



Commission for  
**Communications Regulation**

# **Postal Regulatory Framework Implementation of the Communications Regulation (Postal Services) Act 2011**

**Response to Consultation,  
Direction and Regulation**

**Reference:** ComReg 12/81,  
D08/12

**Date:** 26/07/2012

**An Coimisiún um Rialáil Cumarsáide**

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## Additional Information

Consultation Document 12/38

30 April 2012

### Responses received to Consultation 12/38

<b>Respondent</b>	
1	Allied Irish Bank (“AIB”)
2	An Post
3	Aviva
4	Barnardos
5	Chambers Ireland
6	Communications Workers’ Union (“CWU”)
7	Concern Worldwide
8	Docket and Form International Ltd / IDFA (Quality Printers) Ltd (“DAFIL”)
9	Department of Social Protection
10	DX
11	Freight Transport Association Ireland (“FTAI”)
12	Irish Association of International Express Carriers (“IAIEC”)
13	Irish Banking Federation (“IBF”)
14	Irish Business and Employers Confederation (“IBEC”)
15	Irish Charity Sector (“ICTR”)
16	Irish Life
17	Irish Postmasters’ Union (“IPU”)
18	Irish Rural Life (“IRL”)
19	Lettershop Postal (“Lettershop”)
20	Liberty Insurance (“Liberty”)
21	Nightline
22	TICo Group Limited (“TICo”)
23	Ulster Bank Group (“Ulster Bank”)

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## Chapter 1

# 1 Introduction

- 1.1 ComReg's Consultation Document No. 12/38<sup>1</sup> ("Consultation 12/38") addressed three important issues affecting the future regulation of the Irish postal sector: the scope of regulation; An Post's role as the designated "*universal postal service provider*"; and provision of postal services "*within the scope of the universal postal service*".
- 1.2 This Response to Consultation document sets out ComReg's decisions on those issues which establish the foundations for implementation of the new Postal Regulatory Framework set out in the Communications Regulation (Postal Services) Act 2011 (the "2011 Act"). Together with the Regulations that ComReg has decided to make under section 16(9) of the 2011 Act, this document is intended to give clarity to all interested parties about the new regulatory framework.
- 1.3 In making the decisions set out in this "Response to Consultation" ComReg has considered the views of all 23 interested parties who have submitted observations on the matters set out in Consultation 12/38, and other relevant material. ComReg gratefully acknowledges the time and effort given by all respondents in considering Consultation 12/38 and in preparing their responses.

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<sup>1</sup> 'Postal Regulatory Framework: Implementation of the Communications Regulation (Postal Services) Act 2011' dated 30/04/12

## Chapter 2

# 2 Executive Summary

- 2.1 In total 23 interested parties submitted observations on the three key issues affecting the future regulation of the Irish postal sector which were the subject of ComReg's Consultation Document No. 12/38; the scope of regulation; An Post's role as the designated "*universal postal service provider*"; and provision of postal services "*within the scope of the universal postal service*".

### The scope of regulation

- 2.2 The 2011 Act restricts the scope of regulation to the provision of "*postal services*", which are defined by sections 6 & 8 of the 2011 Act, taken together, as "*services involving the clearance, sorting, transport and distribution of postal packets*". The two distinguishing features of a "*postal packet*" are that it is *addressed* and that it has been accepted or intended for "*transmission by post*"<sup>2</sup>. The definition of "*transmission by post*" appears to encapsulate everything which happens to a "*postal packet*" "*from the time of its being presented at an access point to the time of its being delivered ... to the addressee*"<sup>3</sup>.
- 2.3 The issue raised by these changes is that there are certain "*value added*" services where the sender does not deposit an item at an "*access point*", as defined, or where all four features (*clearance, sorting, transport and distribution*) contained in the definition of a "*postal service*" are not discernible.
- 2.4 In Consultation 12/38, ComReg indicated that it was minded to proceed on the basis that "*Document Exchange*" and "*Express and Courier services*" and the delivery of unaddressed advertising material lack certain constituent features by which to be deemed "*postal services*". On the other hand, other services that do not involve all four constituent features of a "*postal service*" - i.e. - "*clearance, sorting, transport and distribution*" - but which are nevertheless consistent with the definition of "*transmission by post*" (such as direct mail) may be considered to be "*postal services*".
- 2.5 Five of the six respondents who addressed this issue agreed with ComReg's understanding of the provisions of the 2011 Act on this point. Having considered the views of respondents and other relevant evidence, ComReg has decided to proceed on the basis that "*Document Exchange*" and "*Express and*

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<sup>2</sup> See Section 6(1) and Section 50 of the 2011 Act.

<sup>3</sup> See Section 6(3) of the 2011 Act.

*Courier services*” and the delivery of unaddressed advertising material lack certain constituent features by which to be deemed “*postal services*”.

- 2.6 The other issues arising under the scope of regulation heading in the consultation paper concerned the authorisation of “*postal service providers*” and the obligations and rights of postal service providers. No observations were received on the procedures that ComReg proposed to put in place to enable postal service providers to notify ComReg of their presence on the market or their intention to enter the market. ComReg will therefore now implement those proposals. Existing postal providers that are “*postal service providers*” must notify ComReg before 23 August 2012. Notification must be made in the form available online at ComReg 12/81n. ComReg requests the completed form is sent by email to [postal.team@comreg.ie](mailto:postal.team@comreg.ie) and by registered post to ComReg. Other “*postal service providers*” must notify ComReg by the same method before they provide “*postal services*”.

### **An Post’s role as the designated “universal postal service provider”**

- 2.7 Consultation 12/38 also considered An Post’s role as the designated “*universal postal service provider*” under three sub-headings:
- the additional obligations and rights imposed on An Post;
  - the range of “*universal postal services*” that An Post must provide to meet the needs of users; and
  - the approval and publication of An Post's Terms and Conditions and Charges for its “*universal postal services*”.
- 2.8 Consultation 12/38 set out in summary form the relevant sections of the 2011 Act which imposed obligations or gave rights to An Post as the designated universal service provider. An Post queried whether the list of obligations should not also include section 33 of the 2011 Act. Section 33 of the 2011 Act does not of itself impose obligations on An Post. It confirms that other “*postal service providers*” have the right to negotiate with An Post with regard to access to its postal network, while it gives ComReg a dispute resolution role with regard to such negotiations.
- 2.9 The range of “*universal postal services*” that An Post must provide to meet the needs of users was the most important issue to be addressed in Consultation 12/38 and it attracted the largest number of responses. Section 16 of the 2011 Act sets out a general description of the “*universal postal service*” that An Post as the designated “*universal postal service provider*” is required to provide.

ComReg is required by section 16(9) to “*make regulations specifying the services to be provided by a universal postal service provider relating to the provision of a universal postal service*”.

- 2.10 A number of respondents claim that ComReg is suggesting a significant reduction in the scope of the “*universal postal service*” that An Post must provide. ComReg believes such concerns were unfounded given the similarities between the proposals of Consultation 12/38 and ComReg’s 2005 working definition<sup>4</sup> of universal postal services.
- 2.11 The responses received can be considered under three broad headings:
- a) The number of bulk mail services included in the universal postal service should be expanded from the one “last resort” proposed in Consultation 12/38;
  - b) Registered items service and Insurance items service should remain bundled on the basis that there is no customer requirement for these to be separate services;
  - c) Access to the universal postal service provider’s postal network should be included as a universal postal service.

### **Bulk Mail**

- 2.12 With regard to Bulk Mail, in Consultation 12/38, ComReg proposed to use the 2005 working definition of the “*universal postal service*” as the basis for the Regulations it is now required to make. Only three Bulk Mail Services<sup>5</sup> were included by ComReg in its working definition:
- ‘delivery only’ for mail sorted in delivery sequence or by delivery office;
  - ‘deferred delivery’;
  - a combination of ‘delivery only’ and an extended delivery cycle<sup>6</sup>.
- 2.13 In seeking the views of interested parties as to what, if any, adjustments might be made to this working definition to take into account changes necessitated by the passage of time, including the opening of the postal market to competition; ComReg did not envisage any alteration to the single piece services for letters, large envelopes, packets, and parcels as used by private individuals and most businesses.
- 2.14 Consultation 12/38<sup>7</sup> made it clear that exclusion of Bulk Mail from the universal

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<sup>4</sup> See ComReg document 05/85 ‘The Universal Postal Service: A working definition’ dated 15 November 2005

<sup>5</sup> This also included international bulk mail services

<sup>6</sup> In practice, this service was never offered by An Post



postal service altogether would run the risk that some users would not have sufficient bargaining power to secure provision of the postal services that they require. On the other hand, by specifying an extensive range of Bulk Mail services as coming within the universal postal service ComReg might deprive customers of the ability to negotiate terms and conditions that suit their particular requirements.

- 2.15 ComReg therefore indicated that it was only minded to require a ‘*de minimis*’ set of postal services that met the needs of postal service users, while also minimising the regulatory burden on An Post. This approach is consistent with the first Postal Directive and developments in other states such as the UK and the Netherlands. This approach is also consistent with An Post's views at the time of setting the working definition of the universal postal service (published in 2005), in its response to the European Commission's public consultation on postal services (in 2005)<sup>8</sup>, and at the time of the options paper on the liberalisation of the postal market<sup>9</sup> by the Department of Communications, Energy and Natural Resources (published in 2009). Notwithstanding this, Consultation 12/38 sought views from interested parties on five options ranging from all Bulk Mail services currently provided by An Post to exclude Bulk Mail from universal service altogether, and also asked what should the specification for a single bulk mail service of last resort be if that was the decision made by ComReg following the consultation.
- 2.16 Having considered the views of respondents and other relevant evidence, ComReg has therefore decided to include two bulk mail services similar to its 2005 working definition in its *universal postal service* Regulations:
- a) ‘delivery only’ for mail sorted by delivery office; and
  - b) ‘deferred delivery’.
- 2.17 ComReg considers, on the basis of confidential volume information provided by An Post, that these two services are likely to encompass the majority of the postal packets posted at special bulk mail tariffs during 2011.
- 2.18 The third bulk mail service included in ComReg's 2005 working definition (a combination of ‘delivery only’ and an extended delivery cycle) has not been provided by An Post and no user has sought its provision, therefore ComReg has now excluded it.

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<sup>7</sup> See paragraph 5.39

<sup>8</sup> [http://ec.europa.eu/internal\\_market/post/doc/consultation/replies/postal\\_operator/a-2549\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/consultation/replies/postal_operator/a-2549_en.pdf)

<sup>9</sup> ‘Liberalisation of the Irish Postal Market: Options Paper’ dated October, 2009, available at <http://www.dcenr.gov.ie/Communications/Postal/Liberalisation+of+the+Postal+Services+Market.htm>

### **Registered items service and Insured items service**

- 2.19 With regard to Registered items service and Insured items service, the unbundling of registration and insurance was not deemed to be necessary by respondents. However, ComReg cannot ignore that these are listed as separate services in the 2011 Act, nor the potential savings to users (and Government might be one of the biggest beneficiaries of the reduced prices)<sup>10</sup> from specifying separate Registered items service and Insured items service as universal postal services.

### **Access to universal postal service provider's postal network**

- 2.20 With regard to access to the universal postal service provider's postal network, there is no legislative provision for ComReg to include access to the postal network as part of the universal postal service as according to Section 33 of the 2011 Act it is subject to commercial negotiation.

### **Other aspects of the universal postal service**

- 2.21 Consultation 12/38 included a number of questions about other aspects of the universal postal service to be provided. Most respondents agreed that there was no need to:
- (a) specify a two-tier service,
  - (b) specify anything other than a basic service for parcels
  - (c) to review the maximum weight limit for such parcels.
- 2.22 Consultation 12/38 noted that many postal service users require having their *postal packets* collected from their premises. However, as the European Court of Justice observed in *Corbeau*<sup>11</sup> such a service is inconsistent with provision of the "*universal postal service*". Although ComReg cannot require that collection from the sender's premises should be a feature of the "*universal postal service*" some respondents expressed a desire for such a service, making the point that it would not be in An Post's interests for users to bring their mail to an access point. ComReg cannot ignore the legal obligations in this regard but would point out there is nothing to stop the unbundling of the services with one contract covering collection from the premises and another covering *transmission by post*.

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<sup>10</sup> In the UK the price of the recorded Delivery service is 95p and in France the Recommendation service is priced at €2.78 compared with the €5.25 charged by An Post for its bundled service.

<sup>11</sup> Case C-320/91 *Corbeau* [1993] ECR I-2533 at point 19 observed that "*the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the sender's address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit ....*".

- 2.23 Having carefully considered all the observations received ComReg has decided to make under section 16(9) of the 2011 Act the Regulations set out in Annex 4. The Regulations will come into operation on 1 November 2012 which ComReg considers to be a reasonable period of time in order to allow An Post to make any changes that are required as a result of making these Regulations.

### **Publication of terms and conditions for universal postal services**

- 2.24 Prior to enactment of the 2011 Act, An Post provided its services under a public law "Scheme" made under section 70 of the 1983 Act. The 2011 Act revoked this power. However, additional obligations have been imposed on An Post in its capacity as the designated universal service provider, in respect of publication of the terms and conditions for its universal postal services (section 22-25 of the 2011 Act) and their pricing (section 28-30 of the 2011 Act). Having carefully considered all the observations received ComReg has decided to direct An Post under section 22(1)(b) of the 2011 Act in relation to the manner in which it will publish terms and conditions for its universal postal services:

- To publish two sets of terms and conditions for its universal postal services, one set for single piece mail and the other set for bulk mail
- to make printed copies of its booklets containing the terms and conditions of the universal postal service and the schedule of charges available to postal service users, on request, free of charge,
- to make printed copies of its single piece mail terms and conditions booklet readily available at all post offices, as defined by the 2011 Act; and
- to publish the Terms and Conditions and the Schedule of Charges in *Iris Oifigiúil* as a journal of record.

- 2.25 ComReg's approval or otherwise of the content of An Post's terms and conditions for its universal postal services will be by separate consultation which ComReg plans to undertake shortly.

### **Provision of postal services "*within the scope of the universal postal service*"**

- 2.26 Section 37 of the 2011 Act introduces the concept of a "*postal service within the scope of the universal postal service*" and Section 37(2) requires ComReg to "*publish guidelines concerning postal services within the scope of the universal postal service to which persons shall have regard when making a notification*

*under section 38”.*

2.27 If a service falls within the scope of the universal postal service as defined by the legislation then the provider of that service will be obliged by:

- Section 39 of the 2011 Act
  - to pay a levy to cover ComReg’s cost of postal regulation, and
  - to contribute to compensation fund to reimburse to An Post net cost of universal service provision if this is found to be an unfair burden
  - will be obliged to provide information on turnover distinguishing between services falling *within the scope of the universal postal service* and other activities
- Section 42 of the 2011 Act to give three months notice of its intention to withdraw the service

2.28 As part of Consultation 12/38, ComReg set out draft guidelines concerning postal services within the scope of the universal postal service. ComReg has decided to publish these subject to minor amendments to reflect the comments made by the respondents that dealt specifically with this issue. These can be found in Annex 6. These finalised guidelines are also published today by ComReg in a separate document (ComReg document 12/81a) for ease of future reference.

## **Regulatory Impact Assessment (RIA)**

2.29 Having considered the views of respondents, ComReg has finalised its Regulatory Impact Assessment (‘RIA’) in this Response to Consultation for those aspects of the consultation where ComReg is imposing regulatory obligations. The RIA addresses two matters:

- Options for the specification of the universal postal service; and
- Options for the publication of terms and conditions of the universal postal services.

## Chapter 3

# 3 Background

- 3.1 Consultation 12/38 was the first in a series of consultations as to the measures that are necessary to implement the Communications Regulation (Postal Services) Act 2011 (the “2011 Act”). The 2011 Act transposes into Irish Law the European regulatory framework for the postal sector, as established by Directive 97/67/EC, adopted in 1997 and later amended in 2002 and 2008 (the “Postal Directive”). The consultation specifically addressed three important issues affecting the future regulation of the Irish postal sector: the scope of regulation; An Post’s role as the designated “*universal postal service provider*”; and provision of postal services “*within the scope of the universal postal service*”.
- 3.2 As noted in Consultation 12/38, ComReg has two specific statutory functions set out in Section 10 of the Communications Regulation Act 2002 (the “2002 Act”), as amended by section 9 of the 2011 Act:
- “(ba) to ensure the provision of a universal postal service that meets the reasonable needs of postal service users,*
- (c) 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,”*
- 3.3 The “objectives” to be met by ComReg in exercising the above functions are set out in section 12 of the 2002 Act, as amended by section 10 of the 2011 Act:
- “(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”.*
- 3.4 In Consultation 12/38, ComReg set out its understanding of its statutory remit under the 2011 Act and the options available to it where it is required to make

regulations, issue directions or provide guidelines. The purpose was to give interested parties the opportunity to state their views as to the options open to ComReg, and to comment on the draft RIA as to the impact of any regulatory measures on postal service providers. It also provided an opportunity for interested parties to comment on ComReg's understanding of its statutory remit.

- 3.5 As noted at paragraph 3.2 of Consultation 12/38, all financial and other non-postal services which are provided at "*post offices*" are outside the definition of "*postal services*" and therefore such services are outside the remit of ComReg.
- 3.6 All references to statutory sections in this document are references to sections of the 2011 Act, unless stated otherwise. A full listing of all the Terms and Abbreviations used in this document is set out in tabular form at Annex: 1
- 3.7 As noted in ComReg's published Consultation procedures<sup>12</sup>, the purpose of public consultations is to allow ComReg to consider the views of interested parties in the context of reaching a decision on particular matters. All views have been considered and account taken of the merits of views expressed. It should, however, be noted that the process is not equivalent to a voting exercise on proposals and ComReg has exercised its judgement having considered the merits of the views expressed. It is not practical for ComReg to provide commentary on each individual submission.

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<sup>12</sup> ComReg Document 11/34 'Information Notice on ComReg Consultation Procedures' dated 6 May 2011

## Chapter 4

# 4 The scope of regulation

4.1 As set out in Consultation 12/38, the 2011 Act set the scope of postal regulation by ComReg as follows:

- by defining “*postal services*”. Having considered the views of respondents and other relevant evidence, Chapter 4.1 below sets out ComReg’s understanding of that definition and how it will apply it;
- by setting out how “*postal service providers*” are to be authorised. Having considered the views of respondents and other relevant evidence, Chapter 4.2 below sets out how ComReg will implement this; and
- the obligations and rights of authorised “*postal service providers*” which is summarised in Chapter 4.3 below.

## 4.1 ComReg’s understanding of the definition of “*postal services*”

### 4.1.1 Fundamental aspects

4.2 Until the 2011 Act was enacted, on 2 August 2011, the definition of “*postal services*” in Irish law was exactly the same as in EU legislation<sup>13</sup>. This is no longer the case. Section 6 & 8 of the 2011 Act, taken together, provide that the term “*postal services*” is now defined as “*services involving the clearance, sorting, transport and distribution of postal packets*”.

4.3 According to Section 6(1) and Section 50 of the 2011 Act the two distinguishing features of a “*postal packet*” are that it is *addressed* and that it has been accepted or intended for *transmission by post*.

4.4 The definition of “*transmission by post*” in section 6(3) of the 2011 Act appears to encapsulate everything which happens to a “*postal packet*” “*from the time of its being presented at an access point to the time of its being delivered ... to the addressee*”.

4.5 The issue raised by these changes is that there are certain “*value added*” services where the sender does not deposit an item at an “*access point*”, as defined, or where all four features (*clearance, sorting, transport and distribution*) contained in the definition of a “*postal service*” are not discernible.

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<sup>13</sup> Section 2 of the 2002 Act stated that “‘postal services’ has the meaning assigned to it by Directive 97/67/EC of 15 December 1997 (O.J. No. L015, 21.1.98, p. 14)”.

- 4.6 However, for ComReg to seek to exclude a service from the cache of regulated “*postal services*” merely because it does not fully accord with a strict legal definition of “*postal service*” may be unduly restrictive. For example, to exclude a service merely because it involves collection, rather than the sender inputting the mail into an “*access point*”, does not seem reasonable to ComReg or in accordance with the amended definition of “*clearance*” in the Third Postal Directive. Also if *postal packets* are deposited at an “*access point*” in bulk and in such manner that they do not require “*sorting*” then it would not seem reasonable to argue that the service being provided was not a “*postal service*” merely because the “*sorting*” element was absent.

#### 4.1.2 “Document exchange” and “Express and Courier services”

- 4.7 Section 37(1) of the 2011 Act expressly states that “*document exchange*” and “*express or courier services*” are not services “*within the scope of the universal postal service*”. However, the Act does not go so far as to state that such services are not “*postal services*” – i.e. it does not state that such services are altogether excluded from the scope of the 2011 Act.
- 4.8 Section 37(4) of the 2011 Act defines “*document exchange*” as “*provision of means, including the supply of premises specifically for that purpose and transportation by a third party, allowing self-delivery by mutual exchange of postal packets between persons subscribing to this service*”. “*Mutual exchange*” in this context appears to be fundamentally different from a postal service involving “*clearance, sorting, transport and distribution*”.
- 4.9 Recital 18 to the First Postal Directive, and the European Commission’s Statement regarding Recital 27<sup>14</sup> also draw a distinction between “*express and courier services*” and other postal services. Furthermore, providers of such services might not be able to comply with some of the provisions contained in sections 47, 53, and 55 of the 2011 Act.
- 4.10 However, as stated in paragraph 4.7, while section 37(1) goes so far as to specify that such services are not “*services within the scope of the universal service*”, the Act does not expressly state that they are not “*postal services*” at all. On the other hand, if they were to be regarded as “*postal services*”, regulatory obligations would be imposed on the many undertakings providing such services, which would seem disproportionate to any public interest benefit that may result.

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<sup>14</sup> Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services. – COM(2007)695 final, 9.11.2007



### 4.1.3 Unaddressed advertising material

4.11 As set out in Consultation 12/38, one service currently provided by An Post (and other operators) is the door to door delivery of unaddressed advertising material. However, the definition of both “*postal item*” in the EU Postal Directives and “*postal packet*” in the 2011 Act refers to “*an item addressed in the final form in which it is to be carried by ...*” It would therefore seem that door to door delivery of unaddressed advertising material is not a “*postal service*” as defined in the 2011 Act, but is more akin to other forms of advertising such as in newspapers, or on radio, television or the internet, or in any other media.

### 4.1.4 Addressed advertising material

4.12 As noted in Consultation 12/38, addressed advertising material (Direct Mail) is more problematic than unaddressed advertising material, as Direct Mail is similar in many respects to a traditional postal service. Direct Mail items are normally printed in delivery sequence and therefore do not need to be “*sorted*”, which is one of the four features in the legal definition of a “*postal service*”. Historically the provider of a Direct Mail service would appear to have had an obligation only to the sender as the recipient/addressee would in most cases not be depending on receipt of the communication. Recent data protection legislation requires recipients to “*opt in*” to receiving certain unsolicited advertising and many undertakings do seek the addressee’s permission before sending addressed advertising material. Furthermore, delivery of Direct Mail on or by a specified day would be more important than delivery in due course of post - i.e. speed of delivery would not necessarily be of great concern. ComReg further notes that six EU Member States have always excluded addressed advertising material from the postal monopoly and the First and Second Postal Directives therefore included a specific definition of such material so as to enable those six Member States to distinguish it from more traditional *postal items*<sup>15</sup>.

4.13 It is also difficult to distinguish Direct Mail from other bulk mail such as invoices where both senders and addressees have an interest in the item, as the

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<sup>15</sup> Article 2 point 8 defined Direct Mail as “*a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. The national regulatory authority shall interpret the term 'significant number of addressees' within each Member State and shall publish an appropriate definition. Bills, invoices, financial statements and other non-identical messages shall not be regarded as direct mail. A communication combining direct mail with other items within the same wrapping shall not be regarded as direct mail. Direct mail shall include cross-border as well as domestic direct mail*”. This definition has been excluded from the Third Directive simply because it is no longer needed following Full Market Opening.

senders want to be paid and the addressees need to know of their liability to pay, and where speed of delivery may be of the essence to the sender.

## Network access

- 4.14 The issue of *network access* also needs to be considered. Section 6(1) of the 2011 Act defines the “*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;*

- 4.15 An Post, as the designated “*universal postal service provider*”, owns such a “*postal network*”. In order to achieve economies of scale, density and scope, and thereby keep the cost of providing the “*universal postal service*” to a minimum, An Post utilises its network to provide not only the “*universal postal service*” but also other “*postal services*” (which may fall within or outside the scope of the universal postal service) and non postal services (such as the delivery of unaddressed advertising leaflets).
- 4.16 An Post also allows other “*postal service providers*”, and in particular the “*Designated Operators*” of the Universal Postal Union (“UPU”)<sup>16</sup> and members of the European Parcels Group (“EPG”), access to its “*postal network*”. By this arrangement both “*postal service providers*” and An Post, as owner of the network, should benefit from the further economies of scale, density and scope that should arise.
- 4.17 Some “*postal service providers*” may wish to access An Post’s “*postal network*” in order to provide all or part of their “*postal services*”. Section 33 of the 2011 Act gives them “*the 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*” and makes provision for ComReg to provide a dispute resolution function. It appears to ComReg that while such negotiated access is a type of “*postal service*”, as defined, it is distinct from the provision of the “*universal postal service*”. This view is supported by the wording of section 33 “*with a view to concluding an agreement*” rather than including provision for same within the definition of the

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<sup>16</sup> An organisation under the auspices of the United Nations and established by inter-governmental treaty to facilitate the inter-operability of “*postal networks*” at the global level.

*“universal postal service”* in section 16 of the 2011 Act.

- 4.18 In Consultation 12/38, ComReg sought the views of interested parties in relation to ComReg’s understandings as set out above by asking the following question:

**Q. 1 Have you any reasoned observations to make about ComReg's understanding of the definition of postal services in the Communications Regulation (Postal Services) Act 2011?**

### Views of respondents

- 4.19 An Post states that in the absence of a full explanation of the common law position as understood by ComReg it is not possible for An Post to engage fully in the response to the consultation question or to comment fully on the issues involved beyond noting that ComReg does not appear to have correctly stated the applicable law or set out its position transparently.
- 4.20 Notwithstanding this, An Post states that postal services are defined in Section 6(1) of the 2011 Act as *“services involving the clearance, sorting, transport and distribution of postal packets”*. It argues that the *“and”* must be disjunctive as otherwise Section 33(1) of the 2011 Act would not be capable of application such that there would be no *“postal service provider”* in existence because no one could qualify as a postal service provider. An Post contends that even if all four elements were not part of the service, this does not mean that the provider of document exchange services, express services and/or courier services would not be a provider of postal services. An Post considers that document exchange, express services and courier services are not universal service obligation (*“USO”*) services but that sections 47, 53 and 55 of the 2011 Act do, however, apply to those services.
- 4.21 In relation to *“postal packets”*, An Post states that the key features are that it is addressed and that it is transmissible by post i.e. capable of being transmitted by post. However, An Post considers that it need never be actually transmitted by post in order for it to come within the definition of *“postal packet”*.
- 4.22 An Post concurs that a service which involves collection instead of induction at an access point is a *“postal service”*.
- 4.23 An Post disagrees with ComReg’s statement in Section 4.11 of Consultation 12/38 in which ComReg states that the definition of *“postal service”* in the 2011 Act appears to confine the meaning of *“postal services”* to items deposited at *“access points”*. An Post notes that the plain words of the definition of *“postal service”* in Section 6(1) of the 2011 Act includes *“clearance”* which is in turn a defined term meaning *“the operation of collecting postal packets...”*

- 4.24 **Lettershop, DX, and Nightline** agree that Document Exchange, Express and Courier Services are not postal services. **FTA, IAIEC, IBEC** agree that Express and Courier Services are not postal services.
- 4.25 In relation to unaddressed advertising material, **Nightline** agrees with ComReg's understanding that these are not postal services.
- 4.26 In relation to a service such as Direct Mail, **Nightline** agrees with ComReg that such a service should be considered to be a postal service even though the sorting element is missing and therefore it does not fall within the strict legal definition.
- 4.27 **DX** and **Nightline** request ComReg to consider whether network access is part of the universal postal service.
- 4.28 **Nightline** further requests that ComReg publishes its dispute procedures for access by postal service providers to the universal postal service provider's postal network as required by section 33 of the 2011 Act.

### ComReg's position

- 4.29 In response to An Post's claim that it requires a full explanation of the common law position as understood by ComReg, this was set out in letter by ComReg dated 1 June 2012 which is published by ComReg with the submissions to Consultation 12/38. The few references in Consultation 12/38 to the term "common law" are all in relation to the common law concept of "transmission by post" as applied in the past. This common law concept was set out as background, in order to explain the manner in which the 2011 Act continues to impose a duty of care upon authorised postal service providers in relation to "addressees", as well as to "senders".
- 4.30 The argument advanced by An Post that the definition of "*postal service*" in the Act appears to confine the meaning of "*postal services*" to items deposited at "*access points*" is noted but it is of little relevance as ComReg has already indicated that to exclude a service merely from the cache of regulated "*postal services*" merely because it does not fully accord with a strict legal definition of "*postal service*" may be unduly restrictive. For example, to exclude a service merely because it involves collection, rather than the sender inputting the mail into an "*access point*", does not seem reasonable to ComReg or in accordance with the amended definition of "*clearance*" in the Third Postal Directive. Also if postal packets are deposited at an access point in bulk and in such manner that they do not require "*sorting*" then it would not seem reasonable to argue that the service being provided was not a "postal service" merely because the "*sorting*" element was absent.
- 4.31 The construction of the 2011 Act is clearly open to different interpretations,

which ultimately can only be clarified by the Courts. However, ComReg sought to bring as much clarity as possible through its Consultation 12/38, and it is appreciated that its published understanding of how the legislation should be interpreted has been generally accepted.

- 4.32 An Post has also made an argument that a postal packet need never be actually transmitted by post in order for it to come within the definition. In response, ComReg notes that the definition of section 6(1) of the 2011 Act can be divided into three parts:
- (i) An item addressed (i.e., it must be addressed)
  - (ii) in the final form in which it is to be carried by a postal service provider (i.e. there must be an intention to give it to a postal service provider)
  - (iii) and includes a letter, parcel, packet or any other article transmissible by post (i.e. it must be one of the specific types of items mentioned or any other items that is not excluded by section 55(1) of the 2011 Act).
- 4.33 The latter two points also make it clear that to be a “*postal packet*” it must have been accepted or intended for “*transmission by post*”. ComReg considers that it does not go as far as An Post suggests to include an item which could be transmitted by post but which the sender intended to enter into a private law contract with the understanding that it be conveyed, without involving transmission by post, to a stated destination on their behalf.
- 4.34 This latter point is interlinked with An Post’s argument that Document Exchange, Express and Courier services are postal services to which section 47, 53 and 55 apply. As Consultation 12/38 noted at paragraph 4.17 “...providers of such services might not be able to comply with some of the provisions contained in sections 47, 53, and 55 of the 2011 Act.” ComReg considers that there is no evidence that the legislation was intended to impose restrictions on what such undertakings can do.
- 4.35 With regard to Network Access, it should be noted that it is not a feature of the universal postal service described in section 16 of the 2011 Act and has been separately set out under section 33 of the 2011 Act, nor is there any other legal obligation imposed by An Post by the 2011 Act. ComReg notes that there is of course an economic rationale in that it will enable An Post to achieve greater economies of scale and scope than would otherwise be the case. There may also be an obligation under Competition Law. Section 33 merely contains the right of a postal service provider to enter into negotiations and for ComReg to take such steps as are necessary to resolve any disputes that may arise.

- 4.36 In relation to Nightline's request that ComReg publishes its dispute procedures as required by section 33 of the 2011 Act, drafts of these are published today in a separate consultation document.

## Summary

- 4.37 Section 6 & 8 of the 2011 Act, taken together, provide that the term "*postal services*" is now defined as "*services involving the clearance, sorting, transport and distribution of postal packets*". According to Section 6(1) and Section 50 the two distinguishing features of a "*postal packet*" are that it is "*addressed*" and that it has been accepted or intended for *transmission by post*.
- 4.38 The definition of "*transmission by post*" in section 6(3) of the 2011 Act appears to encapsulate everything which happens to a "*postal packet*" "*from the time of its being presented at an access point to the time of its being delivered ... to the addressee*". Additionally most of the key features of the common law principle of *transmission by post* have been incorporated into the 2011 Act and are imposed on postal service providers as a condition of their authorisation (see paragraph 4.49).
- 4.39 Apart from some specific comments from An Post, ComReg's understanding of the definition of "*postal services*" in the 2011 Act, and therefore the scope of regulation has been generally accepted.
- 4.40 ComReg therefore concludes that "*Document Exchange*" and "*Express and Courier services*" and the delivery of unaddressed advertising material lack certain constituent features by which to be deemed "*postal services*". On the other hand, other services that do not involve all four constituent features of a "*postal service*" - i.e. - "*clearance, sorting, transport and distribution*" - but which are nevertheless consistent with the definition of "*transmission by post*" (such as direct mail) may be considered to be *postal services*.

## 4.2 Authorisation of postal service providers

- 4.41 As noted in Consultation 12/38, all "*postal service providers*" require authorisation under the 2011 Act. The key features of the authorisation process are as follows:
- Each undertaking<sup>17</sup> must notify ComReg that it intends to provide one or more "*postal services*" as defined in the 2011 Act.

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<sup>17</sup> Whereas the Postal Directives define *postal service provider* as an "*undertaking that provides one or more postal services*" the 2011 Act defines *postal service provider* as "*any person providing one or more than one postal service*" albeit that the term *undertaking* is used in Schedule 4 in relation to contributions to a universal postal service compensation fund. As the CJEU has observed two or more separate legal or natural persons may be considered to form one economic unit

- On written acknowledgement by ComReg of the notification, the undertaking is authorised, and it must then comply with the obligations set out in the 2011 Act, as summarised in Section 4.3 of this document.
- ComReg must maintain a register of postal service providers.
- If there is serious or repeated non-compliance by a *postal service provider* with the obligations imposed on it, ComReg may suspend or withdraw its authorisation.

## Notification Process

- 4.42 Section 38(1) of the 2011 Act requires any (legal or natural) person who intends to provide a “*postal service*” to notify ComReg of his or her intention before doing so. Section 38(2) requires any (legal or natural) person who was providing a “*postal service*” immediately before the passing of the 2011 Act<sup>18</sup>, to notify ComReg in accordance with the guidelines issued by ComReg under section 37. A notification under sub-section 38(1) or (2) shall be in such form as ComReg shall determine under section 38(3), and shall include a declaration under section 38(6) stating whether the postal service concerned is, or is not, within the scope of the universal postal service.
- 4.43 Notification must be made in the form available online at ComReg 12/81n (it is also at Annex: 2 for information). ComReg requests the completed form is sent by email to postal.team@comreg.ie. However, in view of the penalties that arise from a failure to make a notification or from making a notification or submitting a declaration which is false or misleading, hardcopies of the notification and declarations should also be printed off and signed and sent to ComReg by registered post. On acknowledgement by ComReg of such written notification, the “*postal service provider*” is deemed to be authorised to provide the postal service or services described therein, subject to the conditions specified in section 39 of the 2011 Act. ComReg notes that a condition specified in section 39 of the 2011 Act is the provision by the postal service provider of complaints and redress procedures in accordance with section 43 of the 2011 Act. As noted in Chapter 8 “Next Steps”, ComReg will, in due course, review all complaints and redress procedures received in support of authorisation.
- 4.44 Section 41 of the 2011 Act gives ComReg power to suspend or withdraw an authorisation when it considers that there is or has been serious or repeated non-compliance by a “*postal service provider*” with the conditions imposed on it.

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and therefore to be a single undertaking. ComReg therefore will proceed on the basis that it is the undertaking that should make the notification but that the names of all legal or natural persons included in the undertaking should be disclosed.

<sup>18</sup> On 2 August 2011

### Views of respondents:

- 4.45 There were no responses disagreeing with the proposed notification and authorised procedures, therefore, ComReg's position remains as set out in Consultation 12/38.

### ComReg's decision:

All *postal service providers* should advise ComReg before 23 August 2012 by completing the notification from online at 12/81n and reproduced at Annex 2. This should be sent by email to [postal.team@comreg.ie](mailto:postal.team@comreg.ie) and should also be submitted in signed hard-copy by registered post to ComReg. On acknowledgement by ComReg of such written notification, the "*postal service provider*" is deemed to be authorised to provide the postal service or services described in its notification.

### Holders of existing postal service authorisations

- 4.46 Section 38(8)(b) provides that the obligations applying to the holder of a "*postal service authorisation*" granted under Regulation 7 of S.I. 616 of 2002 shall continue to apply until the holder of such an authorisation makes a notification to ComReg as described above, seeking a new authorisation under the 2011 Act. Having considered the responses to Consultation 12/38, ComReg has decided that holders of "*postal service authorisations*" granted under Regulation 7 of S.I. 616 of 2002, but who only provide "*express or courier services*" or "*Document Exchange*" services, do not need to make a notification to ComReg under Section 38 of the 2011 Act, on the basis that the particular services they are providing are not "*postal services*" as defined by the 2011 Act. For the avoidance of any doubt, holders of "*postal service authorisations*" granted under Regulation 7 of S.I. 616 of 2002, and who do not consider themselves to be "*postal service providers*" for the purposes of the 2011 Act should notify ComReg accordingly.
- 4.47 A form to enable holders of postal service authorisations granted under Regulation 7 of S.I. 616 of 2002 to notify their status as "*postal service providers*" or otherwise is at Annex: 3.



**ComReg's decision:**

Holders of "*postal service authorisations*" granted under Regulation 7 of S.I. 616 of 2002, but who only provide "*express or courier services*" or "*Document Exchange*" services, do not need to make a notification to ComReg under Section 38 of the 2011 Act but are invited to advise ComReg on the form set out in Annex 3 that they do not consider themselves to be "*postal service providers*" for the purposes of the 2011 Act.

## Criminal Offence

- 4.48 Section 38(7) provides that it is a criminal offence to fail to make a notification or to make a notification or a declaration which is false or misleading in any material respect and the offender is liable on summary conviction to a "class A" fine, the largest fine permissible under the Fines Act 2010 following summary conviction.

## 4.3 Obligations and rights of postal service providers

- 4.49 As noted in paragraph 4.43 above, the postal service provider is deemed to be authorised to provide the services subject to compliance with the obligations set out in the following sections of the 2011 Act:

- Sections 11-12 "*Power of Commission to obtain information from postal service provider*";
- Section 42 "*Withdrawal of postal services*";
- Section 43 "*Complaints and redress procedures*";
- Section 45 "*Protection of whistleblowers*";
- Section 47 "*Powers as to the transmission of postal packets*";
- Section 53 "*Prohibition on opening of postal packets and mail bags*"; and
- Section 54 "*Ministerial directions to postal service providers*".

- 4.50 A number of rights and benefits also accrue to authorised postal service providers, under the following sections of the 2011 Act:

- Section 33 "*Access to postal network of universal postal service provider*";
- Section 34 "*Access to postal infrastructure*";

- Section 46 “*Inviolability of mails and immunity from prosecution*”;
- Section 47 “*Powers as to the transmission of postal packets*”;
- Section 55 “*Prohibition on sending certain articles by post*”;
- Section 57 “*Prohibition on interference with post boxes*”; and
- Section 58 “*Secretion of a postal packet*”.

4.51 Additional obligations apply to An Post as the designated “*universal postal service provider*” (see Chapter 5), or in respect of services which fall “*within the scope of the universal postal service*” (see Chapter 6).

4.52 Chapter 8 provides an indicative listing of the future consultations that ComReg will conduct in relation to these obligations and rights.

### **4.3.1 Information requirements under section 13(F) of the Communications Regulation Act 2002**

4.53 ComReg wishes to advise authorised postal service providers that sections 11 & 12 of the 2011 Act inserted a new section 13(F) into the 2002 Act. This means that all postal service providers are subject to the requirement under section 13(F) of the 2002 Act to provide ComReg with information if required to do so in writing. A *postal service provider* commits an offence if it:

- (a) Fails to comply with an information requirement within the period specified in the notice by ComReg or within such extended period as ComReg allows
- (b) In purporting to comply with such a requirement, provides to ComReg information that the *postal service provider* knows to be false or misleading in a material respect.

## Chapter 5

# 5 An Post's role as designated universal postal service provider

5.1 In relation to An Post's role as universal postal service provider, Consultation 12/38 addressed three specific issues:

- Additional rights and obligations on An Post as universal postal service provider;
- The range of universal services that An Post must provide to meet the needs of users (section 16(9) of the 2011 Act);
- Publication of An Post's Terms and Conditions and Charges for its universal postal services (section 22 to 25 and 28 to 30 of the 2011 Act).

## 5.1 Additional rights and obligations on the universal postal service provider

5.2 Section 5.1 of Consultation 12/38 paper set out in summary form the relevant sections of the 2011 Act which imposed obligations or gave rights to An Post as the designated universal service provider. An Post queried whether the list of obligations should not also include section 33.

5.3 ComReg notes that section 33 of the 2011 Act does not of itself impose obligations on An Post. It confirms that other postal service providers have the right to negotiate with An Post with regard to access to its postal network, while it gives ComReg a dispute resolution role with regard to such negotiations.

## 5.2 Universal Postal Services to be provided by An Post<sup>19</sup>

### Legal basis

5.4 Section 16 of the 2011 Act sets out a general description of the “*universal postal service*” that An Post as the designated “*universal postal service provider*” is required to provide. However, as noted in Consultation 12/38, ComReg is now required by section 16(9) to “*make regulations specifying the services to be provided by a universal postal service provider relating to the provision of a universal postal service*”.

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<sup>19</sup> As the universal service provider designated under section 17 of the 2011 Act

## Impact of decisions made by ComReg

- 5.5 As noted in Consultation 12/38, only the services specified by ComReg in Regulations made under section 16(9) will form part of the “*universal postal service*” provided by An Post.
- 5.6 It is only in respect of the “*universal postal service*” that An Post will be subject to requirements in relation to pricing, quality, and contract terms. It is also only in respect of the “*universal postal service*” that An Post may seek funding in respect of the net costs (if any) of providing the “*universal postal service*”, under Section 35 of the 2011 Act.
- 5.7 Other “*postal services*” provided by An Post may, however, fall “*within the scope of the universal postal service*”, as set out in section 37(1) of the 2011 Act. In respect of these services An Post will be subject to the same obligations and rights as other authorised “*postal service providers*” who provide services “*within the scope of the universal postal service*”, as discussed later at Chapter 6.
- 5.8 This means that An Post will not be subject to any provisions of the 2011 Act which solely relate to its role as the designated “*universal postal service provider*”, in respect of those “*postal services*” which it provides and which fall “*within the scope of the universal postal service*” but which are not actual “*universal postal services*”. Consequently, An Post will have flexibility in terms of pricing, quality, and contract terms for all of its “non-universal” postal services.

## Scope of Regulations

- 5.9 In Consultation 12/38, ComReg sought views on the services that should form part of the “*universal postal service*” provided by An Post.
- 5.10 In addition, ComReg noted that it has the statutory function to ensure the provision of a “*universal postal service*” that meets the reasonable needs of postal service users and one of its objectives, to be met in the performance of that function, is to promote 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.
- 5.11 In Consultation 12/38, ComReg indicated that it is obliged to consult on the services that will form part of the “*universal postal service*” provided by An Post, under regulations made by ComReg pursuant to section 16(9) of the 2011 Act. Recital 11 to the First Postal Directive states:

*“... it is essential to guarantee at Community level a universal postal service*

*encompassing a minimum range of services of specified quality to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location in the Community.”*

5.12 In Consultation 12/38, ComReg suggested that a good starting point, in deciding which services shall form part of the “*universal postal service*”, is to look to the list of services specified by ComReg in 2005 as its working definition<sup>20</sup> of universal postal service. These are:

- Standard Post - Letter services (Three Formats; D+1 standard) and Parcels (as per current ‘priority’ offering from An Post)
- Services for businesses, bulk mailers or consolidators of mail from different customers:
  - ‘delivery only’ for mail sorted in delivery sequence or by delivery office
  - ‘deferred delivery’
  - a combination of ‘delivery only’ and an extended delivery cycle
- Registration and Insurance (bundled; compensation up to €4,600)
- Free postal service for blind and partially sighted persons
- International bulk mail services
- Sending books abroad
- Business Reply / Freepost
- Redirection
- Mailminder
- Private boxes / bags
- Certificate of posting (free)

### **Universal postal services (single piece mail)**

5.13 The current range of *universal postal services* is marketed by An Post under the brand name “*Standard Post*”. This includes separate services for each type of “*postal packet*” – i.e. “*letters*”<sup>21</sup>, “*large envelopes*”<sup>22</sup>, “*packets*”<sup>23</sup>, and

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<sup>20</sup> ComReg Document No. 05/85 dated 15 November 2005

<sup>21</sup> Minimum dimensions: 90mm x 140mm x .18mm, with a tolerance of 2mm. Maximum dimensions: 162mm x 235mm x 5mm. Maximum weight 100grams

<sup>22</sup> Minimum dimensions: 90mm x 140mm x .18mm, with a tolerance of 2mm.

“*parcels*”<sup>24</sup> - in recognition of the fact that there are different operational processes and different cost structures for each type of “*postal packet*”.

- 5.14 All of these “*universal postal services*” are provided at a “*single piece tariff*”<sup>25</sup> and offer a basic, but nevertheless high quality, level of service for “*postal packets*” deposited at an “*access point*” for delivery to addressees at their home or premises. “*Domestic postal packets*” should be delivered on the next working day after the day of posting, “*Intra-EU postal packets*” should be delivered within 3 working days, and “*international postal packets*” should be delivered within 5 to 9 working days. A uniform tariff applies throughout the State for “*domestic postal packets*” and a higher uniform tariff applies for all “*international postal packets*”<sup>26</sup>.
- 5.15 In approximately half of all EU Member States, “*postal service users*” are given a choice between a priority postal service with a next-day delivery target and a slower but cheaper non-priority postal service. Where there is a single tier service, such as that currently provided by An Post, it is only possible to meet the requirements of all “*postal service users*” by providing the priority (and more expensive) service. This means that some “*postal service users*” have to pay for a higher level of service than they might actually require.
- 5.16 At the time ComReg published its working definition for universal postal services it took the view that, on balance, the provision of a single tier service was sufficient to meet the requirements of the 2002 Postal Regulations while also meeting the needs of “*postal service users*”.
- 5.17 However, ComReg considered that this should be re-examined and therefore asked the following question in Consultation 12/38:

**Q. 2 Should the “status quo”, i.e. a single tier service offering delivery the next working day, be retained as part of the universal postal service?  
Please give reasons for your views.**

### Views of respondents

- 5.18 There were eight responses to this question and in the main all respondents

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Maximum dimensions: 300 mm x 400 mm x 25mm. Maximum weight 500g (1kg for domestic items)

<sup>23</sup> Minimum dimensions: 70mm x 100mm x 25 mm (In roll form: length and twice diameter: 170mm, greatest dimension not less than 100mm). Maximum dimensions: length, width and depth combined: 900 mm, greatest dimension not exceeding 600mm, with a tolerance of 2mm (In roll form: length and twice diameter: 1040mm, greatest dimension not exceeding 900mm) with a tolerance of 2mm.

Maximum weight 2kg.

<sup>24</sup> Maximum dimensions: Length 1.5 metres, Length + Girth 3 metres [Girth = 2 x (Depth + Width)].

Maximum weight 20 kilograms

<sup>25</sup> Section 28(4) of the 2011 Act provides that “*service provided at single piece tariff*” means “*a postal service for which the tariff is set for individual postal packets by a universal postal service provider in its charges published under section 22 or 23, as the case may be*”.

<sup>26</sup> The exceptions are in respect of packets weighing more than 500g for international destinations and parcels for delivery in the UK.

support the maintenance of the current single tier service.

### ComReg's position:

- 5.19 ComReg has considered the views of all respondents and has taken into account other factors including the provisions set out in section 12(2A) of the 2002 Act, as inserted by section 10 of the 2011 Act, which set out the reasonable measures which ComReg shall take in order to achieve its statutory objectives in relation to the postal sector (as set out in section 12(1) of the 2002 Act as inserted by section 10 of the 2011 Act).
- 5.20 At this time, ComReg's position is that the "status quo", i.e. a single tier service offering delivery the next working day, should be retained as part of the "*universal postal service*" but this may be reviewed again in the future.

### Service for "Parcels"

- 5.21 In relation to a service for parcels, ComReg considers that most "*postal service users*" appear to demand something more than the basic parcel service envisaged by the Postal Directive. As ComReg considers that this demand is being met by a competitive market, in Consultation 12/38, ComReg noted that it was of the view that there is no need to mandate the provision of anything other than a basic parcel service as forming part of the "*universal postal service*". However, that is not to say that where a feature such as track and trace is used by An Post to ensure operational efficiency, that such a feature may not be offered to those who choose to have their parcels delivered as part of the "*universal postal service*", providing that a premium price is not charged and additional "*value added*" features such as day certain or time certain are not provided.
- 5.22 ComReg sought views on this by asking the following in Consultation 12/38:

**Q. 3 Do you agree that there is no need to mandate the provision of anything other than a basic parcel service as forming part of the "universal postal service"? Please give reasons for your views.**

### Views of respondents

- 5.23 In relation to mandating a basic parcel service as forming part of the "*universal postal service*", **DX** and **Lettershop** agree. **IPU** does not agree as they note that while the market for parcels is competitive, there are many customers who cannot, without considerable difficulty, access other providers, especially in rural areas.
- 5.24 Although **An Post** agrees that there is no need to mandate the provision of anything other than a basic parcel service, it suggests that the 16(9) Regulations, the draft of which excluded any "value added" feature should be

amended to provide that track and trace is included.

### ComReg's position

- 5.25 The proposition that only a basic parcel service should form part of the “*universal postal service*” is generally accepted. An Post’s proposed amendment to the 16(9) Regulations cannot be adopted as its effect would be to bring all parcel services provided by other postal service providers with a track and trace facility within the scope of the universal postal service.

### The maximum weight for universal postal service parcel

- 5.26 Section 16(3) of the 2011 Act provides for ComReg to make an Order reducing the maximum weight of a standard parcel from 20kg to a weight not less than 10kg. As noted in Consultation 12/38, ComReg does not intend to use this power at this time but will review the position from time to time. The reason for this is that the UPU [International] Parcels Post Agreement provides for a maximum weight per parcel of 20kg. So if ComReg were to make an Order reducing the maximum weight for parcels posted and delivered within the State to say 10kg there would be an anomaly in that a customer in Dundalk or Letterkenny could only post a parcel weighing 10kg for delivery in the Republic of Ireland, whereas a customer in a neighbouring town or city in Northern Ireland, such as Newry or Derry, could post a parcel weighing 20kg for delivery in the Republic of Ireland.

- 5.27 ComReg sought views on this in Consultation 12/38 by asking:

**Q. 4 Should ComReg reduce the maximum weight for domestic parcels at the present time, or leave it as is? Please give reasons for your views.**

### Views of respondents:

- 5.28 In relation to reducing the maximum weight for domestic universal parcels, the views of respondents (**An Post, Aviva, IPU, Lettershop, Nightline**) are to leave the maximum weight for parcels at 20kg.

### ComReg's position:

- 5.29 ComReg will not consider reducing the maximum weight of a universal service parcel but will review this from time to time.

### Pricing of universal postal services

- 5.30 Section 28 of the 2011 Act requires An Post to comply with specified tariff requirements for each postal service or part of a postal service provided in the provision of a universal postal service. A new requirement is that there should be uniform pricing though this requirement is not defined in the 2011 Act.



- 5.31 In Consultation 12/38, ComReg noted that, at a minimum, uniform pricing requires that the same price is charged irrespective of where in the State the “*postal packet*” is posted and where in the State it is to be delivered. On the other hand, the requirement for uniform pricing does not require that the same (uniform) price shall apply for different types of “*postal packet*” - i.e. “*letters*”, “*large envelopes*”, “*packets*” and “*parcels*” – as the costs of processing each type are significantly different.
- 5.32 ComReg sought views on this in Consultation 12/38 by asking the following question:

**Q. 5 Do you agree that uniform pricing does not require that there be uniform prices for different types of "postal packet" - i.e. “letters”, “large envelopes”, “packets” and “parcels” – as the costs of processing each type are significantly different? Please give reasons for your views and suggest whether there are any other attributes that should be regarded as being outside the uniform pricing principle.**

### Views of respondents

- 5.33 In relation to the interpretation of uniform pricing, respondents (**An Post, Aviva, DAFIL, Lettershop, Nightline**) agree. An Post emphasises that it believes uniform pricing applies only to domestic single piece tariffs. **DX** claims that it would be wrong to charge different prices depending on the payment channel used as this would be an abuse of the non-discrimination principle.
- 5.34 However, An Post states that it does not see a requirement for stamped and metered mail to be provided at a uniform tariff as again the costs of providing each service are significantly different as is reflected in the current payment method discount as approved by ComReg.

### ComReg’s position

- 5.35 Having considered the views of respondents and other relevant evidence, ComReg’s position remains as set out in Consultation 12/38.
- 5.36 In relation to the merits or otherwise of charging different prices depending on the payment method channel, ComReg must balance the argument that charging different prices results in discrimination between different types of senders or whether it is necessary in order to comply with the cost orientation tariff requirement or whether payment by franking meter takes such mail outside the definition of single piece mail in which case the “avoided cost” principle would apply.
- 5.37 Contrary to what An Post claims ComReg did not approve the current payment discount in 2007. ComReg consented to a 1c discount for certain types of standard mail subject to a detailed review of the cost savings. A key issue for

ComReg was the value of the cost savings and the extent to which these were driven by the payment method as opposed to other characteristics. If a different price was warranted to reflect any cost saving due to payment method then this should apply to all types of mail and not just letters. There is of course nothing to stop An Post offering to negotiate special prices for users of meter franking machines, but such a service would not be part of the universal postal service.

## **Bulk Mail Products**

- 5.38 In principle, it seems to ComReg that Bulk Mail products are not entirely consistent with the concept of universal postal service provision and in this context it is noted that some countries confine the universal postal service to single piece items. Specific examples include the UK<sup>27</sup> and the Netherlands.
- 5.39 While An Post currently provides an extensive range of services for Bulk Mail, very few of these are universal in character in that they are only provided at a very limited range of access points, or where they are provided at a broader range of access points they are subject to different quality standards. Some are not provided throughout the year and are only available if the contents meet certain criteria.
- 5.40 Consultation 12/38 noted that, while in principle, Bulk Mail could be excluded from the universal postal service altogether, such an approach runs the risk that some users would not have sufficient bargaining power to secure provision of the postal services that they require. On the other hand, by specifying an extensive range of Bulk Mail services as coming within the universal postal service ComReg might deprive customers of the ability to negotiate terms and conditions that suit their particular requirements, and where they are a business obliged to charge VAT to recover their input VAT.
- 5.41 Therefore, Consultation 12/38 proposed that the universal postal service include only a single bulk mail service of "last resort" to meet the needs of users who are unable or unwilling to negotiate terms and conditions that suit their particular requirements, or who are unable to deposit mail at one of An Post's four mail centres which are the only access points it currently offers to users of its most popular Bulk Mail services.
- 5.42 Consultation 12/38 further noted that in principle, if only a single "last resort" Bulk Mail service is to form part of the universal postal service then it should either be one of the six nationally available Bulk Mail services or a "composite" service encompassing the main features of all six. Furthermore, An Post offers a single outbound international mail product for Bulk Mail – IBMS and

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<sup>27</sup> See The Postal Services (Universal Postal Service) Order 2012, UK Statutory Instrument 2012 No 936

Consultation 12/38 proposed retaining this within the mandated range of universal services to be specified in the Regulations made under Section 16(9).

- 5.43 Before making a decision in relation to a bulk mail as a universal postal service, ComReg sought views by asking the following in Consultation 12/38:

**Q.6 Should An Post be required to provide a single “last resort” Bulk Mail service as described in paragraph 5.41? If not, what Bulk Mail services should An Post be required to provide? Should all Bulk Mail services be excluded from the universal postal service? Please give reasons for your views.**

**Q.7 What type of “last resort” Bulk Mail service, if any, should An Post be required to provide as part of the universal postal service? Please give reasons for your views.**

### Views of respondents

- 5.44 Respondents associated with financial services (**AIB, Irish Life, Ulster Bank, IBF**) state that the bulk mail services should be as wide ranging as possible and that a single last-resort bulk mail product would be too restrictive. These respondents also note that as financial services are VAT exempt they would be unable to reclaim any VAT cost associated with bulk mail services that are not universal postal services.
- 5.45 The charity sector (**ICTR**) also suggests that bulk mail services should be retained within the universal postal service. ICTR note that VAT on bulk mail would impose a further cost of 23% on the postage costs of charities who cannot reclaim the VAT. ICTR claims that there is no evidence to suggest that alternative / similar bulk mail services will be provided by other suppliers in competition with An Post which has a national network of convenient access points for postal customers.
- 5.46 **IPU** expresses concern at the extent ComReg proposes to declassify bulk mail from USO. It notes that this would make non-universal service bulk mail liable to VAT and increase the cost of mail to many of An Post’s customers such as charities, banks, Government Departments etc. It claims that this could drive these organisations to seek electronic alternatives.
- 5.47 **CWU** and **DAFIL** believe that all bulk mail should be included in the universal postal service. DAFIL holds this view in order to ensure An Post has an obligation to supply the services. CWU hold this view as it stresses the importance, in its view, of the bulk mail service to the funding of the universal service.
- 5.48 Three respondents (**DX, Lettershop, Nightline**) agree that a “last resort” bulk

mail service is sufficient for the universal postal service.

- 5.49 The **Department of Social Protection** argues that bulk mail should be collected from the customers' premises and should be regarded as being within the scope of universal service, otherwise the Department would be faced with having to pay VAT in excess of €2.7 million annually.
- 5.50 The universal service provider, **An Post**, is highly concerned about the adverse impact on customer interests of removing Bulk Mail from the universal postal service.
- 5.51 An Post argues that no market research has been carried out on the specific details of real customers' needs regarding Bulk Mail services and whether these needs are likely to be met in the absence of the legal safeguards of the universal postal service.
- 5.52 An Post further states that small and start-up businesses rely heavily on An Post's current service offerings. These customers may well lack the resources needed to pre-sort mail, such that their Bulk Mail service requirement would fall outside ComReg's suggested definition of Bulk Mail as a universal postal service.
- 5.53 An Post claims that if Bulk Mail was not a universal postal service, increased postal prices for senders (in particular charities and banks) and reduced service guarantees might result.
- 5.54 An Post further claims that vulnerable user detriment would also arise if An Post stopped delivering bulk mail but continued delivering single piece mail in specific rural areas.
- 5.55 An Post also notes that the removal of Bulk Mail services from the USO may leave An Post with no option but to make changes to its Bulk Mail services which may have a detrimental effect on some customers. An Post states, by way of example, that the volume reductions that it believes are likely to result from increased prices may make it a commercial necessity for An Post to reduce its Bulk Mail collections or deliveries to fewer days per week, for example, a 3 day service to rural areas, notwithstanding its statutorily imposed universal service obligation.
- 5.56 An Post notes that for VAT exempt organisations, the impact of ComReg's proposals are likely to be very significant. An Post notes that if it chooses to continue to provide the existing discount services, these customers would face a significant price rise on their postage costs. An Post states that together these customers account for c. 50% of bulk mail volumes. Depending on customer demand An Post states that it might restrict access to such discounted services to large urban areas. An Post further claims that some bulk

customers would have no choice but to use single piece mail or (if they could) avail of the proposed service of last resort.

- 5.57 An Post notes that ComReg has stated at paragraph 5.16 of Consultation 12/38 that An Post “*should also be able to reduce its prices for [non USO] services as a result of being able to reclaim input VAT*”. According to An Post, this analysis is incorrect as ComReg has not taken account of the fact that staff costs and VAT exempt costs such as insurance constitute approximately 75% of An Post’s operating costs. An Post states that these costs do not attract a VAT charge. Consequently, An Post claims that applying VAT at 23% to the price of An Post’s postal services would significantly outweigh any price reduction arising from An Post’s additional VAT recovery entitlement.
- 5.58 An Post also notes that paragraph 5.39 Consultation 12/38 states that defining an extensive range of services as coming within the USO would deprive “*customers of the ability to negotiate terms and conditions that suit their particular requirements, and where they are registered for VAT to recover the input VAT incurred by An Post*”. An Post claims that this statement is incorrect. An Post notes that being registered for VAT does not result in an automatic VAT recovery entitlement for a business. An Post states that only those business customers who are engaged in VATable business activities can recover VAT.
- 5.59 In relation to fiscal neutrality (that similar transactions should attract the same VAT treatment if they meet the same needs of the customer), An Post notes that in the field of postal services this was considered at length in the ECJ case of TNT and later in the ECJ case of Rank<sup>28</sup>. An Post states that in these judgments the court found that in order to assess the comparability of the services it is necessary to not only look at the services being provided but also the context in which those services are supplied. An Post states that the obligations on the public postal service put it in such a different position from that of a competitor such that the differing VAT treatments did not result in any breach of fiscal neutrality. An Post claims that the VAT exemption in Article 132 of the Directive must be given its intended aim of protecting the USO and offering postal services which meet the essential aims of postal users at a reduced cost.
- 5.60 An Post believes strongly that the removal of Bulk Mail entirely from universal postal service would ultimately lead to e-substitution, as An Post’s current Bulk Mail services are not necessarily substitutable with Single Piece Mail or Bulk Mail services at a higher price or without USO guarantees. An Post claims that mail volume losses due to e-substitution would prejudice An Post’s ability to continue to cross-subsidise the cost of its single piece USO service through

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<sup>28</sup> HMRC v The Rank Group plc Case C-259/10

revenue from the more profitable Bulk Mail services. An Post therefore claims that the cost of the USO will therefore increase.

- 5.61 An Post notes that the 2011 Act now provides for the right for other operators to negotiate access to the An Post network because this is the postal network of the universal postal service provider. An Post claims that this obligation is part of the USO. Therefore, An Post argues that a USO “off the shelf” solution should be available to facilitate those who require access but who may not have the resources to enter detailed negotiations with An Post. An Post claims that access is a complex area and individual negotiation is both costly and time consuming. An Post notes that it is happy to negotiate with any party in this regard but the option of a simple and transparent “off the shelf” solution should not be ruled out by ComReg.
- 5.62 An Post claims that ComReg appears not to have examined the implications on the Bulk Access Services introduced by An Post on 1 January 2010. These three services were designed to cater for international operators within the European Union, European Economic Area and Switzerland who were unwilling to enter into an agreement with An Post for the delivery of their mail in Ireland.

### **ComReg’s position**

- 5.63 In large part An Post’s and certain other respondents’ observations are based on the premise that in Consultation 12/38 ComReg was proposing to remove bulk mail from the universal service altogether. This premise is not correct.
- 5.64 Consultation 12/38 noted that the UK and the Netherlands had excluded bulk mail from the universal service altogether. However, Consultation 12/38 made it clear that exclusion of Bulk Mail from the universal postal service altogether would run the risk that some users would not have sufficient bargaining power to secure provision of the postal services that they require.
- 5.65 Notwithstanding this, Consultation 12/38 also recognised that specifying an extensive range of Bulk Mail services as coming within the universal postal service might deprive customers of the ability to negotiate terms and conditions that suit their particular requirements, and where they engaged in business activities subject to VAT to recover their input VAT. It would also impose restrictions on An Post’s pricing and other conditions at a time when An Post needs the maximum flexibility in negotiating with its customers in order to secure the sustainability of its postal services.
- 5.66 Against this background ComReg indicated in the Consultation 12/38 that it was minded to require a single bulk mail service of “last resort” to meet the needs of users who are unable or unwilling to negotiate terms and conditions that suit their particular requirements, or who are unable to deposit mail at one of An Post’s four mail centres which are the only access points it currently

offers to users of its most popular Bulk Mail services. In Consultation 12/38, ComReg asked for interested parties' views on five options ranging from "all Bulk Mail services currently provided by An Post" to "exclude Bulk Mail from universal service altogether", and also asked what should the specification for a single bulk mail service of "last resort" be if that was the decision made by ComReg following the consultation.

- 5.67 When ComReg consulted on this issue previously in 2005<sup>29</sup> An Post<sup>30</sup> argued that Bulk Mail should be excluded from the universal service altogether:

*"The provision of bulk discount services is a commercial matter between An Post and its customers. Revisiting the relevant European legislation and how it is generally interpreted, it is clear that it was never intended that the USO should include non-standard services. ComReg's attempt to define the USO to include such services appears to arise from its own desire to see the mandatory introduction of the services in question, quite aside from the issue of the USO per se.*

*ComReg's intervention at this time represents an attempt to increase the level of regulation in a market which is supposed to be undergoing liberalisation. Increased regulation impedes the ability of An Post to operate flexibly in an increasingly competitive marketplace, which in turn can ultimately damage the financial position of the company, the development of the postal sector, and the financial viability of the USO."*

- 5.68 As noted earlier the UK and the Netherlands had indeed taken this position.

- 5.69 An Post made a similar argument to the Department of Communications, Energy and Natural Resources in response to its consultation paper on options regarding transposition of the third Postal Directive. The Department's Option Paper points out that An Post<sup>31</sup> *"was of the view that it needed the flexibility for bulk mail products and also expressed the view that such customers have strong bargaining powers and therefore the products are less in need of regulation."*

- 5.70 In 2005 ComReg had concluded that three Bulk Mail Services should be included in its working definition:

- 'delivery only' for mail sorted in delivery sequence or by delivery office;
- 'deferred delivery';

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<sup>29</sup> Consultation 05/16 'The Universal Postal Service: Formulating a working definition' dated 2 March 2005

<sup>30</sup> At page 3 of An Post's response to Consultation 05/16

<sup>31</sup> At page 43 of the Options Paper available at <http://www.dcenr.gov.ie/Communications/Postal/Liberalisation+of+the+Postal+Services+Market.htm>

- a combination of 'delivery only' and an extended delivery cycle.

5.71 This would ensure that all users had access to a reasonable range of bulk mail services. In practice An Post provided a very wide range of "price controlled" bulk mail services and only one service<sup>32</sup> outside the scope of universal service. However, according to its published brochure for many of these services "*mail must be presented ... at one of the [four] Mail Centres ...*"

5.72 In its response Consultation 12/38, An Post now seems less keen on having the freedom to provide a range of services that best meet the needs of its customers without regulatory intervention. It argues:

*"The consultation document suggests that Bulk Mail services are somehow inconsistent with the concept of the USO and therefore, in principle, could be excluded altogether from its definition. An Post disagrees vigorously with this analysis. For reasons described below, An Post is highly concerned about the adverse impact on customer interests of removing Bulk Mail from the USO.*

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*Moreover, removing Bulk Mail from the USO would remove the possibility of price regulation of these services. This change would be to the potential detriment of small businesses and businesses with limited or no VAT recovery which have limited bargaining powers."*

5.73 The 2011 Act changed the regulatory framework in that other undertakings can now provide services if there is a need which An Post is not meeting. A good example of how a competitive market works in this regard is the recent introduction by An Post of a new parcel service<sup>33</sup> whereby An Post offers to collect a parcel from any home or business premises in Dublin and deliver it the following day anywhere in the State for €11 including VAT.

5.74 However, in An Post's response to Consultation 12/38, ComReg observes that An Post has a reluctance to provide services other than those which it must provide as part of its universal service obligation, in particular the comments:

*"If Bulk Mail was taken outside the USO, increased postal prices for senders (in particular charities and banks) and reduced service guarantees might result in (i) deliveries to these customers being terminated or reduced or (ii) senders of Bulk Mail seeking to pass on price increases to those mail recipients living in rural areas (e.g. by virtue of an additional bank service fee for postal*

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<sup>32</sup> The service for "periodicals"

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[http://www.anpost.ie/AnPost/MainContent/Personal+Customers/Sending+Mail/Speed/Express+Post/Parcel+Collection+Service.htm?utm\\_source=homepage\\_article&utm\\_medium=banner&utm\\_content=CSFXbanner&utm\\_campaign=ParcelCollection](http://www.anpost.ie/AnPost/MainContent/Personal+Customers/Sending+Mail/Speed/Express+Post/Parcel+Collection+Service.htm?utm_source=homepage_article&utm_medium=banner&utm_content=CSFXbanner&utm_campaign=ParcelCollection)



*correspondence)*". (page 23 of An Post response).

*"Depending on customer demand An Post might restrict access to such discounted services to large urban areas. Some bulk customers would have no choice but to use single piece mail or (if they could) avail of the proposed service of last resort."* (page 24 of An Post response)

*"The removal of Bulk Mail services from the USO may leave An Post with no option but to make changes to its Bulk Mail services which may have a detrimental effect on some customers. For example, the volume reductions that are likely to result from increased prices may make it a commercial necessity for An Post to reduce its Bulk Mail collections or deliveries to fewer days per week, for example, a 3 day service to rural areas."* (page 25 of An Post response)

*"Mail volume losses due to e-substitution will prejudice An Post's ability to continue to cross-subsidise the cost of its single piece USO service through revenue from the more profitable Bulk Mail services."* (page 25 of An Post response)

5.75 However, according to section 12 of the Postal and Telecommunications Service Act, 1983 ("1983 Act"):

*(1) The principal objects of the postal company shall be stated in its memorandum of association to be-*

*(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,*

5.76 This of course is a much wider remit than its designation under section 17 of the 2011 Act to provide a universal postal service to meet the minimum needs of users.

5.77 ComReg considers that An Post, like ComReg, must balance the needs of bulk mail users that would benefit from the ability to negotiate bespoke services and to recover any VAT paid for same against the needs of users who might wish to buy from a more restricted range of defined services even though such services might be exempt from VAT.

5.78 According to information published by An Post both groups of users are evenly

balanced – each representing about four in ten of large scale users<sup>34</sup>. The balance comes down in favour of the provision of bespoke services on which VAT is payable because Government bodies account for 14% of mail<sup>34</sup> and under European public procurement procedures such services for Government bodies should be the subject of tendering or some similar negotiated procedure. This means that such services will be outside the scope of the universal postal service. Although the governmental body will have to pay VAT to the successful tenderer it will have no impact on the overall cost to government as the service provider pays this back to the Revenue Commissioners<sup>35</sup>. The public procurement guidelines at paragraph 6.18<sup>36</sup> make it clear that tender prices “*should be evaluated exclusive of VAT*”.

- 5.79 The “bottom line” is that a significant amount of mail appears to be generated by organisations that would benefit from being subject to VAT and the freedom to negotiate bespoke services and prices. The challenge for ComReg is to specify a range of bulk mail services as part of the universal postal service to balance the needs of users who cannot reclaim VAT while not foreclosing on the rights of other organisations to reap the benefits of a liberalised market.
- 5.80 For the avoidance of doubt, ComReg has no remit in relation to taxation liabilities imposed by law. The legislative provision and interpretation of same in relation to VAT is a matter solely for the Revenue Commissioners, for example, as has been done in the UK by its Revenue<sup>37</sup>. Nor has the legal position as to which postal services are liable to VAT and which are exempt been changed recently. The CJEU made its decision in April 2009 and this was transposed by the Finance Act 2010.
- 5.81 Against this background, ComReg considers that expanding the universal postal services to include all bulk mail service would be a considerable expansion of such services compared with ComReg’s 2005 working definition.
- 5.82 However, ComReg has considered the views of respondents against:
- (a) its proposal in Consultation 12/38 that if only a single “last resort” Bulk Mail service is to form part of the universal postal service then it should either be

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<sup>34</sup> Excluding private consumers and others. See An Post data @ <http://www.anpost.ie/AnPost/AnPostDM/Stats/Consumer+Insights+and+Trends/Direct+Mail+in+Ireland/>

<sup>35</sup> The Constitution lays down (Article 11) the general principle that, unless otherwise provided by law, all revenues of the State must be paid into one fund (called the Central Fund or the Exchequer), on which the Government then draws for expenditure on State services. “*All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law*”. This means that any VAT paid on purchases is offset by the receipt of an equivalent amount from the supplier.

<sup>36</sup> At page 28, available at [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=3004](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=3004)

<sup>37</sup> <http://www.hmrc.gov.uk/budget2010/march/vat-post-tech-note-5260.pdf>

one of the six nationally available Bulk Mail services or a “composite” service encompassing the main features of all six; and

(b) its 2005 working definition of universal postal services.

5.83 Consequently, ComReg has now decided to include two bulk mail services similar to those included in its 2005 working definition in its universal postal service Regulations:

- ‘delivery only’ for mail sorted by delivery office; and
- ‘deferred delivery’.

5.84 For the ‘delivery only’ bulk mail sorted by delivery office, this is in essence the proposal in the draft 16(9) Regulations of Consultation 12/38. An Post currently provides two services that fall within the first category – discounts 9 and 10 in its published brochure<sup>38</sup>. The only difference between the two concerns the latest time of posting (noon or 5.30pm). ComReg takes the view that the 5.30pm deadline is of more utility to users without compromising the operation process (no sortation of individual postal packets is necessary until they reach the delivery service unit in the early hours of the morning). ComReg is therefore drafting the specific requirements for this part of the universal bulk mail service based on An Post’s current specification of discount 9 which is offered by An Post on the basis of a volume of 2,000 items upwards.

5.85 In relation to ‘deferred delivery’, this was not proposed in the draft 16(9) Regulations of Consultation 12/38 but has been added having considered the views of respondents to Consultation 12/38 and having considered ComReg’s 2005 working definition of universal postal services. An Post currently provides seven services that fall within that category, but some of these are only applicable for letters and large envelopes and / or for letters presented at one of the four mail centres. ComReg has therefore decided to draft the specific requirements for this bulk mail service based on An Post’s current specification of discount B in the case of letters and discount A in the case of large envelopes and packets<sup>39</sup> which are offered by An Post on the basis of a volume of 350 items upwards. The specification of these services are identical to those for discounts 11 and 12 except that the minimum quantity is lower (350 instead of 2000). Discount 3 is the same as discount 12 and discount 8 the same as discount 11 except that the price is lower and they are only available at one of

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<sup>38</sup> ‘Bulk Discounts For Mailers: Volumes of 2,000 items upwards’ dated 1st May 2012 @ <http://www.anpost.ie/NR/rdonlyres/B5774F94-F37B-429C-8ED0-8583E63DB288/5515/BulkMailBlueA4WWW1.pdf>

<sup>39</sup> ‘Bulk Discounts For Mailers: Volumes of 350 items upwards’ dated 1st May 2012 @ [http://www.anpost.ie/NR/rdonlyres/B5774F94-F37B-429C-8ED0-8583E63DB288/5513/BulkMail\\_YellowA4www.pdf](http://www.anpost.ie/NR/rdonlyres/B5774F94-F37B-429C-8ED0-8583E63DB288/5513/BulkMail_YellowA4www.pdf)

- four access points<sup>40</sup>. Postal packets eligible for discount 6 could also avail of this service. As the service to be specified is a composite of seven existing services An Post will need to carefully consider its pricing to comply with the cost-orientation principles.
- 5.86 ComReg considers, on the basis of confidential volume information provided by An Post, that these two services are likely to encompass the majority of the postal packets posted at special bulk mail tariffs during 2011.
- 5.87 The third bulk mail service included in ComReg's 2005 working definition (a combination of 'delivery only' and an extended delivery cycle) has not been provided by An Post and no user has sought its continued inclusion. It therefore has been excluded from the specification of "*universal postal services*".
- 5.88 Consultation 12/38 also noted that An Post offers a single outbound international mail product for Bulk Mail – IBMS and that ComReg was minded to retain this within the mandated range of "*universal postal services*" to be specified in the Regulations made under section 16(9) of the 2011 Act. ComReg has now included an international bulk mail service in the 16(9) Regulations.
- 5.89 ComReg believes the specification of bulk mail services as "*universal postal services*" set out above and in the 16(9) Regulations are appropriate at this time, but the bulk mail services specified as "*universal postal services*" will be kept under review and may be reduced to a "last resort" only service in the future. The exact specifics of the bulk mail services as "*universal postal services*" (e.g. minimum volume requirements etc) will be approved by ComReg in its approval of the bulk mail terms and conditions for universal postal services. This will be by way of separate consultation which will commence shortly.
- 5.90 In relation to the issue of adding Downstream Access as a universal postal service, ComReg notes that the 2011 Act is explicit on this. The 2011 Act confirms that postal services providers have the right<sup>41</sup> to negotiate access agreements. Services that are negotiated cannot be universal postal services.
- 5.91 Finally, An Post is concerned that the existing "access" products designed for designated operators in other countries are not included in the proposed scope of Bulk Mail. ComReg no longer considers this necessary. The Regulations make provision for An Post to provide as part of its universal service:

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<sup>40</sup> It is not possible to avail of this discount in Limerick, Galway, Waterford, Sligo, Letterkenny Cavan or Dundalk or any place other than Dublin, Cork, Athlone or Port Laoise.

<sup>41</sup> ComReg considers that this is a confirmation of an existing right under competition law and not the imposition of a new obligation on An Post

*A service for the sorting, transport and distribution of postal packets deposited with a universal postal service provider at an Office of Exchange within the State by the designated operator of a signatory to the Universal Postal Convention, acting as such, providing that:*

*“(a) the senders of the postal packets concerned are present in the territory of the relevant signatory to the Universal Postal Convention when the postal packets are deposited at an access point of the Designated Operator for transmission by post; and*

*(b) when the signatory to the Universal Postal Convention is also a member State of the EU subject to compliance with section 29(1) of the Communications Regulation (Postal Services) Act 2011.”*

- 5.92 Condition (a) complements Article 26 of the UPU Convention which provides that:

*“A designated operator shall not be bound to forward or deliver to the addressee letter-post items which senders residing in the territory of its member country post or cause to be posted in a foreign country with the object of profiting by the more favourable rate conditions there.”*

- 5.93 Condition (b) is designed to reinforce that requirements that rates payable by other designated operators in the EU must be cover the costs of processing the mail. The rates only apply to universal postal services and not to commercially negotiated services provided by other designated operators in their own or other countries.

### **Registered items service and Insured items service as *universal postal services***

- 5.94 The definitions of “*registered items service*” and “*insured items service*” in Section 16(12) of the 2011 Act means that the distinction between the two services is copper-fastened in primary legislation. Furthermore, there are significant costs in providing secure handling for postal packets for which the only customer requirement is to obtain proof of the handing in of the postal packet and/or of its delivery to the addressee.
- 5.95 Therefore, Consultation 12/38 proposed that in specifying the universal postal services that registered items service and insured items service would be specified separately as standalone services.
- 5.96 ComReg sought views on this in Consultation 12/38 by asking:

**Q. 8 Should An Post provide standalone services for registered and insured postal packets? Please give reasons for your views.**

**Views of respondents**

- 5.97 In relation to the separation of insured items service and registered items service as universal postal services, the views of respondents was as follows:
- 5.98 **An Post** and **DX** state that they have not seen any market failure that would lead to the conclusion that it is necessary for An Post to provide standalone services for registered and insured postal packets.
- 5.99 **DX** further notes that they do not agree that the 2011 Act forces ComReg to mandate the provision of registered and insured services for postal packets in any event.
- 5.100 **An Post** further notes that the separate definitions of registered and insured services to which ComReg refers is an issue of transposition which refers back to the First Postal Directive and is one that was never intended as these services are clearly linked. This distinction between registered and insured items is absent in Directive 97/67/EC – therefore An Post claims that it does not appear to be the intention to require separate registered and insured services. An Post claims that the indent added in transposition exists simply to give effect to the optional UPU status attached to insurance (rather than mandatory UPU status attached to registration) and should not be read to require An Post to provide standalone registered and insured services.
- 5.101 **IPU** believes that the status quo should remain and do not believe there should be standalone services as it could lead to confusion at access points.
- 5.102 **Lettershop** states that for domestic mail, it does not believe standalone Registered or Insurance service are required as the main features are fairly well covered in the Express Post service. However, it does agree that there should be standalone services for Europe and Rest of World and this should be included in the universal postal service.
- 5.103 **DAFIL** states that An Post should have to supply this service.
- 5.104 **Nightline** believes that neither should be included in the universal postal services and notes that separate commercial options are already available.

**ComReg position:**

- 5.105 ComReg's position is that a registered items service and an insured items service are separate universal postal services as clearly set out in the 2011 Act.
- 5.106 Contrary to what An Post states ComReg considers that the European Postal Directives have always included separate definitions for Registered items and

Insured items and Article 3(4) requires the universal postal service to include at a minimum services for registered items and insured items. Where previously this requirement was transposed by means of secondary legislation, it is now transposed by primary legislation. What ComReg has to do is balance the benefits of retaining the status quo for the universal postal service provider with the benefits to postal service users. While ComReg appreciates that the separation will impact on An Post's existing operational processes it cannot overlook, based on comparisons internationally, with the significant cost savings for a registered service only that should accrue to senders of such items, including Government Departments and agencies.

5.107 To avoid any potential confusion that may be associated with using the existing terminology which has to now be based on a bundled service, ComReg in its Regulations names the "registered items" service as a "proof of delivery facility" and the "insured items" service as an "insurance facility". Furthermore, as the separation will impact on An Post's existing operational processes, the Regulations will come into operation on 1 November 2012 which ComReg considers to be a reasonable period of time in order to allow An Post to make the required change.

### Collection from premises

5.108 Many postal service users require to have their *postal packets* collected from their premises. However, as the CJEU observed in *Corbeau*<sup>42</sup> such a service is inconsistent with provision of the *universal postal service*.

5.109 Consequently, ComReg cannot ignore the legal obligations in this regard but would point out there is nothing to stop the unbundling of the services with one contract covering collection from the premises and another covering transmission by post.

### Other products and services

5.110 There were a number of other services specified in ComReg's working definition of 05/85 which make up the current universal postal service. These services include:

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<sup>42</sup> Case C-320/91 *Corbeau* [1993] ECR I-2533 at point 19 observed that "*the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit ....*".

- Free postal service for blind and partially sighted persons
- Sending books abroad
- Business Reply / Freepost
- Redirection
- Mailminder
- Private boxes / bags
- Certificate of posting (free)

5.111 In Consultation 12/38, ComReg was minded to make no further changes to the services which make up the current universal postal service. Therefore, ComReg asked:

**Q9. Should the services listed in paragraph 5.48 form part of the universal postal service? Should any of these services be excluded, or should any additional services be included? Please give reasons for your views.**

### Views of respondents

5.112 Respondents (**An Post, DX, Lettershop**) generally agreed with the services listed in paragraph 5.48 of Consultation 12/38 should form part of the universal service.

5.113 Exceptions to that consensus on the services listed in paragraph 5.48 of Consultation 12/38 included the following.

5.114 **An Post** remains of the view that Redirection and Mailminder are value-added services and should not form part of the universal service.

5.115 **Lettershop** believes sending books abroad is now a commercial enterprise due to the advent of e-commerce and should not be subject to special rates.

5.116 **Nightline**, with the exception of free services for the blind or partially sighted persons, believes all the services are not basic services but commercial services and as such do not need to form part of the USO.

### ComReg's position

5.117 Having considered the views of respondents, ComReg's position is that the additional universal postal services set by ComReg in its working definition of 2005 remain appropriate. However, ComReg will keep these under review. In particular, ComReg will keep the sending books abroad 2kg – 5kg under review and will revise the universal postal services if it considers it to be a commercial



service.

- 5.118 ComReg also wishes to clarify that Redirection and Mailminder relates only to mail posted as part of the universal postal services.
- 5.119 ComReg also wishes to clarify that the certificate of posting should be free of charge and the Regulations include it as part of the letter / flat / packet service and not as a standalone service.

## Regulation specifying universal postal services

- 5.120 In Consultation 12/38 sought views on the proposed specification of An Post's universal postal services by asking:

**Q. 10 Do you wish to suggest any amendments to the draft regulations that ComReg proposes to make under Section 16(9) of the 2011 Act? Please give your reasons for any such suggestions.**

### Views of respondents

- 5.121 As a general comment, **An Post** and **CWU** has queried why ComReg has not undertaken a conducted a full-scale user survey in order to ascertain the scope of a universal postal service that meets the reasonable needs of Irish postal users.
- 5.122 At page 9 of their response An Post state: *"Before changing the services to be provided within the USO, a detailed investigation into the needs of users should be undertaken. For example, Ofcom (the postal regulator in the United Kingdom) has initiated a review of user needs which it is required to undertake by March 2013 in determining their framework. This review encompasses market research and direct engagement with stakeholders to determine users' needs. ... This type of detailed research is completely absent from ComReg's consultation and informed decisions cannot be made in the absence of a review of users' needs"*.
- 5.123 CWU claim that there is no empirical evidence supplied in the Consultation 12/38 to support the considerations that ComReg has made in relation to the *"technical, economic and social environmental changes"*.
- 5.124 The following were the main suggested amendments to the 16(9) Regulations made by respondents:
- 5.125 **An Post** makes a number of suggested amendments and provides a marked-up revised version of the 16(9) Regulations. The main change An Post proposes relates to broadening the definition of bulk mail as a universal postal

service. **DAFIL** also want the definition of bulk mail as a universal postal service to remove the “pre-sort” requirement. **DX, Lettershop, Nightline** make suggested amendments based on what they consider to be universal postal services as raised in their respective responses.

### **ComReg’s position:**

- 5.126 In relation to An Post’s and CWU’s comment that ComReg should conduct an assessment of customer needs, ComReg notes that Ofcom in the UK is subject to a specific statutory obligation in this regard. ComReg is subject to no such specific statutory obligation under the 2011 Act to conduct an assessment of user needs before making the section 16(9) Regulations.
- 5.127 However, ComReg is obliged under section 16(9) of the 2011 Act for “*the purposes of ensuring that the universal postal service develops in response to the technical, economic and social environment and to the reasonable needs of postal service users*” to conduct a “*public consultation process*” in accordance with section 15 of the 2011 Act before it makes the section 16(9) Regulations. ComReg has done this through Consultation 12/38 and has considered the views of respondents to that Consultation in specifying the “*universal postal services*”. In specifying the “*universal postal services*”, ComReg has also considered its previous working definition of universal postal services, the Postal Directive, the 2011 Act, and other relevant material.
- 5.128 This specification of the “*universal postal service*” is formally set out in Annex: 4. The Regulations specifying the “*universal postal services*” will come into operation on 1 November 2012 which ComReg considers to be a reasonable period of time in order to allow An Post to make any changes that are required as a result of making these Regulations.

## **5.3 Publication of An Post's Terms and Conditions and Charges for its universal services**

- 5.129 Obligations have been imposed by the 2011 Act on An Post in its capacity as the designated “*universal postal service provider*”, in respect of publication of the terms and conditions for its universal postal services (Section 22-25 of the 2011 Act) and their pricing (Section 28-30 of the 2011 Act). These include publication on its website (section 23(2) of the 2011 Act) and by making available on request free of charge and at such access points it considers appropriate (section 24(9) of the 2011 Act).
- 5.130 Consultation 12/38 sought views on how An Post’s terms and conditions and the details of charges for its universal postal services should be published.

5.131 Therefore, in Consultation 12/38 ComReg proposed that it would be appropriate to require An Post:

- to make printed copies of a booklet containing the terms and conditions of the universal postal service and a Schedule of Charges available to postal service users at every place where postage stamps are sold;
- to make available the printed copy of the booklet containing the terms and conditions of the universal postal service and a Schedule of Charges on request and;
- to published the Terms and Conditions and the Schedule of Charges in *Iris Oifigiúil* as a journal of record.

5.132 A draft Direction to this effect was included in Consultation 12/38.

5.133 ComReg sought views on these proposals by asking the following in Consultation 12/38:

**Q.11 Do you agree that An Post's terms and conditions for its universal postal service should be set out in a single, comprehensive document and in plain language? Please give your reasons.**

**Q.12 Should An Post be required to publish the terms and conditions of its universal postal service, including its Schedule of Charges, in *Iris Oifigiúil* and make them available in printed form on request and wherever postage stamps are sold? Please give your reasons.**

**Q.13 Do you wish to suggest any amendments to the draft Direction to An Post? Please give your reasons.**

### **Views of respondents**

5.134 The main views of respondents were as follows.

5.135 **An Post** notes that to service the needs of different customer segments, An Post published one set of terms and conditions for single piece customers, and one set for bulk mail customers. An Post notes that the needs of these customers are fundamentally different and An Post maintains that it would be confusing, counterproductive and unnecessary to have both sets of terms and conditions in one document.

5.136 An Post further notes that it would be impractical for An Post to seek to offer these at all places where stamps are sold - which could be a vending machine or a convenience store. An Post states that it can make the documents available at all 57 An Post Company post offices and 1,099 postmaster-operated offices. An Post claims that extending this to 175 postal agents and approximately 2,400 retail premises where the retailer has a contractual

relationship with PostPoint to sell stamps would be onerous. An Post notes that it has no contractual relationship with many other stamp sellers and so would not be in a position to require them to comply with this requirement.

- 5.137 **DX** makes a response similar to An Post. It notes that it would be more cost effective to have separate documents for personal and business customers. Also DX notes that it might be better to replace “wherever postage stamps are sold” with a formulation that reflects that stamps can be sold through machines and retail outlets other than post offices.
- 5.138 **Lettershop** and **Nightline** agree with ComReg’s proposal. However, Nightline also believes that it is unnecessary to require that these terms and conditions be made available at all outlets where Postage Stamps are sold, but which are not Post Offices. Nightline claims that this would be onerous on An Post, and is beyond the reasonable expectation of users of USO services. Nightline also recommends that the terms and conditions of the USO are posted in a prominent position on the An Post website, with a clear link to them from the An Post ‘home page’.

### **ComReg’s position**

- 5.139 Having considered the views of respondents, ComReg’s has revised its preliminary view of Consultation 12/38 to require, in relation to the “*universal postal services*” only, a separate terms and conditions booklet for (1) single piece mail and (2) bulk mail. Furthermore, the terms and conditions booklet for single piece mail need not be at every location postage stamps are sold but readily available at post offices as defined by the 2011 Act. As required by section 24(9) of the 2011 Act, the terms and conditions will be available free of charge on request. ComReg will also make clear that terms and conditions must be posted in a prominent position on the An Post website, with a clear link to them from the An Post ‘home page’. The resultant final Direction is set out at Annex 5.
- 5.140 For the avoidance of doubt, ComReg’s approval or otherwise of the content of An Post’s terms and conditions for its “*universal postal services*” will be by separate consultation which ComReg plans to issue shortly.

#### **ComReg’s position:**

ComReg will direct An Post to publish its terms and conditions for its universal postal services as follows:

- to have two separate (1) single piece mail and (2) bulk mail universal postal service booklets
- to make printed copies of the single piece mail booklet containing the terms and conditions of the universal postal service and a Schedule of Charges readily available to postal service users at every post office as defined by the 2011 Act,

- to make available the printed copy of both booklets containing the terms and conditions of the universal postal service and a Schedule of Charges on request and free of charge
- to publish clearly and in a prominent position both booklets for its universal postal services or the An Post website with a clear link to them from the An Post 'home page' and
- to published the Terms and Conditions and the Schedule of Charges in Iris Oifigiúil as a journal of record.

## Chapter 6

# 6 Providers of services within the scope of the universal postal service

## 6.1 Guidelines to be issued under Section 37 of the 2011 Act

6.1 Section 37 of the 2011 Act introduces the concept of a “*postal service within the scope of the universal postal service*” and Section 37(2) requires ComReg to “*publish guidelines concerning postal services within the scope of the universal postal service to which persons shall have regard when making a notification under section 38*”.

6.2 According to Section 37(1) there are three circumstances in which a postal service may be considered to be within the scope of the universal postal service:

*(1) A postal service is within the scope of the universal postal service (in this Part referred to as a “postal service within the scope of the universal postal service”) if*

*a) the service is within the description of the universal postal service set out in section 16,*

*(b) the service would be within the description of the universal postal service set out in section 16 but for the fact that—*

*(i) in the case of a service consisting of the clearance and delivery of postal packets, the clearance or delivery is not made on every working day as required by section 16 (1) (a),*

*(ii) the service is not provided throughout the State, or*

*(iii) the service is not provided at an affordable price in accordance with a uniform tariff applicable throughout the State pursuant to section 28 (2),*

*or*

*(c) the postal service is of a kind that, having regard to postal service users, could reasonably be said to be interchangeable with a service of a description set out in section 16,*

*but does not include a document exchange or express or courier services*

- 6.3 Section 37(1) is specific in stating that “*Document Exchange*” and “*Express or Courier services*” are not within the scope of the universal postal service. This reflects specific provisions in the Postal Directives (Recital 21 to the First Directive in the case of “*Document Exchange*”, and Recital 18 to the First Directive) and is consistent with EU case law (e.g. Case C-320/91 [*Corbeau*]) in the case of “*Express or Courier services*”.
- 6.4 EU Law also suggests that an additional three categories of postal services cannot be considered to be “*universal postal services*”, namely:
- New services (i.e. services quite distinct from conventional services)<sup>43</sup>.
  - Services with Value Added Features<sup>44</sup> (such as collection from the senders' address, greater speed or reliability of distribution, or the possibility of changing the destination in the course of transit), and
  - Services provided under individually negotiated contracts<sup>45</sup>.
- 6.5 As noted in Consultation 12/38, because Section 37(1) of the 2011 Act does not make any specific reference to these categories of postal services, ComReg needs to consider the following:
- whether these categories of services do in fact fall within the definition of “*postal service*” as set out in the 2011 Act; and
  - if they do fall within the definition of “*postal services*” can they be considered to be “*postal services within the scope of the universal postal service*”?

### **New services, services with Value Added Features, etc., fall within the definition of *postal service***

- 6.6 As noted in Consultation 12/38, ComReg can see no reason why the categories of services described in paragraph 6.4 above should not be deemed to be “*postal services*” as defined in the 2011 Act. Indeed many postal service users would be denied access to services involving *transmission by post* if ComReg were to take any other view. Furthermore, it was noted that Section 37(3) does

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<sup>43</sup> See Recital 21 to the First Directive “*Whereas new services (services quite distinct from conventional services) .... do not form part of the universal service*”

<sup>44</sup> The ECJ in Case C-320/91 *Corbeau* [1993] ECR I-2533 at point 19 observed that “*the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit ....*”. Also Recital 18 to Directive 97/67/EC observes that “*the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers*”

<sup>45</sup> The ECJ in Case C-357/07 *TNT Post UK Ltd* 23 April 2009 - point 48– observed that “*it is apparent [from recital 15 to Directive 97/67] that the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of universal service provision*”.

expressly states that that "... a reference to a postal service includes a part of a postal service."

### **Can New services, services with Value Added Features, etc., be considered to fall within the scope of the universal postal service?**

- 6.7 In this regard the question is whether such *postal services* that are "New", with "Value Added Features", etc, be considered to be "*postal services within the scope of the universal postal service*", as defined in section 37 of the 2011 Act. ComReg's position is that the provisions of the Postal Directive and the case law of the CJEU is binding on it and that, having regard to same, such categories of postal services cannot be considered to be "*postal services within the scope of the universal postal service*".
- 6.8 However, taking into account the provisions of section 37(2)(c) of the 2011 Act, in Consultation 12/38, ComReg proposed to take the view that it is necessary for services with Value Added Features not only to have such features but to charge a premium price for same. Otherwise, it could be argued that despite the Value Added Features because of a low price the service was in fact of a kind that could reasonably be said to be interchangeable with the "*universal postal service*" described in section 16 of the 2011 Act. Furthermore, while the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of "*universal postal service*" provision it cannot be reasonably said that services provided in this manner are not interchangeable with the universal service.
- 6.9 It is on this basis that ComReg published in Consultation 12/38 its draft guidelines concerning postal services within the scope of the universal postal service to which persons shall have regard when making a notification under section 38 as required by section 37(2) of the 2011 Act.
- 6.10 Before finalising these guidelines, ComReg sought the views of interested parties by asking:

**Q. 14 Have you any observations to make about ComReg's analysis of the issues involved?**

**Q. 15 Have you any amendments to suggest concerning the proposed guidelines set out in Annex 7? Please give your reasons.**

### **Views of respondents**

- 6.11 **An Post** considers that the draft guidelines to be issued under section 37 of the 2011 Act provide limited guidance to postal service providers in ascertaining whether they are within the scope of the universal postal service.



- 6.12 An Post understands that the key determinant is whether a postal service user would view a particular postal service as being “reasonably interchangeable” with a service provided by An Post as part of its universal postal service. An Post notes that ComReg suggests that this determination can be made by “*comparing and directly assessing the characteristics and similarities of the respective services*” which “*may include consideration of the following characteristics and similarities*”. However, An Post notes that no characteristics or similarities are listed. Consequently, An Post suggests that the guidelines are developed further in this regard.
- 6.13 An Post is also interested in understanding ComReg’s proposals for the policing and enforcement of these guidelines and in particular ensuring compliance by postal service providers with, inter alia, section 38 of the 2011 Act.
- 6.14 An Post also notes the reference to a performance of a SSNIP test in determining whether an entity falls under scope of section 37 of the 2011 Act. An Post would also point out that there is a geographical dimension to be considered - the SSNIP test of 5-10% is not appropriate when a competitor seeks only to deliver in certain areas. For example, another operator may choose to only service Dublin and may charge a lower rate per item. This is within the scope of the USO as under section 37 of the 2011 Act a service can be within the USO even if not provided throughout the State. However, An Post claim using ComReg’s test as set out, the service may not be classified as being within the scope of the universal service as the differential in prices may be more than 10% compared with the equivalent An Post service.
- 6.15 On the other hand, **Lettershop** notes that the analysis by ComReg is very thorough and very sensible in its approach. However, Lettershop states that the implications relating to funding of the universal postal service are not sufficiently covered. Without knowing this cost, Lettershop claims that it is unreasonable to expect a postal service provider to provide notification under section 38 of the 2011 Act until this is clarified. Lettershop claims that this point also applies to the plan to impose fees on authorised postal service providers to cover the cost of ComReg’s activities.
- 6.16 Lettershop claims that the need to maintain separate accounting (paragraph 6.14 of Consultation 12/38) is, on the face of it, clearly unworkable for all postal service providers, including An Post. Lettershop believes that the difference between the services provided within the scope of the universal postal service and those outside the scope are considerable, yet the resources required to provide all services are interchangeable and probably apply to all services. Lettershop considers that each postal service provider will have different operational cost and pricing models, so applying percentages of revenue and cost to services within, and outside, the scope of the universal service, will be

impossible. Lettershop believes that many of the fixed costs involved in providing a postal service may, in part, be used for other products and services that have nothing to do with postal services. Lettershop claims that the cost of such an accounting system would further threaten the viability of any competition, either new entrant or existing postal service providers.

- 6.17 **Nightline** agrees with ComReg that new and value added services as set out in section 6.4 in Consultation 12/38 should be deemed to be “postal services” as defined in the Act.
- 6.18 Nightline also agrees that such services are not postal services within the scope of the universal services, provided that a premium price is charged for these services and that they are not otherwise interchangeable with services which are deemed to be within the scope of the universal service.
- 6.19 Nightline requests ComReg to amend the guidelines to acknowledge explicitly that it may be found to be the case that there is no unfair burden to An Post of providing the USO, and in that case no sharing mechanism or common fund would need to be set up.

### **ComReg’s position**

- 6.20 In relation to An Post’s response, ComReg did list guideline characteristics for determining whether a service is “*reasonably interchangeable*”. ComReg has now bulleted these in the guidelines to make it clearer.
- 6.21 In relation to An Post’s query as to compliance by postal service providers under section 38 of the 2011 Act, ComReg notes that this requirement is clearly set out in section 38 of the 2011 Act and in particular at section 38(7).
- 6.22 In relation to An Post’s query on the consideration by a postal service provider of an increase in its charge for its postal service by a small but non-transitory amount, ComReg notes this is provided as one suggested method that a postal service provider could use to determine whether the postal service is “reasonably interchangeable”. Another suggested method provided was consideration by the postal service provider as to whether if their service was not provided at all would their customers be able to use An Post’s universal postal services to meet their needs (e.g. the universal bulk mail postal service).
- 6.23 In relation to Lettershop’s response, ComReg notes that the funding of the universal postal service, if an unfair burden, is as set out in the 2011 Act. ComReg will consult as to the mechanism to make a net cost claim and funding of same by separate consultation. Until An Post makes a claim for net cost and this is found to be an unfair burden, ComReg cannot advise what the cost associated with the funding of the universal postal service may be. In relation to the accounting requirement, ComReg notes that it is a specific requirement

of section 39(d) the 2011 Act and relates to information on turnover from the provision of services within the scope of the universal postal service for the following purposes:

- To pay a levy to covers ComReg's cost of postal regulation
- To contribute to a compensation fund to reimburse An Post's net cost of universal postal service provision if this is an unfair burden

- 6.24 In relation to Nightline's request to amend the guidelines to acknowledge explicitly that it may be found to be the case that there is no unfair burden to An Post of providing the USO, and in that case no sharing mechanism or common fund would need to be set up, ComReg has amended the guidelines to reflect this.
- 6.25 Having considered the views of respondents and other relevant evidence the guidelines are finalised in Annex: 6 and are also published by way of a separate document, 12/81a, for ease of future reference.
- 6.26 ComReg will keep the guidelines under review and they may be changed from time to time where further interpretation is required.
- 6.27 However, for the avoidance of doubt, it is for each *postal service provider* to determine, having due consideration for these guidelines and other relevant evidence, whether any of their postal services fall "*within the scope of the universal postal service*" and therefore require notification to ComReg under section 38 of the 2011 Act.

## 6.2 General comments made in response to Consultation

- 6.28 The following are some of the general comments made by respondents which were not in response to a specific question.

### Strategy Statement

- 6.29 **An Post** states that the Consultation would have been better informed had this Strategy Statement been finalised first.
- 6.30 ComReg disagrees. As the strategy statement has direct effect on all interested parties including, in particular, postal service providers, ComReg considers that the strategy statement, and respondents to same, are now better informed by a clearer understanding as to postal service providers under the 2011 Act and to the universal postal services to be provided by the universal postal service provider. The strategy statement will issue in the near future.

## Universal Postal Service must be informed by evidence

- 6.31 **An Post** contends that the overwhelming regulatory requirement is the need to maintain a Universal Postal Service that meets the reasonable needs of Irish postal users – for that to be achieved, it is imperative that there is a properly formulated USO . Therefore, An Post maintains that the definition of the postal services included in the USO must be informed by an evidence-based assessment of (i) the needs of users, (ii) the extent to which these needs would be met by normal market conditions, and (iii) the impact of the defined scope of the USO on the commercial returns and overall economic viability of the designated USO provider. Before changing the services to be provided within the USO, An Post considers that a detailed investigation into the needs of users should be undertaken. Accordingly, An Post does not consider it appropriate to make these changes to the universal service at this point.
- 6.32 ComReg has considered the views of respondents, especially those who are postal service users, in making its 16(9) Regulations specifying the universal postal services. In doing so, ComReg has arrived at a universal service very similar to its 2005 working definition. Accordingly, and contrary to An Post’s argument, ComReg has not changed the universal postal service materially.

## VAT liability on non-universal postal services

- 6.33 **Barnardos, Chambers Ireland, Concern, Department of Social Protection, IBEC, IRL, Liberty Insurance** note that VAT will have to be charged on those postal services that are no longer universal postal services.
- 6.34 ComReg has no remit in this. Para. 1 of Schedule 1 to the VAT Consolidation Act 2010 (as amended) is the definitive legal provision applying VAT exemption to postal services provided as part of a universal service. This legislation provision and interpretation of same is a matter solely for the Revenue Commissioners, for example, as has been done in the UK by its Revenue<sup>46</sup>.

## Comments outside the scope of the Consultation

- 6.35 **Nightline** claims that ComReg has a duty to “promote competition”. **ComReg** notes that the statutory objective of ComReg to “*facilitate the development of competition and innovation in the market for postal service provision*” is explicitly stated at section 12(1)(c)(iii) of the Communications Regulation Act 2002 (as amended) to be subject to ComReg’s objective at section 12(1)(c)(i) of the same Act “*to promote the development of the postal sector, and in particular, the availability of a universal postal service with, to and from the*

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<sup>46</sup> ‘VAT – Postal Services: Technical Note’ dated 24 March 2010 at <http://www.hmrc.gov.uk/budget2010/march/vat-post-tech-note-5260.pdf>

*State at an affordable price for the benefit of all postal service users*". While section 34(3)(b) of the 2011 Act allows ComReg to give a direction "to promote effective competition", this only relates to access to "postal infrastructure" as defined by the 2011 Act, such as post office boxes, delivery boxes, postcodes.

- 6.36 A number of respondents (e.g. **IPU**, have raised issues concerning Postcodes and the Post Office Network (as distinct from the postal network). ComReg has no function in respect of these issues and therefore cannot respond to these observations.

### **6.3 Comments on draft Regulatory Impact Assessment (RIA)**

- 6.37 In Consultation 12/38, ComReg asked the following question:

**Q. 16 Do you have any views on this draft Regulatory Impact Assessment and are there other factors ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.**

#### **Views of respondents**

- 6.38 **An Post** claims that Consultation 12/38 is flawed given that there has been no assessment of users' needs and the fact that the consultation contains fundamental errors in terms of VAT analysis and hence an examination of the draft RIA is of no real benefit.
- 6.39 **CWU** makes a similar claim by stating that the draft RIA is almost impossible to respond to in circumstances where there is no supporting data for the claims.
- 6.40 **ICTR** states that the draft RIA does not take adequate account of the severe financial hardship that imposing VAT on direct and bulk mail services would create for charities now and into the future.
- 6.41 **Lettershop** notes that although the majority of the services will not be universal postal service, the vast majority of the volume of mail will be universal postal service. Therefore, Lettershop claims that An Post will still have a significant advantage by being VAT exempt and that this will continue to ensure that An Post enjoy a substantial advantage over any competition. According to Lettershop, this further emphasises the issue as to why the other postal services providers should fund the universal postal service provider when competing in an area where the playing field is far from level.

## ComReg's position

- 6.42 ComReg has considered all the views of respondents to this question in finalising its RIA at Chapter 7.
- 6.43 In response to the views of An Post and CWU, ComReg refers to its previous positions in this document and in particular paragraph 5.127 of this document.
- 6.44 In response to ICTR and Lettershop in relation to their comments on the VAT exemption, ComReg refers to paragraph 6.34 of this document.
- 6.45 In response to Lettershop's other comments, ComReg notes that the requirement to fund the universal postal service (if an unfair burden) is as set out in the 2011 Act. In relation to the universal postal services now set, ComReg agrees and does consider that the universal postal services specified account for the majority of An Post's 2011 mail volume.

## Chapter 7

# 7 Regulatory Impact Assessment (RIA)

- 7.1 A RIA is a structured approach to the identification and assessment of available regulatory options to meet the policy issue, including the likely impact of the regulatory options on different stakeholders. Based on this assessment, the RIA concludes with the choice of the best option to meet the policy issue. This best option should be the most effective and least burdensome regulatory option – it should be appropriate, effective, proportionate, and justified.
- 7.2 ComReg's approach to the RIA is set out in the "Guidelines on ComReg's Approach to Regulatory Impact Assessment" published in August 2007<sup>47</sup> and have regard to the RIA Guidelines issued by the Department of An Taoiseach in June 2009 ("the Department's RIA Guidelines"), adopted under the Government's Better Regulation programme.
- 7.3 The guidelines set out, amongst other things, the circumstances in which ComReg considers that a RIA is appropriate. In summary, ComReg indicated that it would generally conduct a RIA in any process that might result in the imposition of a regulatory obligation, or the amendment of existing regulatory obligations to a significant degree, or which might otherwise significantly impact on any relevant market or on any stakeholders or consumers
- 7.4 Having considered the views of respondents and other relevant evidence, this Chapter set out ComReg's RIA on:
- The Regulations "*specifying the services to be provided by a universal postal service provider relating to the provision of a universal postal service*" - see section 5.2 / Annex: 4 and
  - The Direction setting out how An Post's terms and conditions (which includes its charges) for its universal postal services should be published – see section 5.3 / Annex: 5.
- 7.5 It is only in relation to these universal postal services that there are regulatory options open to ComReg. The rest of the consultation concerns matters of interpretation or fact in relation to the 2011 Act and are therefore not within the scope of this RIA assessment.

### Steps involved

- 7.6 In assessing the available regulatory options, ComReg's approach to RIA

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<sup>47</sup> ComReg document 07/56a

follows five steps as follows:

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

Step 3: determine the impacts on stakeholders

Step 4: determine the impacts on competition

Step 5: assess the impacts and choose the best option

### **Step 1: Describe the policy issue and identify the objectives**

- 7.7 As noted in section 5.2 the first policy issue is to set the range of universal services that An Post, as the universal postal service provider, must provide to meet the needs of postal users. This policy issue arises as, pursuant to Section 16(9) of the 2011 Act ComReg is now required, following this public consultation, *“to make regulations specifying the services to be provided by a universal postal service provider relating to the provision of a universal postal service”*.
- 7.8 Up to now ComReg did not have the legal powers to specify the precise range of universal postal services to be provided by An Post although in the interests of transparency it previously consulted upon and published its working definition of universal postal services in 2005. As a result of the 2011 Act, ComReg will now specify the services to be provided by the universal postal service provider, An Post, relating to the provision of a universal postal service. As with the current working definition of universal postal services, the objectives of this policy issue are two-fold:
- to safeguard the postal services which postal customers need
  - to provide certainty for customers (businesses, organisations and individuals) as to what services the universal service provider is obliged to provide for them.
- 7.9 As noted in section 5.3, An Post, as the designated universal postal service provider, has obligations in respect of the publication of its terms and conditions (which also contain its schedule of charges). Under the 2011 Act, these must be published on its website and by such other means as ComReg may direct. Furthermore, the 2011 Act also requires the universal postal service terms and conditions to be made available to postal service users on request free of charge and at such access points that are considered appropriate. Therefore, the second policy issue is whether publication by An Post in accordance with the 2011 Act is sufficient or should there be additional requirements to ensure that all customers are fully aware and certain of An Post's terms and conditions.



## Step 2: Identify and describe the regulatory options

7.10 In relation to the first policy issue, in identifying the regulatory options for the universal postal services, ComReg needs to assess postal customer demand and whether this will be met without being set as a universal postal service. As a result, ComReg has considered the changes to the needs of postal services users and to the wider technical, economic and social environmental changes since ComReg's working definition of universal postal services was published in 2005. For example:

- there are no longer any restrictions on undertakings other than An Post providing a service if An Post decides not to do so,
- the demand for postal services has changed substantially with evidence of significant "e-substitution" including:
  - the use of electronic billing by most major utilities rather than posting bills to every customer
  - the increased use of electronic media by advertisers and government bodies.

7.11 As a result, ComReg has identified the two following regulatory options which may be adopted in order to meet the first policy issue, setting the universal postal services, in line with the requirement of Section 16(9) of the 2011 Act. These regulatory options are as follows:

- Option 1 – A "de minimis" set of universal postal services to be provided by An Post. This will be:
  - the existing uniform priced standard delivery single piece letter / large envelope / packet
  - two bulk mail services; one pre-sorted (including an international bulk mail service), one deferred delivery, similar to the working definition of 2005
  - basic parcel service
  - registered items service (not to be bundled with insurance)
  - insured items service
  - free postal service for blind and partially sighted persons
  - sending books abroad
  - Business Reply / Freepost

- Redirection
  - Mailminder
  - private boxes / bags
  - certificate of posting (free)
- Option 2 – A wider set of universal postal services to be provided by An Post. This will be in addition to the services set out in Option 1 above by including more bulk mail and/or parcel services.
- 7.12 In relation to the second policy issue, publication by An Post of its terms and conditions, again, ComReg must consider postal customer needs in reviewing the possible regulatory options.
- 7.13 As a result, ComReg has identified the two following regulatory options for the second policy issue which may be adopted in order to meet the policy issue of setting the publication requirement on An Post for its terms and conditions in line with the requirement of Section 22(1)(b) of the 2011 Act. These regulatory options are as follows:
- Option 1 - Requirements set by the 2011 Act.
  - Option 2 – Requirements beyond that set by the 2011 Act. In particular, this includes that the terms and conditions will also be published in *Iris Oifigiúil* as a journal of record.

## **Steps 3 & 4: Determine the impacts on stakeholders and competition**

### **Policy issue 1:**

- 7.14 In relation to the first policy issue, setting the universal postal services, only the services specified by ComReg in the Regulations it will issue following this consultation will be part of universal postal service. ComReg considers that the stakeholders to be affected by the options outlined above are:
- Postal users including:
    - Individual consumers
    - SMEs who are liable for VAT
    - SMEs who are not liable for VAT
    - Larger businesses who are liable for VAT
    - Larger businesses who are not liable for VAT

- Government departments and other public bodies
- NGO<sup>48</sup>s including charities
- The universal postal service provider, An Post
- Other postal service providers

### **Policy Issue 1: Option 1**

- 7.15 Option 1 would mean that only a “*de minimis*” set of universal postal services need be provided by An Post. The “*de minimis*” set of universal postal services is set by reference to postal customer needs to ensure that only those postal services that postal customers would not otherwise be able to obtain nationally (at affordable prices) are provided. This ensures that postal customer needs are safeguarded.
- 7.16 This also means that An Post will be freed from detailed regulatory control in respect of the majority of its postal services as they will not be universal postal services. An Post will therefore have considerable flexibility in terms of pricing, quality, and contract terms.
- 7.17 Also, this will put An Post on the same commercial basis as its competing postal service providers as they cannot offer VAT exempt postal services and should consequently facilitate the further development of competition in the market for postal service provision.
- 7.18 Furthermore, in setting a “*de minimis*” set of universal postal services it will be only in respect of these specified universal postal services that An Post would be able to seek financial support for universal postal service provision under Section 35 of the 2011 Act, if such provision would involve “*net costs*” for an efficient service provider and if that “*net cost*” was an unfair burden on An Post.

### **Policy Issue 1: Option 2**

- 7.19 Option 2 will expand the “*de minimis*” set of universal postal services under Option 1 by including more bulk mail and/or parcel options. If Option 2 is taken, expanding the set of universal postal services beyond the “*de minimis*” set, it will have the following impacts on stakeholders and competition. It will increase the number of postal services provided by An Post that will be subject to regulatory control. Furthermore, it will also increase the number of postal services provided by An Post that are VAT exempt and therefore subject to a different VAT treatment than those provided by competing postal service providers who cannot avail of the VAT exemption. It will also increase the number of postal services to be included in any “*net cost*” calculation

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<sup>48</sup> Non-Governmental organisations

associated with the provision of the universal service.

### **Policy Issue 2:**

7.20 In relation to the second policy issue, publication by An Post of its terms and conditions, ComReg considers that the stakeholders to be affected by the options outlined above are:

- Postal users
- The universal postal service provider, An Post

### **Policy issue 2: Option 1**

7.21 An Post only publish the terms and conditions as required by the 2011 Act.

### **Policy issue 2: Option 2**

7.22 Option 2 expands the requirement of Option 1 by setting where the terms and conditions are to be made available and also requiring them to be published in *Iris Oifigiúil* as a journal of record - this will benefit postal users and An Post in case there are subsequent disputes in relation to the terms and conditions (which includes charges and complaint procedures).

7.23 Option 2 also further specifies the requirements under Option 1 by requiring An Post to have the terms and conditions for its universal postal services set out in a comprehensive printed document available as applicable to An Post's customers on request and in the case of single piece mail universal postal services at each post office (post office as defined by the 2011 Act). These printed documents will be in plain and understandable language for postal users so that all postal users can be fully informed and certain when making their purchase of postal services or when making a complaint where their postal services has been unsatisfactory - this is to the benefit of postal users and to the benefit of An Post in case of any subsequent disputes.

## **Step 5: Assess the impacts and choose the best option**

### **Policy issue 1:**

7.24 In relation to policy issue 1, setting the universal postal services, as set out above, Option 1 has a number of impacts:

- it ensures a minimum set of postal services, that would otherwise not be provided, to meet the needs of postal customers
- it minimises the scope of regulatory control on An Post

- it puts An Post and its competing postal service providers on the same VAT treatment footing for the majority of postal services

7.25 Option 2 for policy issue 1 has a number of impacts

- it expands the number of universal postal services once it is demonstrated that such postal services would not otherwise be provided
- it expands the scope of regulatory control on An Post
- it expands the number of postal services for which An Post will have a different VAT treatment than its competing postal service providers

7.26 Having regard to the impacts assessed above, the conclusion of this RIA for Policy Issue 1, setting the universal postal services, is that Option 1, a “*de minimis*” set is best to address the policy issue of setting universal postal services pursuant to Section 16(9) of the 2011 Act as it is the most effective and least burdensome regulatory option. Option 1 also reflects ComReg’s previous working definition for universal postal services.

## **Policy issue 2:**

7.27 In relation to policy issue 2, setting the publication requirement on An Post for its terms and conditions, Option 1, publication according to the requirements set out in the 2011 Act would minimise the regulatory burden on An Post. However, under this Option, An Post would decide at what access points it will make its terms and conditions available and there would be no publication in *Iris Oifigiúil* as a journal of record.

7.28 Therefore, Option 2 expands the publication requirement to include making the single-piece mail printed publication readily available at all post offices as defined by the 2011 Act. Option 2 also includes publication of the terms and conditions in *Iris Oifigiúil* as a journal of record.

7.29 Having regard to the impacts assessed above, the conclusion of this RIA for Policy Issue 2, publication by An Post of its terms and conditions, is that Option 2 is best to address the policy issue pursuant to Section 22(1)(b) of the 2011 Act as it is the most effective regulatory option to ensure that all postal users are fully informed when making their purchase of postal services from An Post. Option 2 also adds certainty in relation to those terms and conditions (and complaint procedures) in the case of any subsequent disputes between An Post and its customers. ComReg does not consider the requirements beyond that mandated in the 2011 Act should be a burden for the universal postal service provider as the additional requirements relate mainly to (1) publication in *Iris Oifigiúil* and (2) making the terms and conditions booklet for single piece universal postal services readily available at post offices.

## Chapter 8

# 8 Next Steps

- 8.1 This document has set the:
- Universal Service Regulations (section 16(9) of the 2011 Act)
  - Services *within the scope of the universal postal service* Guidelines (section 37(2) of the 2011 Act)
  - Notification Procedures (section 38 of the 2011 Act)
  - Direction setting out the publication requirements for An Post's terms and conditions for its universal postal services (section 22 of the 2011 Act)
- 8.2 Today, ComReg has also published a consultation in relation to its proposed dispute procedures relating to access by postal service providers to a universal postal service provider's postal network (section 33 of the 2011 Act).
- 8.3 ComReg will shortly undertake a consultation on its approval or otherwise of An Post's proposed Terms and Conditions for its *universal postal services* (set by section 16(9) of the 2011 Act).
- 8.4 In the near future, ComReg will publish for consultation a draft of ComReg's Postal Strategy Statement 2012 - 2014.
- 8.5 As noted in Consultation 12/38, there are a significant number of other tasks that ComReg must undertake following the coming into operation of the 2011 Act.
- 8.6 **Postal Levy:** In accordance with section 44 of the 2011 Act the cost of regulating the postal sector is in future to be borne solely by postal service providers offering services *within the scope of universal postal service*. ComReg will therefore review its Postal Levy Order in accordance with the 2011 Act.
- 8.7 **Price Cap:** ComReg will consult on the Price Cap required by section 30 of the 2011 Act. This will involve three separate tasks:
- Decide if the conditions exist where ComReg must impose a price cap.
  - Decide on what the efficiency or "-X" factor should be. ComReg will engage expert consultants to investigate the scope of efficiencies with this task commencing this year.

- Decide how An Post's services within the scope of the universal postal service should be grouped into "baskets"
- 8.8 **Financing of Universal Service Provision:** The 2011 Act makes provision for An Post to seek funding of its universal services provision. In accordance with section 35 of the 2011 Act, ComReg must determine the form in which An Post should submit any request for funding.
- 8.9 **Code of Practice and Out of Court Settlement Procedures:** Section 43 of the 2011 Act requires postal service providers to publish a code of practice for dealing with complaints in accordance with directions given by ComReg and to put in place out of court settlement procedures.

# Annex: 1 Terms and Abbreviations used in this document

Term	Definition for the purpose of this document
You / Your	The legal or natural person reading and/or responding to the Consultation document including an "undertaking" or a "user" of postal services
Undertaking	An entity engaged in an economic activity, regardless of its legal status and the way in which it is financed <sup>49</sup> . Two separate legal entities may be considered to form one economic unit and therefore to be a single undertaking. In this respect the [European] Court of Justice looks at the existence of a controlling share or functional, economic and organic links <sup>50</sup>
User	any person benefiting from postal service provision as a sender or as an addressee
RIA	Regulatory Impact Assessment
CJEU	The Court of Justice of the European Union, formerly known as the European Court of Justice (ECJ) and Court of First Instance (CFI)
The 1908 Act	Post Office Act, 1908. [8 EDW. 7. Cu. 48.]
The 1983 Act	Postal and Telecommunications Services Act, 1983. (1983 No. 24)
The 2002 Act	Communications Regulation Act, 2002. (2002 No. 20)
The 2011 Act	Communications Regulation (Postal Services) Act 2011. (2011 No. 21)
Section nn <sup>51</sup> OR Section nn of the 2011 Act	Section nn of the Communications Regulation (Postal Services) Act 2011 (2011 No. 21).
Section nn of the NNNN Act	Section nn of the specified Act.
S.I. 616 of 2002	European Communities (Postal Services) Regulations 2002, S.I. 616 of 2002 (revoked by the Communications Regulation (Postal Services) Act 2011)

<sup>49</sup> see Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451

<sup>50</sup> see Case C-480/09 P AceaElectrabel Produzione SpA v Commission [2010] ECR paragraphs 47 to 55 and Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SPA and Others [2006] ECR I-289, paragraph 112

<sup>51</sup> nn being a number e.g. 21



Term	Definition for the purpose of this document
The First Directive	Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service <sup>52</sup> .
The Second Directive	Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services <sup>53</sup> .
The Third Directive	Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services <sup>54</sup> .
The Postal Directive	Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 and Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008.

<sup>52</sup> OJ No. L15, 21.1.1998, p.14

<sup>53</sup> OJ No. L176, 5.7.2002, p.21

<sup>54</sup> OJ No. L52, 27.2.2008, p.3

## Annex: 2 Form of notification and declaration required by Section 38 of the 2011 Act

For information, this is a copy of the form of notification and declaration that undertakings should enter and when complete print off for sending by registered post to ComReg. The notification and declaration form to be completed for sending by email to postal.team@comreg.ie and by registered post to ComReg is at 12/81n.

<b>Section 1. Information about undertaking making Notification</b>	
<b>1.1 Name of undertaking *</b> (Name of Legal or Natural Person, e.g Company's Registered Name)	
<b>1.2 Trading Name(s)</b> (if different to above)	
<b>1.3 Postal Address *</b>	
<b>1.4 Undertaking's Telephone Number</b> (inc dialling code)	
<b>1.5 Website address</b>	
<b>1.6 Address of Registered Office</b> (*in the case of a body corporate that is a company)	
<b>1.7 Company registration Number (* in the case of a body corporate that is a company)</b>	
<b>1.8 Other legal or natural persons which are part of the undertaking</b>	
<b>1.9 Email Address</b> (if available)	

\* Indicates a mandatory field

<b>Section 2. Information about Compliance Officers</b>	
<b>2.1 Name of Principal contact *</b>	
<b>2.2 Office Phone number *</b>	
<b>2.3 Mobile Phone Number</b>	
<b>2.4 Email address *</b>	
<b>2.5 Name of Deputy contact</b>	
<b>2.6 Office Phone number</b>	
<b>2.7 Mobile Phone Number</b>	
<b>2.8 Email address</b>	

\* Indicates a mandatory field

<b>Section 3. Contacts Details for postal service users wishing to make a complaint</b>	
<b>3.1 Postal Address *</b>	
<b>3.2 Telephone Numbers (inc dialling code)</b>	
<b>3.2.1 Freephone number</b>	
<b>3.2.2 LoCall number</b>	
<b>3.2.3 Office Phone number *</b>	
<b>3.3 Website address</b>	
<b>3.4 Email Address</b>	

\* Indicates a mandatory field

<b>Section 4. Details of Services provided and Declarations</b>	
<b>4.1 Number of postal services provided by undertaking and described on Schedules attached to this declaration (a separate Schedule must be completed for each service)</b>	
<b>4.2 Number of these Services which are within the scope of the universal postal service</b>	
<b>4.3 CONFIRMATION</b> <b>Do you confirm that you will comply with all obligations imposed by or under the Communications Regulation (Postal Services) Act 2011 in respect of the provision of postal services, and in particular those imposed by sections 11, 12, 39, 42, 43, 45, 47, 53 and 54?</b>	1 Yes 2 No
<b>4.4 Do you confirm that you are aware that it is a criminal offence to fail to make a notification or to make a notification or a declaration which is false or misleading in any material respect and on summary conviction any offender is liable to a “class A” fine, the largest fine permissible under the Fines Act 2010?</b>	1 Yes 2 No
<b>Signature</b>	
<b>Date</b>	

Schedule number Details of Services Provided	nn of nn
<b>Name of service</b>	
<b>Nature of items conveyed</b>	1 Items of correspondence 2 Business documents 3 books 4 catalogues 5 newspapers 6 periodicals 7 Merchandise with or without commercial value 8 Other (please state)
<b>Geographical scope (sender)</b>	
<b>Geographical scope (addressee)</b>	
<b>Advertised delivery standards</b>	
<b>Size limits</b>	
<b>Weight limits</b>	
<b>Access arrangements (Please select only one option)</b>	1 Deposited at access point 2 Collected from senders' premises
<b>Legal Basis for contract (Please select only one option)</b>	1 Individually negotiated agreement 2 Standard Contract Terms and Conditions and individually negotiated discounts from Rate Card 3 Standard Contract Terms and Conditions and non-negotiable Tariff
<b>The estimated date of commencement for the postal service concerned (if after date of signing below)</b>	

<p><b>Declaration</b>                  Do you confirm that this service is <i>within the scope of the universal postal service</i> as defined in section 37(1) of the Communications Regulation (Postal Services) Act 2011?</p>	<p>1 Yes                  2 No</p>
<p><b>Declaration</b>                  Do you confirm that you aware that it is a criminal offence to fail to make a notification or to make a notification or a declaration which is false or misleading in any material respect and on summary conviction any offender is liable to a “class A” fine, the largest fine permissible under the Fines Act 2010?</p>	<p>1 Yes                  2 No</p>
<p><b>Signature</b></p>	
<p><b>Date</b></p>	

## Annex: 3 Advice by holder of postal service authorisation granted under S.I. 616 of 2002

Section 1. Information about holder of Postal Service Authorisation under Regulation 7 of S.I. 616 of 2002.	
<b>1.1 Name of holder of Postal Service Authorisation</b>	
<b>1.2 Trading Name(s) (if different to above)</b>	
<b>1.3 Postal Address</b>	
<b>1.4 Telephone Number (inc dialling code)</b>	
<b>1.5 Website address</b>	
<b>1.6 Registered Office (if registered company)</b>	
<b>1.7 Company registration Number (if applicable)</b>	
<b>1.8 Email Address</b>	
<b>Declaration</b> Do you confirm that the services provided under your authorisation are not <i>postal services</i> as defined in the Communications Regulation (Postal Services) Act 2011?	
<b>Confirmation</b> Do you confirm that you are aware that it is a criminal offence to fail to make a notification or to make a notification or a declaration which is false or misleading in any material respect and on summary conviction any offender is liable to a “class A” fine <sup>55</sup> , the largest fine permissible under the Fines Act 2010 following summary conviction?	
<b>Signature</b>	
<b>Date</b>	

# Annex: 4 Section 16(9) Regulation

## STATUTORY INSTRUMENT

S.I. No. 280 of 2012

### COMMUNICATIONS REGULATION (UNIVERSAL POSTAL SERVICE) REGULATIONS 2012

The Commission for Communications Regulation, in exercise of the powers conferred on it by section 16(9) of the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) hereby makes the following regulations:

#### 1. Citation and Commencement

(1) These Regulations may be cited as the Communications Regulation (Universal Postal Service) Regulations 2012.

(2) These Regulations shall come into operation on 1 November 2012.

#### 2. Interpretation

(1) In these Regulations except where the context otherwise requires:

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

“certificate of posting” means a receipt issued in respect of a postal packet deposited at an access point for transmission by universal postal service;

“D + n” is a formula in relation to the transit time of postal packets, where “D” represents the “day of posting” of a postal packet and “n” represents the number of working days after the “day of posting” after which the postal packet will be delivered to the addressee in due course of post, and in respect of delivery to addresses within the State “n” is to be replaced by “one”, in respect of delivery to other addresses within the European Union “n” is to be replaced by “three”, and in respect of delivery to all other Foreign addresses “n” is to be replaced by “up to nine”;

“day of posting” means the specific day of the week on which a postal packet is deposited at an access point by a sender for transmission by post;

“deferred delivery” means deposited at a delivery office for delivery within the State one day later than would otherwise be the case using the “D+n” formula;

“delivery office” means an office managed by the universal service provider for the purposes of processing postal packets immediately prior to the activity of delivery to the addressee;



"delivery only" means deposited pre-sorted at a delivery office for delivery within the State using the "D+n" formula;

"designated operator" has the meaning assigned to it by Article 1.8 of the Universal Postal Convention;

"foreign" refers to any postal packet deposited at an access point in the State for transmission by post to an address outside the State;

"franking Impression" means the postal mark printed upon a postal packet, produced by a postal franking machine and setting out the postage paid and the date and place of posting;

"girth" means twice the combined depth and width of a postal packet;

"insurance" means a service insuring a postal packet in the event of loss, theft or damage up to the value declared by the sender of the postal packet;

"large envelope" means a postal packet other than a letter of minimum dimension 90 millimetre ("mm") x 140mm x 0.18mm (with a tolerance of 2mm) and maximum dimension 300mm x 400mm x 25mm, and with a maximum weight of 500 grams;

"letter" means a postal packet of minimum dimension 90mm x 140mm x 0.18mm (with a tolerance of 2 mm) and a maximum dimension of 235mm x 162mm x 5mm, and with a maximum weight of 100 grams, and includes a postcard;

"Office of Exchange" has the meaning assigned to it by Article 169 of the Letter Post regulations adopted by the Universal Postal Union;

"packet" means a postal packet other than a letter or large envelope of minimum dimension 70mm x 100mm x 25mm and a maximum dimension of length, width and depth combined of 900mm, with a tolerance 2 mm, with the greatest dimension not exceeding 600mm and with a tolerance of 2mm with a tolerance of 2 mm and a maximum weight of 2 kilograms except in the case of a packet for transmission by post to an address outside the State containing books and pamphlets where a maximum weight of 5 kilograms will apply; when the packet is in the shape of a roll the length and twice the diameter shall not exceed 1040 mm and the greatest dimension shall not exceed 900 mm;

"parcel" means a postal packet other than a letter, large envelope or packet of maximum length 1.5 metres provided that the combined length and girth does not exceed 3 metres and the weight does not exceed 20 kilograms;

“postcard” means a card of minimum dimension 90mm x 140mm x 0.18mm and maximum dimensions of 235mm x 162mm x 5mm, with a tolerance of 2mm provided it is sufficiently stiff to withstand processing without difficulties and the length is at least equal to the width multiplied by  $\sqrt{2}$  (approximate value 1.4);

“postage stamp” includes a label produced at a post office or at a sender’s premises;

“postal franking machine” means a machine of any type designed and used to denote, by means of a franking impression, the payment of postage or any other sum payable to a postal service provider, and includes any meter used in a postal franking machine;

"postal packets deposited in bulk" means a substantial number of similar postal packets deposited with a universal postal service provider at the same place and time, to be transported and distributed to the addressees as marked on each of the postal packets;

“postal packets for the blind” means letters, large envelopes, packets and parcels (excluding foreign parcels) weighing no more than 7kg and containing material for the use of blind and partially-sighted persons;

“proof of delivery facility” means a postal service providing the sender with proof of the handing in of the postal packet and/or of its delivery to the addressee, for which an amount determined by the universal postal service provider is payable by the universal postal service provider to the sender or addressee in the event of theft or loss of or damage to the postal packet in the course of its transmission by post;

“re-direction” involves the delivery of a postal packet to its addressee at an address other than that shown on the postal packet;

“single piece service” means a postal service involving the transmission of individual postal packets to addressees where the postage paid by the senders is not subject to any discounts based upon —

- (a) the number of postal packets sent;
- (b) the substance, formatting or positioning of the address;
- (c) the use of markings to facilitate sorting by machines;
- (d) pre-sorting into geographical areas for delivery; or
- (e) an obligation to purchase any other postal service;

"track and trace" means a facility enabling a postal service user to monitor the progress of a postal packet through the postal network; and

“universal postal service provider” has the meaning set out in section 6(1) of the Act of 2011.

(2) A word or expression that is used in these Regulations and in the Act of 2011 has, except where the context otherwise requires, the same meaning in these Regulations as it has in the Act of 2011.

(3) In these Regulations, unless otherwise indicated —

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

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

### **3. The universal postal service**

(1) The Commission, pursuant to section 16(9) of the Act of 2011, hereby specifies the following services to be provided by the universal postal service provider relating to the provision of the universal postal service:

(a) A single piece service involving the clearance, sorting, transport and distribution of letters which —

(i) has a transit time objective of D + n;

(ii) provides for the payment of postage by postage stamp, postal franking machine, or other reasonable methods;

(iii) provides for the provision of a certificate of posting on request where the postal packet is deposited at a post office; and

(iv) does not include any “value added” feature.

(b) A single piece service involving the clearance, sorting, transport and distribution of large envelopes which—

(i) has a transit time objective of D + n;

(ii) provides for the payment of postage by postage stamp, postal franking machine, or other reasonable methods;

(iii) provides for the provision of a certificate of posting on request where the postal packet is deposited at a post office; and

(iv) does not include any “value added” feature.

- (c) A single piece service involving the clearance, sorting, transport and distribution of packets which—
- (i) has a transit time objective of  $D + n$ ;
  - (ii) provides for the payment of postage by postage stamp, postal franking machine, or other reasonable methods;
  - (iii) provides for the provision of a certificate of posting on request where the postal packet is deposited at a post office; and
  - (iv) does not include any “value added” feature.
- (d) A single piece service for the clearance, sorting, transport and distribution of parcels which—
- (i) has a transit time objective of  $D + n$ ;
  - (ii) provides for the payment of postage by postage stamp, postal franking machine, or other reasonable methods;
  - (iii) provides for the provision of a certificate of posting on request where the postal packet is deposited at a post office; and
  - (iv) does not include any “value added” feature.
- (e) A single piece service providing a “proof of delivery facility” for postal packets tendered to a universal postal service provider for transmission under any of the services listed at 3(1)(a) to 3(1)(d) inclusive, which—
- (i) provides for the payment of postage and proof of delivery by postage stamp, postal franking machine, or other reasonable methods; and
  - (ii) does not include provision of a track and trace facility or any other “value added” feature.
- (f) A single piece service for the insurance of postal packets tendered to a universal postal service provider for transmission under any of the services listed at 3(1)(a) to 3(1)(d) inclusive, provides for the payment of postage and insurance by postage stamp, postal franking machine, or other reasonable methods.
- (g) A single piece service provided free of charge to the postal service user for the transmission of “postal packets for the blind”.
- (h) A service for the clearance, transport and distribution of “postal packets deposited in bulk” for “delivery only”.
- (i) A service for the clearance, transport and distribution of foreign “postal packets deposited in bulk” pre-sorted by country of destination.

- (j) A service for the clearance, transport and distribution of “postal packets deposited in bulk” for “deferred delivery”.
- (k) A service for the sorting, transport and distribution of postal packets deposited with a universal postal service provider at an Office of Exchange within the State by the designated operator of a signatory to the Universal Postal Convention, acting as such, providing that —
  - (i) the senders of the postal packets concerned are present in the territory of the relevant signatory to the Universal Postal Convention when the postal packets are deposited at an access point of the Designated Operator for transmission by post; and
  - (ii) when the signatory to the Universal Postal Convention is also a member State of the EU subject to compliance with section 29(1) of the Act of 2011.
- (l) The following special facilities for the delivery of postal packets at the request of the addressee (provided that no abbreviated form of address, such as "PO Box NN", shall be used without such additional information as to enable the sender to ascertain the location of the premises of the addressee) —
  - (i) Private boxes and bags: providing at specified universal postal service provider premises for the rental of private boxes or bags into which postal packets may be placed, where such private boxes or bags may be called for by the addressee of such postal packets as are contained therein, or his or her agent, and further providing for the delivery of such private bags to addressees by officers of a universal postal service provider;
  - (ii) Redirection: providing, during a specified period of time, that all universal service postal packets bearing a specified address shall be delivered to a specified alternative address (“the redirection address”) at which the addressee is resident;
  - (iii) Poste restante: providing free of charge a facility for the address of any specified post office in the State to be used as an addressee’s postal address for three months, and for postal packets for that addressee to be held at that post office for three months for collection by the addressee, provided, in relation to any post office, that it is reasonable for the post office concerned to be used to provide the service;
  - (iv) Mailminder: a facility for the retention of universal service postal packets during the pre-notified absence of the addressee from his home or premises and subsequently the delivery on his return;
  - (v) Business Reply: the provision of a facility for an addressee to supply pre-printed envelopes or labels of a design specified by a universal postal service provider in its terms and conditions so that senders may deposit postal packets

for transmission by services 3(1)(a) to 3(1)(f) inclusive without pre-payment of postage subject to confirmation by the addressee that he will pay the postage due thereon on delivery;

(vi) Freepost: the provision of a facility for an addressee to authorise the inclusion of the word "FREEPOST" in his address so that senders may deposit postal packets for transmission by services 3(1)(a) to 3(1)(f) inclusive without pre-payment of postage subject to confirmation by the addressee that the addressee will pay the postage due thereon on delivery.

GIVEN under the Official Seal of the Commission for Communications Regulation,  
this 26 day of July 2012.

KEVIN O'BRIEN,

Commissioner

For and on behalf of the Commission for Communications Regulation

## EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

These Regulations specify the services that An Post, as the universal postal service provider designated by section 17 of the Communications Regulation (Postal Services) Act 2011 is obliged to provide. The Commission for Communications Regulation is making these Regulations under the powers conferred upon it by section 16(9) of the Communications Regulation (Postal Services) Act 2011.

# Annex: 5 Direction to An Post concerning publication of its Terms and Conditions for universal postal service provision

COMMUNICATIONS REGULATION (POSTAL SERVICES) DIRECTION No.1, 2012

## 1. Statutory and legal powers

This Direction is made by the Commission for Communications Regulation (“ComReg”):

Having had regard to sections 22(1)(b), 24(2) and 24(5) of the Communications Regulation (Postal Services) Act 2011;

Having regard to the reasoning and analysis set out in ComReg Document No.12/38 where relevant and the responses thereto.

## Definitions

In this Direction, unless the context otherwise suggests:

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

“**An Post**” means An Post and its subsidiaries, and any Undertaking which it owns or controls, and any Undertaking which owns or controls An Post and its successors and assigns;

“**Bulk mail universal postal services**” means the services listed at Regulations 3(1)(h) to 3(1)(j) inclusive as set out in the Communications Regulation (Universal Postal Service) Regulations 2012 made under section 16(9) of the Act as enacted;

“**Charges**” means the charges made by An Post in respect of *universal postal service* provision and published by An Post under section 22 or 23 of the Act as the case may be;

“**Iris Oifigiúil**” is the official Irish State gazette;

“**Post office**” has the meaning set out in the Act;



**“Single piece universal postal services”** means the services listed at Regulations 3(1) other than 3(1)(h) to 3(1)(j) inclusive as set out in the Communications Regulation (Universal Postal Service) Regulations 2012 made under section 16(9) of the Act as enacted;

**“Terms and conditions”** has the meaning set out in section 24 of the Act;

**“Undertaking”** means an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Two separate legal entities may be considered to form one economic unit and therefore to be a single undertaking. In this respect the [European] Court of Justice looks at the existence of a controlling share or functional, economic and organic links;

**“Universal postal services”** means the postal services as specified in the Communications Regulation (Universal Postal Service) Regulations 2012 made under section 16(9) of the Act as enacted.

## 2. Scope and application

This Direction applies to An Post.

This Direction is binding upon An Post and An Post shall comply with it in all respects.

## 3. Publication of terms and conditions for universal postal service provision

An Post is directed to publish the terms and conditions of its *universal postal services* provision and the charges made by it in respect of the *universal postal services* provision in the following manner:

- (i) two sets of terms and conditions, the first set for single piece universal postal services, the second set for bulk mail universal postal services
- (ii) both sets of the terms and conditions on the An Post website, as required by 22(b) of the Act. Publication on An Post’s website will be in a clear and prominent position with a clear link from An Post’s ‘home page’
- (iii) by making printed copies of both sets of booklet containing the current terms and conditions and the applicable charges available to postal service users on request at no charge as required by 24(9) of the Act
- (iv) by making printed copies of the single piece universal postal services booklet containing the current terms and conditions and the applicable charges readily available to postal service users at every post office

(v) To publish both sets of terms and conditions and the applicable charges in *Iris Oifigiúil* and to re-publish in *Iris Oifigiúil* when an amendment to the terms and conditions and the applicable charges is made by An Post.

#### 4. **Statutory powers not affected**

Nothing in this Direction shall operate to limit ComReg in the exercise and performance of its statutory functions, powers and duties under any primary or secondary legislation (in force prior to or after the effective date of this Direction) from time to time as the occasion may require.

#### 5. **Maintenance of obligations**

If any section, clause or provision or portion thereof contained in this Direction is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Direction and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Direction, and shall not in any way affect the validity or enforcement of this Direction.

#### 6. **Effective Date**

This Direction shall be effective from the date of this decision but shall come into operation on 1 November 2012.

**Kevin O'Brien**  
**Commissioner**  
**The Commission for Communications Regulation**  
**THE 26 DAY OF JULY 2012**

## Annex: 6 Guidelines under Section 37 of the 2011 Act

**Section 37(2) of the Communications Regulation (Postal Services) Act 2011 – ComReg guidelines concerning “postal services within the scope of the universal postal service” to which persons shall have regard when making a notification under section 38.**

The Communications Regulation (Postal Services) Act 2011 (“2011 Act”) provides, amongst other things, for the regulation by the Commission for Communications Regulation (“ComReg”) of “*postal services*” generally and for ensuring the provision of the “*universal postal service*” by An Post, the designated “*universal postal service provider*”. The scope of the universal postal service is largely set out in section 16(1) of the 2011 Act while section 16(9) provides that ComReg shall, following a public consultation, make regulations specifying the services to be provided by An Post relating to the provision of the universal postal service.

ComReg has the specific statutory function to ensure the provision of a universal postal service that meets the reasonable needs of postal service users while it also has the statutory objective, in the performance of that function, to promote the availability of a universal postal service within, to and from the State at an affordable price of the benefit of all postal service users. This function includes ensuring the proper financing of the universal postal service and Chapter 5 of the 2011 Act (sections 35 and 36) sets out provisions relating to same.

Section 35(1) of the 2011 Act provides that if An Post seeks funding for the net costs (if any) of providing the universal postal service then it may submit a request in writing to ComReg. On receipt of such a request and all required information in support of it, ComReg shall determine whether the universal postal service does represent a net cost and an unfair financial burden on An Post, in the period to which the request relates. ComReg may determine that the universal postal service does not represent a net cost and unfair burden on An Post.

Section 36(1) of the 2011 Act provides that if ComReg determines that the net cost of the universal postal service does represent an unfair financial burden on An Post then it shall apportion that net cost amongst “*providers of postal services within the scope of the universal postal service*”. Such providers shall be required to make a contribution for the purposes of meeting An Post’s burden, in accordance with the cost apportioned to each of them. The assessment, apportionment, collection and distribution of any such contributions shall be carried out under a “*sharing mechanism*” established under regulations made by ComReg, with such contributions paid into a common fund.

In addition, section 44 of the 2011 Act amends section 30 of the Communications Regulation Act 2002 (the “Principal Act”) by insertion of the following text: *“for the purpose of meeting expenses properly incurred by [ComReg] in the discharge of its functions relating to postal services [ComReg] may make an order imposing a levy on postal service providers providing postal services within the scope of the universal postal service.”*

From the above provisions in sections 35, 36, and 44 of the 2011 Act, it is clear that there are potential financial consequences to being deemed to be a provider of a *“postal service within the scope of the universal postal service”*. Any such provider shall be required to pay such levy to ComReg as may be imposed, and may also be required in time to make contribution(s) to the net cost of the universal postal service provided by An Post if it is an unfair burden on An Post.

Section 38 of the 2011 Act sets out the provisions for obtaining an authorisation to provide a *“postal service”*. A person who intends to provide a postal service is required to notify ComReg before doing so, providing the information set out in section 38(3). Section 38(6) provides that any such person must include with his or her notification a declaration stating whether the postal service concerned is, or is not, within the scope of the universal postal service. Section 38(7)(a) provides that a person who intends to provide a postal service shall, before doing so, make the required notification to ComReg; failure to do so is committing a criminal offence and is liable on summary conviction to a class A fine. Section 38(7)(b) provides that a person who makes a notification or a declaration which is to his or her knowledge false or misleading in any material respect commits a criminal offence and is liable on summary conviction to a class A fine.

A *“postal service provider”* must therefore have some means of assessing whether the postal service concerned is, or is not, within the scope of the universal postal service. In this regard, Section 38(1) of the 2011 Act provides that a person who makes a notification shall have regard to the guidelines published by ComReg under section 37.

Section 37 of the 2011 Act is the key provision in relation to the concept of *“postal services within the scope of the universal postal service”* and so it is set out in full below:

*“(1) A postal service is within the scope of the universal postal service (in this Part referred to as a “postal service within the scope of the universal postal service”) if –*

*(a) the service is within the description of the universal postal service set out in section 16,*

*(b) the service would be within the description of the universal postal service set out in section 16 but for the fact that—*

*(i) in the case of a service consisting of the clearance and delivery of postal packets, the clearance or delivery is not made on every working day as required by section 16 (1) (a),*

*(ii) the service is not provided throughout the State, or*

*(iii) the service is not provided at an affordable price in accordance with a uniform tariff applicable throughout the State pursuant to section 28 (2),*

*or*

*(c) the postal service is of a kind that, having regard to postal service users, could reasonably be said to be interchangeable with a service of a description set out in section 16 ,*

*but does not include a document exchange or express or courier services.*

*(2) The Commission shall, not later than 3 months after the passing of this Act, publish guidelines concerning postal services within the scope of the universal postal service to which persons shall have regard when making a notification under section 38 , in particular concerning —*

*(a) whether a postal service has the characteristics set out in section 16(1) or would have these characteristics if it were offered on the days specified in section 16(1)(a) throughout the State,*

*(b) whether a postal service has characteristics that postal service users may reasonably perceive it to be interchangeable with a service of a description set out in section 16 , and*

*(c) the characteristics of the postal service itself, including the value added features, intended use and price.*

*(3) In this section a reference to a postal service includes a part of a postal service.*

*(4) In this section “document exchange” means provision of means, including the supply of premises specifically for that purpose and transportation by a third party, allowing self-delivery by mutual exchange of postal packets between persons subscribing to this service.”*

It should be noted that in order to publish these guidelines it was first necessary for ComReg to make regulations, under section 16(9) of the 2011 Act, specifying the services which An Post shall provide as the designated universal postal service provider. It was only after having set the scope of the universal postal service in this manner that ComReg could then move onto considering which postal services fall within the scope of the universal postal service.

Having regard to the provisions of section 37(1) of the 2011 Act, it is apparent that the central issue is one of substitutability of services. If a postal service matches the description of the universal postal service in section 16 of the 2011 Act and Regulations 16(9) then it is a postal service within the scope of the universal postal service, but even if it does not fully match that description then it may still be a the postal service within the scope of the universal postal service. If the service does not involve a clearance or delivery on every working day, or if it is not provided throughout the State, or if is not provided at an affordable price or at a uniform tariff, then it still maybe a postal service within the scope of the universal postal service.

Section 37(1)(c) of the 2011 Act makes it clear that the key determinant is an economic assessment of demand-side substitutability – i.e. whether a “*postal service user*” would view a particular postal service as being “*reasonably interchangeable*” with a service provided by An Post as part of its universal postal service. If the two services are “*reasonably interchangeable*” then it is proper to conclude that the postal service falls “*within the scope of the universal postal service*”. If the two services are not “*reasonably interchangeable*” then one may only conclude that the postal service does not fall “*within the scope of the universal postal service*”.

In determining whether the service is “*reasonably interchangeable*”, a postal service provider should consider whether his or her service is interchangeable for any of the “*universal postal services*” which An Post is required to provide. This can be done by comparing and directly assessing the characteristics and similarities of the respective services. In this respect, this may include consideration of the following characteristics and similarities:

- The postal service provider may consider the likely reaction of users of its service if it decided to increase the charges for that service. That is, considering if it increased its charge for its postal service by a small but non-transitory amount (in the range of 5 - 10 %) could its customers switch with relative ease to the universal postal service provided by An Post?
- The postal service provider may also involve consideration as to whether its service was not provided at all would its customers be able to use An Post's universal postal service to meet their needs.

For the avoidance of doubt, these guidelines are not a substitute for the 2011 Act and should be read in conjunction with the relevant legislation including the 2011 Act and the ComReg Regulations, made under section 16(9) of the 2011 Act. It is for each postal service provider to determine, having due consideration for these guidelines and other relevant evidence, whether any of their postal services fall “*within the scope of the universal postal service*” and therefore require notification to ComReg under section 38 of the 2011 Act. This document may be amended from time to time and is without prejudice to the legal position or the rights and duties of ComReg to regulate the market generally.