReg is likely to impose a significant additional cost burden on An Post and to deprive An Post of the

2. [1994] IR 101.

ability to effectively manage its own business and to secure the provision of the USO; and

- We are not aware of an example of any Irish regulator having previously appointed the auditor of a company's accounts.

In light of the above, an express power for ComReg to appoint an auditor of An Post's Regulatory Accounts would have been included in the 2011 Act if the legislature had intended to grant it.

3 Lack of proportionality

It is not clear to us that the Proposal complies with the principle of proportionality. We understand that the Proposal has not been subject to a detailed Regulatory Impact Assessment and that ComReg has not explained the rationale for the Proposal to An Post. Furthermore, as noted below, no clarity on the rationale for the Proposal is provided by the draft report by Frontier on which the Proposal is based.

(a) Relevant legal principles

ComReg's decision to issue a Direction must comply with the principle of proportionality. The principle of proportionality is well-established under Irish administrative law and is expressly incorporated into the Communications Regulation Act 2002 (as amended), under which ComReg operates (the "**2002 Act**").

When reviewing a relevant decision for proportionality under general principles of Irish administrative law / judicial review, the Irish Courts will require the decision in question to:

- *"be rationally connected to its objective and not be arbitrary, unfair or based on irrational considerations;*
- *impair rights as little as possible; and*
- *be such that its effect on rights is proportionate to the objective to be achieved."*³

If the decision in question does not satisfy these criteria, then it will fall foul of the principle of proportionality and the Irish Courts will not uphold it.

As stated above, the principle of proportionality is also given specific statutory force in relation to ComReg in the 2002 Act. Section 12 of the 2002 Act directs that:

"In carrying out its functions, the Commission shall seek to ensure that measures taken by it are proportionate having regard to the objectives set out in this section."

Applying the above requirement to the Proposal, a number of issues arise:

The first issue is whether the Proposal is consistent with ComReg's statutory functions. Section 10 of the 2002 Act prescribes the functions of ComReg in relation to the postal sector in the following terms:

3. Heaney v Ireland [1994] 3 IR 593.

“to monitor and ensure compliance by postal service providers with the obligations imposed on them by or under the Communications Regulation Acts 2002 to 2011 in relation to the provision of postal services”; and

“to ensure the provision of a universal postal service that meets the reasonable needs of postal service users.”

Based on the above, the Proposal must be consistent with ComReg’s statutory functions and particularly its function to ensure the provision of the USO postal service provided by An Post.

The second issue is whether the Proposal is consistent with ComReg’s statutory objectives. ComReg’s fundamental statutory objective in postal regulation is to secure the provision of the USO postal service. Other relevant objectives include to promote competition and the interests of consumers. Specifically, Section 12(1)(c) provides for ComReg to have the following objectives:

“in relation to the provision of postal services—

(i) 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 postal service users,

(ii) to promote the interests of postal service users within the Community, and

(iii) subject to subparagraph (i), to facilitate the development of competition and innovation in the market for postal service provision.”

Consistent with the 2002 Act, ComReg’s own description of its objectives, as set out on its Postal Strategy Statement 2015-17, describes the following ‘High Level Goals’:

High Level Goal #1: Ensure the provision of the universal postal service

High Level Goal #2: Promote the interests of postal service users

High Level Goal #3: Promote the development of the postal sector

Based on the above, the Proposal must be consistent with ComReg’s statutory objectives and in particular to its objective of ensuring the provision of the USO postal service.

(b) Application to the Proposal

In assessing the proportionality of the Proposal in light of the foregoing, it is necessary to consider whether the Proposal is consistent with ComReg’s statutory functions and objectives, when balanced against the likely adverse effect on An Post and its operations, such that it impedes An Post’s rights as little as possible.

We understand that the Proposal is capable of having serious adverse effects on An Post by requiring it to prepare Regulatory Accounts that are out of line with professional accounting standards. In particular:

- The Volume Reconciliation Proposal may result in auditor qualifications to the Regulatory Accounts of An Post (see Section 4 below), which could damage An Post's reputation and market value.
- The Cash Proposal, for An Post to publish its cash figures quarterly, is wholly exceptional and unprecedented as far as An Post is aware, and may damage An Post's perceived financial standing and its ability to secure and retain business.
- The Segmentation Proposal may distort competition in the markets where An Post is active, by requiring An Post to disclose highly specific and sensitive information on the financials of its various services. In particular, we understand that the publication of financials in accordance with the Segmentation Proposal would facilitate actual and potential competitors to draw implications in relation to the operation of An Post's non-USO businesses.
- As described above, the Auditor Proposal is likely to impose significant additional costs on An Post.
- The Proposal may expose An Post to commercial risk because it requires the publication of a significant amount of financial information that is currently confidential.

For the reasons described below, the Proposal does not appear to comply with the administrative law principle of proportionality and in particular Section 12(3) of the Act.

First, it is not self-evident that the Proposal will assist ComReg in performing a particular statutory objective or function and we have seen no explanation by ComReg to this effect. Frontier's draft report does not identify which statutory function(s) or objective(s) each of its recommendations is intended to further. Rather, the introduction to the draft report makes the following vague and unsupported assertion:

"The provision by An Post of robust regulatory accounting data is essential in ensuring that ComReg can meet its duties in relation to a number of other provisions of the 2011 Act."

Further, certain aspects of the Proposal bear no clear relation to ComReg's statutory functions and objectives. As regards the Volume Reconciliation Proposal, for example, we can only assume that its aim is to further verify An Post's mail volume figures, which are based primarily on revenue figures, as we understand is standard practice for postal operators and other suppliers of fast moving goods / services. There is no clear link between this aim and ComReg's functions and objectives. Specifically, assuming it were possible for the Volume Reconciliation Proposal to improve the accuracy of An Post's volume figures, it is not obvious that improved figures would assist in safeguarding the USO, promoting the interests of users, or developing the postal sector (ComReg's 'High-Level Goals'). In fact, as described in Annex 2, we understand that the Volume Reconciliation Proposal would be costly to implement and additional regulatory costs could actually threaten rather than safeguard the USO.

In accordance with Section 12(3) of the 2002 Act, all aspects of the Proposal should be consistent with ComReg's statutory functions and objectives.

Second, we have seen no evidence that the difference between An Post's current Regulatory Accounts and the Proposal reflects a perceived current impediment to the furtherance of ComReg's statutory objectives or functions. We understand that ComReg did not notify An Post (or Frontier as far as An Post is aware) of any particular shortcoming in An Post's current

Regulatory Accounts prior to instructing Frontier. Further, the draft report by Frontier does not explain the rationale for the Proposal. In particular, the draft report does not identify what perceived deficiency (if any) each of its recommendations are intended to solve or contrast the perceived benefits of its recommendations against the *status quo*. Rather, the draft report recommends that ComReg should issue a Direction “to reflect changes in the law and the market since 2006” without identifying the relevant changes in law and market conditions on which it relies and how its recommendations are linked to them.

In accordance with Section 12(3) of the 2002 Act, ComReg should be able to demonstrate the rationale for the Proposal.

Third, there are grounds for concern that the Proposal is disproportionate because ComReg has available to it alternative regulatory tools that enable it to procure information it considers necessary to carry out its functions and objective and would be less burdensome on An Post. For example, ComReg could procure additional financial information from An Post on a case-by-case basis that is tailored to a particular action by ComReg, in furtherance of its statutory functions / objectives. Case-by-case requests may be more cost efficient and may gather more targeted and useful information, and therefore may result in better regulatory outcomes for ComReg as well as a reduced burden for An Post.

In light of the above, it is not clear that the Proposal would meet the applicable statutory requirement of proportionality. In addition, we note that a robust Regulatory Impact Assessment would be required to support any proposal for a Direction and we could expand our analysis of proportionality based on the content of the same.

4 Impossibility of performance

We understand that the Proposal may be impossible to perform, in that the proposed Direction would require that An Post’s Regulatory Accounts be audited in a particular and detailed manner according to an unprecedented, prescribed format. In particular, we understand that any optimally efficient postal operator would not implement the Volume Reconciliation Proposal due to practical obstacles including those outlined in Annex 2.

We understand that no audit firm could conduct such an audit resulting in a comprehensive audit opinion because the proposed accounts format conflicts with current Irish professional accountancy standards. In particular, we understand that An Post is not aware of any other postal operator or any other provider of any fast moving consumer good who carries out the suggested Volume Reconciliation Proposal. Therefore, there may be no precedent of the calculations required by the Proposal having been prepared or subject to audit in any jurisdiction to date, making audit unpractical and likely to lead to qualifications.

On this basis and for the following reasons in particular, it is not clear that the Proposal complies with applicable laws.

First, a Direction that is impossible to perform in certain respects (ie, by requiring auditing where an unqualified audit opinion cannot be obtained) is manifestly unreasonable. Section 12(2) of the 2002 Act requires that all measures taken by ComReg be “reasonable”. In accordance with Section 12(2) and the general administrative law principle of reasonableness, ComReg must refrain from imposing obligations on An Post that cannot be performed in full.

Second, the relevant legislation indicates that ComReg must exercise its power to issue a Direction in a manner that allows the resulting accounts to be audited. Section 31(3)(d) of the 2011 Act provides for auditing to take place and this indicates that a set of accounts prepared under Section 31 of the 2011 Act must be susceptible to audit.

5 **Conclusion**

We have identified a number of serious doubts regarding the legality of the Proposal. In particular, there are grounds for concern that the Proposal lacks a clear legal basis and conflicts with applicable statutory requirements of proportionality and reasonableness.

We note that this advice letter does not cover all concerns held by An Post in relation to the Proposal. We would be happy to advise separately on other issues, if helpful.

Yours sincerely

Sent by email, bears no signature

HELEN KELLY

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Annex 1

Section 31 of the 2011 Act

1. Where all or any of the conditions specified in subsection (2) are met, the Commission may give a direction providing for the keeping by a universal postal service provider, in its internal accounting system, of separate accounts for each service it provides—
 - (a) which is part of the universal postal service, and
 - (b) which is not part of the universal postal service.
2. The conditions referred to in subsection (1) are as follows:
 - (a) that a sharing mechanism has been established under section 36;
 - (b) that the Commission is satisfied that a universal postal service provider is in receipt of State assistance;
 - (c) that the Commission is satisfied that competition in the market for postal services is not fully effective.
3. A direction given under subsection (1) shall provide for—
 - (a) rules relating to the identification of costs,
 - (b) rules relating to the allocation of costs,
 - (c) rules relating to the use of internal cost accounting systems for the purposes of the matters referred to in paragraphs (a) and (b),
 - (d) the verification by a statutory auditor or statutory audit firm of compliance with internal cost accounting systems,
 - (e) the publication of such accounts and other information relating to requirements under this section and such direction, as the Commission considers appropriate, subject to the protection of any information which the Commission considers confidential (within the meaning of section 24 of the Principal Act),
 - (f) the publication of a statement relating to compliance with this section and such direction, and
 - (g) such other matters relating to the requirements of this section and such direction, as the Commission considers appropriate.
4. The Commission shall keep available, to an adequate level of detail, information on the cost accounting systems applied by a universal postal service provider, and shall submit such information to the European Commission on request.
5. A universal postal service provider shall make available in confidence to the European Commission, on request, detailed accounting information arising from its cost accounting systems.
6. This section is in addition to, and not in substitution for, the provisions of the Companies Acts relating to the preparation of accounts and their audit.

Annex 2

Note by An Post on the issues raised by the Volume Reconciliation Proposal

The nature of the postal sector means that collecting mail volume data from multiple locations and adding it up is not straightforward. To illustrate this, we set out below an example regarding a letter posted at Oughterard Post Office in Co. Galway, addressed to Ardee, Co. Louth:

A letter is collected from Oughterard Post Office and conveyed to Galway DSU where it is consolidated with other mail items and forwarded to Athlone Mail Centre (AMC). The letter is processed in AMC for further distribution and leaves the AMC for conveyance to the Dublin Mail Centre (DMC) where it is processed for further distribution to Drogheda Delivery Service Unit (DSU). From Drogheda DSU the item is forwarded to Ardee Delivery Service Office (DSO) for delivery to the addressee in Ardee. Adding the volume in mail centres for that day will count this letter twice. A letter going from Dublin to Dublin (say from Fairview to Sandyford) would go through the DMC only and be counted once. Where in the country a mail item is inducted (posted) and its final destination (addressee) will determine the multiple journeys a mail item may take. Additionally, certain mail products such as unaddressed Publicity Post items can go straight into DSUs and could miss a volume count at mail centres. Furthermore, assumptions would have to be made regarding daily cut-off adjustments for next day and deferred delivery services. In line with international best practice An Post's Regulatory Accounts are based on 'revenue-derived' volume data.

Furthermore, operational volume data cannot be fully reconciled to revenue-derived volume data for a number of reasons. For example, mail that is poorly addressed moves through portions of the postal system more than once without generating additional revenue. An Post could provide ComReg, on a confidential basis, with examples of databases where poor addressing is a significant issue

An Post's network is designed to move mail in the most efficient way through one (or more) automated mail centre for onward distribution to its final destination (the addressee). In handling mail, the primary focus is on getting delivery made in line with Quality of Service targets and to ensure customer satisfaction.

Owing to the above-described complex journeys that 2.5 million pieces of mail go through each day throughout An Post's c.250 premises, adding volume data from multiple locations is extremely complex and may generate meaningless data even where the exercise is performed at all times with optimal precision.

An Post notes that volume counting in specific instances is of value in conducting and managing operations – the requirements vary from each section of the postal pipeline. However, the primary controls that are applied as best practice in the postal industry worldwide are very much as follows. Post services must be paid for by Stamp (placed on letter), meter machines (letter franked) or by recording on account (bulk / ceadunas). Therefore, the primary control is to ensure all mail is correctly stamped, franked, or recorded (as appropriate). The above-described best practice approach would be typical for logistic and FMCG businesses.

The recommendation for additional volume counting, reconciliation of mail movements between sites, and incremental checking delays would have no clear benefit in An Post's view. The recommendation would require significant additional resources for counting, checking and reconciliation. The associated costs would be considerable without having any clear benefit.

In conclusion, it is An Post's view that the recommendation is not of merit for clear and objective reasons, based on best practice elsewhere and studies undertaken in this space.



14/12/2015

Mr Damian Quinn
Head of Regulatory Affairs
An Post
GPO
O'Connell Street
Dublin 1
D01 F5P2

Ref: Proposed Accounting Direction pursuant to section 31 of the 2011 Act

Dear Damian

I refer to your letter dated 9 December 2015 regarding the proposed Accounting Direction which would issue pursuant to section 31 of the Communications Regulation (Postal Services) Act 2011 ("Proposed Accounting Direction").

As you are aware, the matters raised in your letter will be the subject of a forthcoming public consultation on the Proposed Accounting Direction which we expect to commence shortly.

As your letter has been submitted to ComReg in the context of a matter which will require public consultation, and as that consultation is imminent, we require that you please advise as to how you wish to proceed in relation to the content of your letter and annexed advice from An Post's legal advisors, Matheson¹. In this regard, the two options are as follows.

- Option 1 is that your letter and annexed advice will be published by ComReg, together with this response and all other relevant correspondence, as part of the forthcoming public consultation on the Proposed Accounting Direction. This would be done in accordance with ComReg's published Consultation Procedures (Doc 11/34) and Guidelines on the treatment of confidential information (Doc 05/24). Furthermore, if Option 1 is taken, in order to fully understand the content of the legal advice provided to An Post by Matheson, ComReg would require a copy of the related instructions provided by An Post to

¹ Legal privilege has been waived by An Post in sending the advice to ComReg

Matheson. Without these instructions, the contents of Matheson's advice is incomplete and cannot be considered fully by ComReg. In providing these instructions, please advise of any required redactions for publication.

OR

- Option 2 is that, at your request, ComReg will not publish your letter and annexed advice as part of its forthcoming public consultation, but that An Post will instead submit the content of the letter as it sees fit as part of its response to the public consultation, once published. If you should choose this option then ComReg will not consider the content of your letter further, unless or until it has been received in response to the public consultation.

As noted above, ComReg's internal review process in relation to the public consultation has now commenced and for that reason we require you to respond, indicating your preferred option, by this Tuesday, 15 December at the latest.

Yours sincerely



**Stephen Brogan,
Postal Policy Manager**

Stephen Brogan
Senior Manager, Postal Regulatory Policy
ComReg
Abbey Court
Lower Abbey Street
Dublin 1

15 December 2015

**Reference: Proposed Accounting Direction pursuant to section 31 of
the 2011 Act**

Dear Stephen

I refer to your letter of 14 December 2015 on the above subject.

Please note that An Post considers the issue of the discussion on the Accounting Direction to be of the utmost importance.

It is also important that the issues and any such consultation complies with all relevant legislation. On this basis, An Post considers its letter of 9 December to ComReg to be important information for the Commissioners and any parties responding to the proposed consultation. We would expect the letter be an essential element of the overall consultation process and should be included in any consultation documentation issued by ComReg, i.e. Option 1.

As requested in your letter above, An Post confirms that it gave oral instructions to Matheson on Wednesday 2 December and those instructions are set out on page 1 of Matheson's advice to An Post:

“to advise on whether the Proposal [for a new Universal Postal Service Accounting Direction by Frontier Economics], if implemented in its current form, is compliant with applicable laws”

For completeness, we confirm that An Post provided Matheson with the following substantive documents as background information:

- Draft report to ComReg by Frontier Economics
- Annex 2 to Matheson's legal advice to An Post
- An Post's recent correspondence with ComReg regarding Frontier Economics' proposal.

An Post does not accept the assertion in your letter that legal privilege is waived by An Post's sharing of its legal advice for a limited and confidential purpose. However, we confirm that An Post consents on a once-off basis to the publication of its submission dated 9 December without redactions.

We urge you to re-consider the approach identified in your letter and to consider the content of our submission dated 9 December and to reply to us in writing explaining the steps that ComReg proposes to take in response to our submission dated 9 December.

Yours sincerely


Damian Quinn
Head of Regulatory Affairs