



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Postal Universal Service Provider Designation Procedures

Submissions to Consultation Document No. 19/25

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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**POSTAL UNIVERSAL SERVICE PROVIDER DESIGNATION
PROCEDURES**

Response to ComReg Consultation 19/25

COMREG DOCUMENT 19/25

**AN POST RESPONSE
18th April 2019**



EXECUTIVE SUMMARY

1. An Post submits the following views to ComReg's public consultation on the Review of the Universal Postal Service Specification (ComReg 19/25):
2. The universal postal service guarantees postal services of a specified quality at an affordable price for the benefit of all postal service users, irrespective of their geographic location.
3. ComReg is responsible for conducting reviews of, and making decisions on, the USP designation(s) for the State to ensure the provision of the universal postal services for the State.
4. In law, this is the first time ComReg has been required to review the USP designation, to consider whether a USP designation is required and whether it is appropriate to designate An Post or other postal service providers as USP(s) for all or part of the universal postal services in all or parts of the State.
5. Cognisant of the range of possible options for USP Designation, An Post's view is that for the reasons detailed in the following submission, ComReg should, at a minimum, following its review, designate An Post under Section 17(1) of the Communications Regulation (Postal Services) Act 2011.
6. Further, in our view, concluding a framework agreement with the designated USP for a fixed period of time and outlining the service requirements and USO expectations may be the optimal solution to ensure the continuity and sustainability of the USO in the medium term.
7. **SUMMARY OF AN POST'S VIEWS:**
 - a) The designation period should be a minimum of 7 years (as contemplated by the 2011 Act as an appropriate timeframe) to allow for both return on investment and sufficient time for meaningful innovation;
 - b) The assessment of whether or not there is a requirement for a USP designation should reflect the State's national and international obligations in respect of universal postal service provision and the requirement to develop social, cultural and commercial communications by the efficient operation of the universal postal services;
 - c) Step 1 procedures should ensure the following:
 - That the purpose and scope of any information gathering is clearly defined;
 - That the outcomes of Step 1 are made known to stakeholders;
 - That all required procedural principles are respected;
 - Given the range of options available to ComReg, that the Regulator clearly evidences the grounds for any particular choice of action;
 - d) Step 2 should ensure that the following primary concerns are addressed:
 - That the sustainability of the USO in its entirety is ensured and that strategic cherry picking of services is protected against as a matter of regulatory policy;
 - That the continuity and uniformity of the USO throughout the State is ensured through equal application of regulatory obligations to all service providers;
 - That the overall "solution" for USO provision fosters longer term commercial certainty, financing and planning for the USP as well as due regard to international standards and government obligations to guarantee a universal postal service.

Governing Legislative and Regulatory Framework

- An Post welcomes this opportunity to provide input into ComReg’s consultation on draft Postal USP Designation Procedures (the “**Draft Procedures**”).
- The EU Postal Directives¹ stipulate that basic postal user needs are met under a universal service obligation (“**USO**”) which sets minimum standards to be guaranteed by Member States.
- EU Postal Directives further stipulate that an undertaking is designated as a universal service provider (“**USP**”) to provide the universal postal service. By virtue of the USO and USP designation, EU member states ensure the continued full coverage and affordability of a wide range of postal services for the whole community.
- The EU Postal Directives are transposed into Irish law by the Communications Regulation (Postal Services) Act 2011 (the “**2011 Act**”), which sets minimum requirements for the universal postal service in Ireland. These basic requirements can only be changed with further legislation approved and enacted by government.
- ComReg may set the specification of the postal service in Ireland in accordance with Section 16(9) of the 2011 Act. The universal service obligation is designed to ensure that a prescribed minimum level of service and quality is provided at an affordable price for all users of the service.
- As the currently designated USP, An Post is uniquely positioned to ensure fulfilment of these obligations and related requirements.
- While An Post is entirely cognisant of the range of options available under the EU Postal Directives² in terms of USP designation, An Post would emphasise that it is also entirely within ComReg’s powers to provide for a mechanism permitting continuation of An Post’s USP designation at this juncture in accordance with Section 17 of the 2011 Act.
- Concluding a contract framework agreement with the designated USP for a fixed period of time and outlining the service requirements and USO expectations may be the optimal solution to ensure the continuity and sustainability of the USO.
- The purpose of our response is to provide comments on ComReg’s proposed Draft Procedures and in so doing, support our contention that provision of the universal postal service and the related matter of USP designation is a matter of such significance that:
 - any intervention in this regard must be subject to the most stringent assessment to ensure compliance with procedural and regulatory requirements in law;
 - such procedures must recognise that EU Member States are obliged to ensure the provision of the universal postal service and that the USO and USP designation are the means by which a nationwide range of postal services for all citizens and that match the specified requirements are achieved;
 - such designation procedures must take into account the important and special position of a universal postal service as an enabler of business and trade as well as being a service valued by and valuable to the general community.
 - It is imperative that the Draft Procedures provide a mechanism for USP designation which achieves these objectives.

¹ Directive 97/67/EC, as amended by Directive 2002/39/EC and Directive 2008/6/EC.

² Postal Directive “Universal Service” Article 4 and “Financing of the USO” Article 7.

- The Member States' obligation to ensure that the provision of the universal postal service is guaranteed,³ is reflected in ComReg's objectives for the postal services sector and as is set out in Section 12 of the Communications Regulation Act 2002 (the "**2002 Act**"). Section 12(1)(c)(i) of the 2002 Act provides that ComReg's objective is to promote the development of the postal sector *and in particular* (emphasis added), 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. While Section 12(1)(c)(iii) provides for the further objective of facilitation of competition and innovations in the market for postal services provision, but as set out in Section 12(1), this is *subject to* the objective of Section 12(1)(c)(i), i.e., to ensure provision of the universal service.
- An Post is cognisant of ComReg's wide powers to designate a USP under the EU Postal Directives⁴. But the Postal Directives also recognise that designation of any USP must take into account the important role that the post plays in social and territorial cohesion⁵.
- On this basis, by requiring the USO and USP designation, the European Commission has always prioritised ensuring the needs of users and the general importance of the postal sector for the economic, cultural and social development and cohesion of the EU when regulating the sector⁶.
- The requirements under the Postal Directives to set common quality standards, to publish such standards, as well as performance results, the tariff principles and the establishment of complaints procedures compliant with the EU Postal Directives are all examples that indicate the paramount importance of the designation of a USP and fulfilment of the Member States' obligations in this regard.
- In addition, notwithstanding the pressures on traditional mail services, the postal service plays an important role in facilitating trade and e-retail / e-commerce. The post is used by entities and businesses of all sizes to develop and action their business activities, to supply goods and to receive payment.
- It is used by government as well as by vulnerable members of the community alike.
- As signatory to the Universal Postal Convention, the Irish government is also subject to certain obligations in relation to the provision of nationwide postal services which must be fulfilled. This context cannot be ignored in drawing up procedures for the designation of a USP and to do so would be a failure to take all relevant matters into account. The Universal Postal Convention is an international treaty and contains rules which are inter-governmental in nature and which set out the fundamental provisions relating to the supply of the postal services concerned. The Beijing Congress inserted in the UPU Convention a new Article 1 obliging all UPU members to provide a universal postal service. Pursuant to this provision, all users or customers located within members of the UPU must have a right to benefit from quality basic postal service at all points in the territory at an affordable price. Furthermore, UPU members must ensure that the offers of postal services and quality standards will be achieved by operators responsible for providing the universal postal service⁷.
- Postal services are recognised as coming within the EU's 2012 framework for Services of General Economic Interest (the "**SGEI Framework**")⁸ denoting the importance of the sector to the EU and the community in general and the availability of EU compliant state funding in this regard.
- An Post would emphasise that within this overall national, EU and international legislative and policy context, the state obligations are both clear and extensive and An Post is unique in being in a position to fulfil these obligations and related requirements already.

³ Directive 97/67/EC as amended, Article 4, paragraph 1 and 2.

⁴ Postal Directive "*Universal Service*" Article 4 and "*Financing of the USO*" Article 7.

⁵ Directive 97/67/EC as amended, Article 4, paragraph 2.

⁶ In addition, postal services are included within the scope of the EU's 2012 framework for Services of General Economic Interest, Commission Notice No. 2012/C008/03/

⁷ Articles 1 to 3 of the UPU Convention.

⁸ Commission Notice No. 2012/C008/03/.

The remainder of our response is structured as follows:

Section 1 provides a short summary of the areas in which An Post believes the proposed USP Designation Procedures may be made more consistent with the relevant provisions of the 2002 Act and the 2011 Act.

Section 2 sets out An Post's response to the question raised in ComReg's consultation document, i.e.:

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

Section 2, Part 1 considers Step 1 and Section 2, Part 2 considers step 2.

Section 1

Summary of An Post comments on ComReg's Draft Procedures:

- a. The Draft Procedures must take in to account the overall context in which the procedures are to be applied, i.e., the State's obligation to ensure the USO under the EU Postal Directives and ComReg's objectives under the 2002 Act, which is to facilitate competition in the postal sector but *subject to* ensuring the provision of the universal postal service;
- b. While recognising the range of options available for USP designation under the EU Postal Directives⁹, the Draft Procedures appear to combine elements of all possible designation procedures and it is not clear on which grounds a mix of these could fairly and reasonably be applied; the possibility to continue the designation of An Post as a USP for the remaining period permitted under Section 17(1) should be clearly taken into account in any designation procedures and the grounds for not doing so before proceeding to a lengthy Step 2 exercise should be made clear;
- c. Due care must be taken to ensure that a Step 1 user need review under Section 19(2)(a) and information gathering in Step 2 observe the requirements contained in Section 19(2)(b), i.e. that the procedures must be:
 - efficient,
 - objective,
 - transparent,
 - non-discriminatory and
 - proportionate.

The Step 1 and Step 2 information gathering exercises, as well as any related requests for information made to postal service providers authorised by ComReg in accordance with Section 38 of the 2011 Act, must be proportionate, clearly defined and efficient in order to meet these procedural requirements;

- d. The proposed procedures may conflict with ComReg's own published RIA guidelines¹⁰ and the more general objective of limiting new and / or additional regulatory intervention unless necessary and required in the circumstances;
- e. The procedures do not appear to contemplate adequate safeguards for ensuring the integrity and sustainability of the universal postal service overall in the manner required under the 2011 Act and the EU Postal Directives. Article 7 of the Postal Services Directive clearly indicates that the provision of a universal postal service should not amount to a net cost and represent an unfair financial burden to the provider, and therefore account should be taken in the procedures of measures to ensure the financial sustainability of any designation to a provider. Additionally, the stated criteria and requirements must fully reflect all obligations imposed on the USP(s) in this regard, including in terms of quality, financial reporting, complaints procedures and otherwise, as is required in this legislative and policy context;
- f. The means by which parts of the review are proposed to be carried out may become unduly burdensome and inefficient. While it is noted that the legislation permits Section 13F requests to be made for the purposes of a Section 17 / or 18 review, unless caution is deployed, these requests may easily become disproportionate, discriminatory, non-transparent; as well as inefficient as to timing;

⁹ EU Postal Directives Article 7.1 – 7.4.

¹⁰ Guidelines on ComReg's Approach to Regulatory Impact Assessment, Doc. No. 07/56a, 10th August 2007.

- g. While it is recognised that ComReg fully intends to follow the USP Designation Procedures when conducting a review of and making USP designation decisions, it is nevertheless ComReg's position that it reserves the right to deviate from these procedures (once drawn up) should a different approach be warranted. To deviate in this way would likely be at odds with the stated procedural requirements of Section 19(2)(b) as well as other Irish law and/or EU requirements, unless grounds for any such deviation were clear, justifiable, and clearly ascertainable, which the Designation Procedures should reflect;
- h. The Draft Procedures make reference to a party's proposals for a "solution" for the USO. An Post submits that for the sake of business certainty, continuity, efficacy and the overall sustainability of the USO; concluding a contract with the designated USP for a period of years sufficiently long (in our opinion 7 years) to allow both for return on investment and innovation; and which outlines the service requirements and expectations for the USO would be the optimal solution.

Section 2

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

Section 2 – Part 1

Step 1 - Is there a requirement for a USP Designation?

- 1.1 Section 19 of the 2011 Act stipulates that review procedures must have regard to ComReg's functions and objectives and *in particular*, (emphasis added) ComReg's objective of ensuring the provision of a universal postal service and compliance with the requirements of Section 18. Thus ComReg's overall powers and discretion in this matter are clearly anchored by the universal service obligation; which in turn is an obligation falling on the government of the member state itself under the EU Postal Directive.
- 1.2 This is reinforced in Section 17(4) which stipulates that when giving or refusing consent to a proposal by ComReg to make a decision under subsection 2(a)(ii) or (b) (i.e. to designate one or more universal postal service providers, or make no designation at all); the Minister shall require to be satisfied whether or not ComReg's proposal ensures the provision of a universal postal service.
- 1.3 An Post would make the following remarks concerning the manner in which Step 1 may better reflect the national, EU and international context in which USP designation will be made :
 - Step 1 needs to adequately focus on the State's obligation to ensure the provision of the USO in its entirety as required at the time of review;
 - The purpose and scope of Step 1 should be clear from the Draft Procedures;
 - Step 1 should identify the grounds on which fresh regulatory intervention in the USO / USP designation may (or may not) be required;
 - The outcomes / potential outcomes of Step 1 should be made clear.
- 1.4 Step 1 should take account of all procedural requirements explicitly contained in Section 19 and in the EU Postal Directive and which are otherwise required to be applied as a matter of Irish and EU law; including in terms of any information gathering exercises.
- 1.5 As stated above, while Section 12(1)(c)(iii) of the 2011 Act provides for the ComReg objective of facilitation of competition and innovation in the market for postal services provision, this objective is statutorily prescribed as being *subject to* the objective in Section 12(1)(c)(i), i.e., to ensure provision of the universal service.

The Purpose of Step 1

- 1.6 It is indirectly acknowledged in the Draft Procedures that the purpose of the information gathering exercise is to ascertain whether any services would not be provided without a USP designation (at A1.21). However the Draft Procedures do not indicate how this is to be measured or which factors will be taken into account in this assessment.
- 1.7 The reviewing of the profitability of one service alone as an indicator of whether it should be provided without USP designation is not sufficient, in the view of An Post, to make such a determination. The USO and designation of a USP must ensure that the overall "safety net" of

the USO scope as set out in Section 16 of the 2011 Act and international conventions and standards are met. The overall USO may be destabilised by focus on one service alone. A USP

must be allowed to generate sufficient revenue over its whole range of services to ensure a financially sustainable universal service overall. Adequate preparedness and ability to provide the universal postal service, the ability to meet all USP statutory requirements, on-going potential synergies and efficiencies as well as ability to invest or access funds, must also be relevant to ensuring the State's fulfilment of USO guarantees under national, EU and international legal obligations.

- 1.8 An Post would further submit that the proposed Step 1 review may reveal that there are certain segments of the market in which other operators chose to be active and that a variation in the USP designation should only occur where the market and/or other regulatory tools do not provide sufficient protection to consumers or the required guarantee of a universal service.
- 1.9 The emergence of increasing competition in the market in certain segments together with the regulatory requirements may provide sufficient protection for customers.
- 1.10 The regulatory oversight to which An Post is subject helps to ensure that safeguards exist for the provision of a universal postal service to all customers. Such safeguards include *inter alia* tariff requirements including uniform tariff, obliging An Post to charge the same price to customers countrywide (whether they live in densely populated urban areas or remote rural areas) and financial reporting requirements to enable ComReg to review compliance with such tariff requirements.
- 1.11 In summary, in the interests of regulatory certainty as well as fulfilling the member state guarantee to ensure the provision of the universal service, An Post submits that the purpose and scope of the Step 1 information gathering step (A 1.18) should be clearly defined in the Draft Procedures and in any event, in advance of commencing the "information gathering" exercise and making requests to affected parties.
- 1.12 In keeping with ComReg's more general obligations under the 2011 Act, as well as its stated RIA guidelines, it is submitted that ComReg should also consider the extent to which regulatory change may not actually be required or justified at all in these procedures. As such we do not believe that the Draft Procedures sufficiently or clearly contemplate the basis on which the Step 1 review will be carried out, nor how additional regulatory invention after completion of Step 1 may or may not be justified.

The Step 1 Information gathering exercise - procedural requirements

- 1.13 Section 19 stipulates that pursuant to Section 19(2)(b), a review for the purposes of Section 17 or 18 must also be:
 - efficient
 - objective
 - transparent,
 - non-discriminatory and
 - proportional.

ComReg therefore has an obligation to ensure that the Draft Procedures, including the information gathering steps, comply with each of these principles.

- 1.14 As stated above, the purpose of the information gathering exercise is to ascertain whether any services would not be provided without a USP designation (at A1.21). The information gathering must therefore be reasonable, measured, and clearly linked to this purpose. Otherwise, the information gathering step would not be transparent, objective or proportionate as required by Section 19 of the 2011 Act.
- 1.15 As such, in relation to the proposed Step 1 exercise, An Post submits that the Draft Procedures should:
- make clear (i) the purpose of the Step 1 exercise i.e., such purpose being to ascertain whether a universal postal service would not be provided without a USP designation and (ii) the bases on which such assessment will be carried;
 - reflect ComReg’s obligation to ensure the integrity of the universal postal service (as required to be provided at the time of review and in accordance with applicable international standards and norms) and that it is provided in its entirety;
 - clearly indicate the nature and extent of information that ComReg will require to satisfy itself as to this purpose;
 - set clear and reasonable time lines for replies and completion.
- 1.16 The position (as expressed at A 1.14), that postal service providers would be required to provide “*detailed information on their existing postal products and services*” should be clarified further to avoid disproportionality in its implementation. Information can effectively change or become obsolete very quickly and the process may be easily frustrated as a result.
- 1.17 Clear and clearly ascertainable classes of information or data (as well as the extent of such data, including any required support or back up documentation/data which can be assessed by ComReg without the need for multiple follow up queries and requests) should be worked out by ComReg in advance and contained in the Draft Procedures so that the parameters are clear and the process is transparent and efficient. Whether any further information is even required from the currently designated USP or other postal providers may be questionable given the volume of information already available to ComReg through reporting obligations on the USP and notification obligations on other providers.
- 1.18 As a separate but related matter, reliance on Section 13F requests under the 2002 Act as stated (at A 1.14), should be implemented with extreme caution for the reasons set out below:
- If ComReg’s objective in its Step 1 “information gathering” exercise is clearly defined as to purpose, it may actually have limited need to resort to this measure given the information available on postal services being provided to it under several legislative provisions, including USP financial reporting as well as under Section 38 USO notifications under the 2011 Act for non USP service providers¹¹;
 - Use of such requests is unlikely to be “efficient” as required by Section 19(2)(b). Unlike in other regulatory areas, Section 13F requests under the 2002 Act have no definitive cut off point or deadline for completion of ComReg’s review and assessment of 13F replies;
 - The serious consequences of such requests and the risk of criminal prosecution are such that unless 13F requests are applied with extreme caution and recognising the differing

¹¹ There is extensive information available to ComReg as part of ComReg’s authorisation process (<https://www.comreg.ie/industry/postal-regulation/authorised-postal-providers/authorised-postal-providers-register/>).

activities and obligations of different postal service providers, their use may result in a potentially biased or discriminatory approach;

- Given that any responses to such 13F requests are highly likely to be provided on a confidential basis, it is not clear how it can be ensured that any feedback received would be treated in a manner that ensures the requirements for transparency, non-discrimination and objectiveness are met. It may also be open to respondents that are not (yet) subject to the full rigours of a USP designation to reply in a strategic or tactical manner.

Completing Step 1 / Proceeding to Step 2

- 1.19 The steps that ComReg proposes to take at the end of Step 1 should be more clearly prescribed, in the interests of regulatory certainty, as well as fulfilling the member state guarantee to ensure the provision of the universal service, the grounds for taking a particular course of action at the end of Step 1 should be clearly established in advance, whether in the Draft Procedures or elsewhere.
- 1.20 The Draft Procedures state (at A 1.22 - 1.23) that following Step 1, ComReg may proceed directly to Step 2 to assess which postal service provider(s) should be designated as USP(s), or in the alternative, conclude that no USP designation is required. The Draft Procedures refer to providing reasons for proceeding with a decision under 17(2)(b) (i.e. no USP designation) but do not provide for giving reasons to proceed directly to Step 2 (A 1.22).
- 1.21 In addition, An Post submits that reasons must also be given for any decision by ComReg not to exercise its powers to make a continued designation under Section 17(2)(a)(i) at the end of Step 1. This would clearly be a decision which would impact the interests of An Post. Failing to make the outcome of Step 1 known without the opportunity for affected parties to comment would potentially be a failure by ComReg to take all relevant information into account¹². Furthermore, it may not be in keeping with the required principle of efficiency to proceed automatically to a Step 2 review (A 1.22) where a justifiable outcome may be obtained by other means.
- 1.22 The Draft Procedures refer (at A 1.23 - 1.25) to a possible consultation and draft decision in respect of no USP designation. The criteria by which ComReg may determine that a USP designation is not required should be clear and articulated in the Draft Procedures and take into account both ComReg's obligations to postal users under the 2002 Act as well as the government's obligations under the EU Postal Directives and international treaties.

Section 2 – Part 2

Step 2 – Which Postal Service Provider(s) should be designated as USP(s)?

- 2.1 It is understood that the purpose of Step 2 is to outline procedures for the continued designation of An Post and / or the selection / designation of a future USP or USPs.

An Post submits that the Draft Procedures may be made more consistent with the national and international legal and policy requirements in the area by more fully addressing the following:

- Clarifying the grounds for proceeding to a Step 2 process at all as well as for Step 2 decision generally, thus ensuring good regulatory practice and procedural fairness.;

¹² The Irish Supreme Court has recently articulated (in *Dellway Investments Limited and Others v NAMA*, Case 396/2010; judgement delivered 12th April 2011) the fundamental importance of allowing an affected party to be heard in relation to any decision that may interfere with its rights. The Court articulated that the purpose of the rule is that the addressee of any decision significantly affecting their interests must be placed in a position to submit observations before that decision is adopted, and that this is to enable the competent authority to take into account all relevant information.

- Seeking adherence to all regulatory requirements applicable to a USP and ensuring that information is sought on that basis and in light of anticipated compliance with such requirements;
- Ensuring that international postal norms and standards are not ignored;
- Seeking to ensure the sustainability of the USO overall and effectively encourage modernisation and innovation while USO principles are observed.

2.2 It is not clear that the continued designation of An Post is contemplated (A 1.26) and for the reasons stated above, including in connection with ComReg’s own stated RIA guidelines, the grounds on which ComReg may choose not to proceed under Section 17(a)(i)(i.e. continuation of designation of An Post), or on what grounds it may proceed to designate more than one USP, should be clarified in the Draft Procedures.

2.3 The grounds on which ComReg would consider exercising such a power and/or the selection criteria that may or may not be applied should be made clear in the Draft Procedures. Such a course of action may not otherwise be compliant with principles of procedural fairness and non-discrimination as already stated above, nor with rules of public procurement, if applicable to any given selection or designation process. ComReg must also be cognisant of the effect of objections, legally-based or otherwise, from non-applicant parties to designation as a USP which has not expressed any interest in designation. The reference to ComReg holding discussions (at A 1.27) without any stated parameters also raises concerns where ComReg may not have made the results of its Step 1 review available.

Designation of more than one USP

2.4 The Draft Procedures provide (at A 1.33) for designation of more than one USP with the consent of the Minister.

2.5 Notwithstanding that the Postal Directive (as amended) refers to the designation of one or more undertakings to ensure that the whole of a territory is serviced, member states are also obliged to take measures to ensure that conditions under which universal services are entrusted are based on the principles of:

- transparency,
- non-discrimination and
- proportionality,

thereby guaranteeing the provision of the universal service (*Article 4(2)*).

As stated above, the grounds and criteria for such a decision must be clear and clearly ascertainable.

2.6 ComReg is also referred to legislation in the UK where the matter is in fact put on a clear and certain statutory basis. There are only 2 circumstances in which a second USP may be designated (the UK’s Postal Services Act 2011, Section 35), i.e., (i) where the net cost of providing the USO has been determined to be an unfair burden on the USP and (ii) where the designated USP is effectively being wound up.

- 2.7 It is acknowledged that ComReg is permitted under the 2011 Act¹³ to designate a USP in respect of one part of the USO only (A 1.29), or in different regions¹⁴. In a market where traditional mail volumes are falling, it is important that a universal postal services provider is afforded the necessary flexibility to enable it to generate sufficient revenue over its whole range of services to ensure a financially sustainable universal service overall, which in itself, is one of ComReg's main objectives and part of a member state's obligation.
- 2.8 Article 4(2) of the Postal Services Directive requires Member States to take specific measures to guarantee the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion. In that regard, special consideration should be given in any designation procedures to the effect that the delivery of the USO by two or more separate providers may have on the continuity of service and social and territorial cohesion, including its effect on business certainty and efficacy.

It should be borne in mind that the practice of designating a single USP has generally been followed in other EU member states¹⁵.

- 2.9 An Post reiterates the position already stated above that certain product segments and/or geographic regions of the market in which other operators may choose to be active are developing rapidly and that designation of another USP (or part designation) should only occur where the market and other regulatory tools do not provide sufficient protection to consumers or the required guarantee of a universal service can no longer be fulfilled.

ComReg is referred to **Annex A** to this response setting out the USPs in other EU member states.

- 2.10 The countries with more than one USP are a minority and reflect very specific conditions. For example, there is more than one designated operator in Bosnia-Herzegovina to service all ethnic communities. In addition, An Post would point out that in the interest of ensuring social cohesion, Finland has implemented authorisation requirements to ensure that an operator may be authorised only for an area which must be *uniform in administrative and operational terms*¹⁶. Such an approach avoids "cream skimming"; which in itself would have a discriminatory effect on an already designated USP. It is submitted that such selectivity would do nothing to foster investment, innovation or efficiency in the universal postal service overall in the long run.

Step 2 – A Information Gathering

- 2.11 Step 2 procedures allow for extensive information requests and data collating. The same comments made for Step 1 in relation to efficiency and proportionality also apply to Step 2. ComReg again refers (at A 1.29 and 1.30) to the use of Section 13F requests. The same comments as are made on Step 1 above apply.
- 2.12 In the interests of ensuring that the overarching purpose that the USP designation procedures fulfil the state's obligations in respect of the universal postal service in general, the intended application of key regulatory requirements to USPs under the 2011 Act should be made clear in the Draft Procedures. Failure to make this matter clear may affect the nature or extent of information provided.

¹³ Section 18(3) of the 2011 Act.

¹⁴ Also permitted under Section 18(3).

¹⁵ See Commission Staff Working Document – Report to EU Parliament and Council on application of the Directive of 17 November 2015 which contains the following in the conclusions on page 77: ".....All Member States except Germany continue to formally designate the universal service provider, instead of using one of the other mechanisms provided by the Directive.....".

¹⁶ See for example, Study by WIK on "Main Developments in the Postal Sector (2010-2013)" at page 38.

- 2.13 All USPs should be subject to the same statutory requirements under the 2011 Act as provided for in that legislation. It may be discriminatory if different obligations were to apply. Failure to do so may in practice impede a designated USP from properly fulfilling its own USO obligations on a practical, day to day basis.
- 2.14 In addition, assessing matters such as cost-efficiency, financial stability, pricing etc. across one product segment or region only as opposed to the full USO range of services is potentially misleading, incomplete and discriminatory unless some additional safeguards are built into the assessment criteria. The assessment and related criteria must take in to account the full scope of Section 16 of the 2011 Act, the effective safety net that Section 16 and Section 21 provide in terms of universal postal service provision and the state's obligations in this regard.
- 2.15 As already stated above, preservation of the current USP designation and USO scope does not of itself prevent competition in the market or new market entrants.

Step 2 Information requirements

- 2.16 The Draft Procedures provide (at A 1.28) that all postal service providers interested in seeking USP designation should submit details of their proposed solution, including details of "at least" the matters set out below. An Post agrees that extensive information may be required to assess a potential USP's capabilities and compliance with regulatory obligations under the 2011 Act. However, in order to be transparent, the Draft Procedures will need to clarify the categories of information to be provided in the designation procedures.
- 2.17 While the Draft Procedures make reference to time periods for designation, they do not make explicit reference to the manner in which the USP's proposed "solution" will ultimately be documented (A 1.27).
- 2.18 An Post submits that for the sake of business certainty, continuity and efficacy; concluding a contract for a period of at least 7 years with the designated USP for a sufficiently long period of time and which outlines the service requirements and expectations for the USO would be the optimal solution.
- 2.19 Such a contract or framework agreement would facilitate fulfilment of the member state guarantee to provide the USO by:
- reflecting the outcome of previous relevant consultations to reflect the USO requirements of the time;
 - create certainty in terms of both of USP and regulator planning and expectations and thus preserve the integrity and equilibrium of the USO;
 - foster long term planning for improvements and efficiencies in general;
 - as a result of the foregoing, address the objective of achieving a reasonable return on investment.

2.20 Information requirements – Section A 1.28 of the Draft Procedures

Products and Services

Details of any USO products or services provided or to be provided should follow the descriptions and requirements of the applicable legislation in this regard.¹⁷ Unless the extent of any permitted variations are made clear in the Draft Procedures, the approach will not allow for a transparent and non-discriminatory assessment and consideration of all relevant information.

Postal network and resources

The reference to a postal service provider's postal network and resources requires caution. There is currently a vague reference in the Draft Procedures (at page 19) to inter-operator arrangements.

Unless there are clear obligations for all operators to meet the same standards and norms, the business and activities of a designated USP may be impeded in practice.

Where access to An Post logistics or network may be potentially required, this should be made clear as well as any proposals and/or obligations on An Post for same. This may also be a matter requiring a separate decision and right to make representations. Any applicable UPU requirements or other international standards or norms regarding interoperability must also be factored in.

Encouraging harmonisation of technical standards to enable interoperability of postal industry stakeholders while taking user needs into account, as well as a co-ordinated approach to international postal traffic, are also features of the Postal Directives which result in member state obligations. The EU Postal Directives confirm the mechanism by which technical harmonisation in the postal sector is to be encouraged (i.e., CEN activities (https://ec.europa.eu/growth/sectors/postal-services/standardisation_en)).

Since 1993, the European Commission has promoted and supported the process of technical standardisation in the postal sector by CEN. The Postal Directive recognises the role standardisation can play in benefitting postal customers, and the EU recognises the European Committee for Standardisation (CEN), one of three European Standardisation Organisations, as being responsible for developing and defining voluntary standards at European level, including for postal services. There is a dedicated CEN Technical Committee (TC/331) working on this. It takes into account measures adopted at international level, and in particular those decided upon within the Universal Postal Union (UPU). UPU and CEN signed a Memorandum of Understanding in 2001 to strengthen information exchange and cooperation.

These efforts and objectives cannot be disregarded.

By way of example in this regard, reference to operators demonstrating how geographic locations will be determined (also page 19) is not a legally accurate approach and is not consistent with the State's obligations under the UPU Conventions.

Case law¹⁸ subsequent to the introduction of the 2011 Act has made clear that delivery to postal addresses rather than geographic or other addresses is the correct approach. The High Court decision in this regard flowed in part from a recognition of the efforts in the area by the European Committee for Standardisation (CEN) and the applicable CEN standard EN14142-1:2001; and that the concept of "postal address", as opposed to geographic or other address, is a distinct concept acknowledged by the EU, the UPU, CEN and NSAI.

¹⁷ Section 16 of the 2011 Act and SI 280/2012, as amended.

¹⁸ *An Post v The Commission for Regulation* 2012/106 JR, Judgement of Mr. Justice Hedigan of 4th October 2012.

Cost efficiencies

This request appears to require visibility of processes to be relied on to achieve efficiency on an on-going basis. It is submitted that a discriminatory approach must be avoided in such information requests. There are no benchmarks for cost efficiency or specific cost efficiency expectations prescribed in the 2011 Act. The 2011 Act is also silent as to what level of efficiency gain would be considered appropriate for the industry. As such, any respondent references to unrelated or irrelevant cost efficiency methodologies should be avoided and a reasonably analogous market benchmark should be considered rather than potentially unrealistic or overly optimistic results.

Any planned improvements or updates by a current USP should also be taken into account given the importance of the postal service industry generally, as recognised by the SGEI Framework.

Any data or information as to cost efficiencies can only be made available as confidential and commercially sensitive information.

In contrast to the above matters of *Postal Network and Resource* and *Cost efficiencies*, the information categories (in A 1.28) in relation to:

- *Price, Quality of Service , Confidentiality and Security of USO, Annual Projected costing and Financial Standing*

make no provision as to *how* such matters are required to be demonstrated.

All USPs should be subject to the rigour of the same regulatory requirements under the 2011 Act. The procedures should therefore contain requirements to demonstrate how all of these statutory obligations will be met and assessed.

It would be open to other potential USPs to respond in a strategic manner unless also obliged to demonstrate *how* they intend to achieve the objectives stated in the 2011 Act.

Financial Standing

In relation to *Financial Standing*, the reference to financial stability is overly vague as a concept and may undermine ComReg's / the state's obligations vis-à-vis the universal service guarantee unless some criteria for demonstrating this at the outset and on an ongoing basis are also indicated and included.

The Draft Procedures are also silent on what financial reporting requirements would be required in order to enable ComReg to monitor such required financial standing on a continual basis given the obligation to ensure continuity of the USO and whether the current obligations applied to An Post will be applied to all other USPs, if any designated. These should also refer to any decisions published by ComReg in this regard such as the Accounting Direction of 2017.

In addition, the ability of an undertaking to actually carry out such non-standard reporting as is required of An Post should not be taken for granted. The Step 2 requirements should also address the application of these on-going obligations.

Finally, the ability of an existing or incumbent USP to effectively step in and take up provision of one element of the USO where a partial designation fails or cannot continue for financial reasons should also be taken into account.

Draft terms and Conditions

The terms on which the USO may be provided by another USPs are insufficiently clear and do not reflect ComReg's requirements for review, approval and publication as set out in the 2011 Act.

In addition, the Draft Procedures make no reference to applicable customer complaint procedures which are another element of consumer protection required by the USO.

Step 2 C - ComReg Decision

2.21 As stated, requirements under the EU Postal Directives must be respected in this process.

Notwithstanding that the Postal Directive (as amended) refers to the designation of one or more undertakings to ensure that the whole of a territory is serviced, member states are also obliged to take measures to ensure that conditions under which universal services are entrusted are based on the principles of:

- transparency,
- non-discrimination and
- proportionality,

and the need to ensure provision of the USO.

2.22 The approach proposed in these draft Designation Procedures should be amended to better incorporate the above principles. Moreover, the grounds and criteria on which ComReg's decision will be based are not sufficiently clear and may be unbalanced unless the same obligations and requirements are applied to all USPs and are accordingly factored into the assessment criteria.

CONCLUSION

In conclusion, as a general matter, the Draft Procedures must adequately reflect ComReg's own obligations under Sections 17 – 19 of the 2011 Act and as well those of the State under EU Postal Directives to:

- ensure the State's obligation to guarantee the provision of the USO and the related consumer protection on a nationwide basis in this regard;
- to ensure that the procedures drawn up are efficient and proportionate while also respecting the rights of affected parties;
- to ensure all legal principles both under Irish and EU law are respected in ComReg's decision making processes and that the basis of ComReg's decision making is clear;
- to limit regulatory intervention to the extent actually required in the circumstances.

An Post would favour additional safeguards to ensure the above matters and more specifically, to address the following:

- clear and meaningful parameters are set in advance in respect of any information gathering exercises so that that any information gathering steps do not require extensive resources to be redirected from day to day business operations;
- that an excessively far-reaching and/or robust regulatory intervention does not occur where other regulatory or market tools may be available and will suffice to ensure that ComReg's objectives are met;
- that the grounds for pursuing any course of action are made clear and fully take into account the legal and policy context;
- that any assessment criteria fully reflect all applicable USO/USP regulatory requirements so that a potentially discriminatory "cherry picking" approach cannot arise;
- that the quality, tariff, reporting and other obligations are applied to all operators (or potential operators) such that the essence and nature of the USO under Irish, EU and international provisions is achieved;
- that any interoperability of service providers is given due consideration in the context of such regulatory requirements, as well as applicable international standards.

Annex A

“National universal service provider” extracted from “Main Developments in the Postal Sector (2010-2013) - A Study for the European Commission” by WIK Consult, page 16.



WIK Report - Table
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