



Commission for
Communications Regulation

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

Submissions to Consultation 12/82

Submissions to Consultation

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An Coimisiún um Rialáil Cumarsáide

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Submissions Received from Respondents

Consultation:	12/82
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1: An Post

Consultation and draft procedures

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

COMREG DOCUMENT 12/82

**An Post Response
27 August 2012**



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1. Introductory Statement

An Post welcomes the opportunity through this Consultation to contribute its views on dispute procedures for access by a postal service provider to the postal network of a universal service provider which ComReg is minded to establish and maintain as required by Section 33 of the Communications Regulation (Postal Services) Act 2011 ('the Act').

An Post is committed to meeting its obligations set out in the Act including entering into negotiations with postal service providers with a view to concluding an agreement with that provider to access the postal network of An Post. Any request for access must, however, be on sound commercial terms and in a manner which does not undermine the provision of the Universal Service. ComReg expresses the wish not to see access unreasonably withheld and this is a view with which An Post fully concurs. As a consequence it fully shares ComReg's belief and expectation that the procedures to resolve disputes will be used only sparingly in practice.

2. Industry context

The Industry context has been set out by An Post in its response to ComReg's recent Consultation on the Postal Regulatory Framework (ComReg 12/81s). The key point is that the postal industry and An Post face many challenges and as a result, access to the postal network of An Post must be provided only on sound commercial terms.

3. Response to Consultation Question

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

An Post's response to the Consultation question covers the following areas:

- Comments on the draft procedures as set out by ComReg;
- Additional procedures proposed by An Post;
- Costs arising from these procedures.

Each of these areas is dealt with below.

ComReg's draft procedures as set out:

ComReg has set out a useful flowchart in paragraph 22 of its Consultation document demonstrating the steps necessary before ComReg is required to intervene in a dispute. In the event that ComReg is required to intervene, ComReg sets out in paragraphs 40-45 the information that will be required by ComReg in order to allow it make a decision in the dispute. Again this is a critical part of the process and must be set out as prescribed by ComReg. An Post has only a couple of comments in relation to the draft procedures as set out:

- An Post is of the opinion that ComReg should set out the notification process which will be undertaken throughout the process. For example, under the "Optional Preliminary Stage" a postal service provider is required to provide details such as the type and number of packets proposed, geographical profile, what part of the network would be involved and the duration. Following submission of these details by a postal service provider to ComReg, these details should be notified by ComReg to An Post in order to ensure that they reflect the actual negotiations that have occurred already (if any). This step would provide certainty as to what is at issue in the dispute.

- ComReg should elaborate on the terms “trivial or vexatious” and “reasonable steps to reach an agreement” stated in Section 33(4) of the Act. ComReg should provide guidance on how it envisages these terms will be interpreted.
- An Post also points out that under Section 33(8)(g) of the Act that ComReg is obliged to take into account the capital investment expenditure of the universal service provider alone and not also that of the postal service provider as stated in paragraph 40.9 of the Consultation document.

An Post’s proposed additional procedures:

ComReg’s draft procedures do not set out how a decision will actually be made. An Post is of the opinion that these next steps in the process are critical and should also be set out in detail in its procedures. This step in the dispute resolution process needs to be absolutely transparent by being set out in advance so all parties are assured of an objective, evidence based outcome. The criteria which ComReg is obliged to take into account in reaching a decision under Section 33(8) should, therefore, be appropriately weighted. Specific attention should be afforded to sub paragraph (c) which requires an evaluation of *“the need to ensure and maintain the efficient provision of the universal postal service”*. It should be recalled that Section 10 (a) of the 2011 Act amends ComReg’s statutory objectives to prioritise the availability of a universal postal service to all.

The statutory objectives are set out as:

“(c) in relation to the provision of postal services-

- (i) to promote the development of the postal sector and, in particular, the availability of the 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 paragraph (i), to facilitate the development of competition and innovation in the market for postal service provision.” (emphasis added)

A formal notification of the outcome should also be included in the procedures which require ComReg to set out in detail the reasons behind any decision made and its assessment under each of the criteria listed in Section 33(8) of the Act. Any conclusion arrived at should be evidenced based and not subjective in character. Any determination by ComReg should be for a fixed period of time or subject to periodic review.

An Post is also of the opinion that the procedures should set out the appropriate appeals process that is available to either side following a decision being made by ComReg. This is set out in Section 52 of the Act but for completeness should be included in the final procedures. An Post will utilise the appeals process set out in Section 52 of the Act if it believes that any decision is likely to undermine the Universal Service.

Costs:

ComReg note in the consultation that costs may be involved in resolving disputes, for example, at paragraph 42 of the Consultation document, ComReg state that “ComReg may seek the expert assistance of an independent advisor”. In relation to any additional costs incurred by ComReg in conducting these procedures, ComReg should also set out how these costs are to be split. In ComReg’s Decision document on the Postal Regulatory Framework¹, ComReg stated in relation to Network Access that “it should be noted that it is not a feature of the universal postal service described in section 16 of the 2011 Act”. Therefore, as these costs are not related to Universal Postal Services, they should not be included as part of the levy. An Post believes that the costs should be borne between the two parties involved in the dispute. However where it is discovered that the complaint is trivial or vexatious the postal provider requesting ComReg’s intervention should bear all the relevant costs. For example, Ofcom is empowered to levy payments under Section 190 of the Communications Act 2003 in the UK where a party has made such a claim.

Therefore, in order to ensure that ComReg is only requested to intervene in genuine cases of dispute, a system based on the payment of a deposit or a set fee should suffice in the majority of cases:

¹ D08/12 (ComReg document 12/81), Paragraph 4.35

Deposit: ComReg should discourage postal service providers from making trivial requests for intervention or unfounded allegations in support of their case. Therefore, there should be some mechanism whereby a provider who seeks ComReg's intervention on what are considered trivial grounds or has made an unfounded allegation forfeits the deposit.

Fee: Alternatively, a fee structure modelled on that of An Bord Pleanála could be considered (Guide to Fees payable to An Bord Pleanála - <http://www.pleanala.ie/>).

Summary of Full Procedures as envisaged by An Post:

An Post sees the process as encompassing the following steps:

Optional Preliminary Step and Steps 1-4: – as set out by ComReg and subject to An Post's comments above.

Step 5: - Decision process, specifying how ComReg will actually decide, how it will weight the various factors through the awarding of points. Whatever formula is chosen ComReg's duty to protect the universal service under Section 10 of the Act must remain paramount.

Step 6: – Notification of outcome by ComReg and split of costs.

Step 7: – Appeals process (under Section 52 of the Act). For completeness, the right to appeal should be set out in the formal procedures.

4. Conclusion

An Post expects that the dispute resolution mechanism will discourage the submission of cases which are patently unwarranted or unjustified. As the designated universal service provider under Section 17 of the Act, An Post does not want to be deflected from its statutory duties by onerous conditions attached to local access arrangements. Any such arrangements must be on a commercial basis. If ComReg is required to resolve a dispute, the basis for making its decision should be outlined in a formal notification to the parties involved. ComReg's statutory objective to prioritise the availability of the universal service over the promotion of competition should be reflected in the procedures maintained by it.

A key factor determining the success of the procedures will be a fair and equitable system for costs which An Post expects ComReg to establish.

2: Nightline

Response by Nightline to ComReg Consultation 12/82 - Consultation and draft procedures: Dispute procedures for access by a postal service provider to the postal network of a universal postal service provider

1. Introduction

1.1 General background

Nightline welcomes ComReg's Consultation on dispute procedures relating to access by postal service providers such as Nightline to the postal network of "a universal postal service provider" - in the present case, the postal network of An Post.

As emphasised in our submission to ComReg Consultation 12/38, Nightline believes that **the provision of Downstream Access (DSA) for other postal service providers to the network of An Post, on fair terms and in a timely manner, is the single most important issue to be resolved by ComReg and other stakeholders in the creation of a healthy, competitive postal sector in Ireland.** For this reason we maintain that it is vital to put clear and unambiguous procedures in place around how DSA is sought and achieved.

We note that that ComReg is confident that the principle of mutual, voluntary agreement will prevail between An Post and access seekers; ComReg has stated explicitly that it does not expect the procedures under discussion in the present consultation to be frequently invoked:

ComReg considers that it is in the interest of both the postal service provider concerned and the designated universal postal service provider to reach a mutually acceptable agreement concerning access to the postal network, rather than to have an agreement imposed upon them. All parties engaged in a negotiation process under section 33 of the 2011 Act will of course have to be cognisant at all times of their legal obligations under Irish and EU competition law (as applicable). ComReg does not expect that access to a universal postal service provider's postal network will be unreasonably withheld. ComReg envisages that these procedures to resolve disputes will be only used as a last resort. Nevertheless ComReg appreciates that postal service providers might wish to have, at an early date, an understanding of what procedures are envisaged¹.

Nightline shares ComReg's expectation that an efficient and equitable DSA mechanism will be proposed and implemented by An Post in a timely fashion. However, the technical and commercial terms of DSA – in particular the pricing points proposed by An Post – are so critical to Nightline's business planning process and investment planning decisions over the short-term and medium term, that we need to ensure that the envisaged dispute process is sufficiently robust and fit for purpose, in the event that commercial agreement between ourselves and An Post does not prove to be attainable, or, if attained, does not turn out to be implemented within an acceptable commercial timeframe.

For this reason Nightline believes that the present dispute procedures should be designed so as to require ComReg to intervene speedily where access negotiations are not making sufficient progress from the perspective of the access seeker. In particular it is crucial for Nightline that there is clear agreement as to **what objective criteria ComReg will apply** in deciding the following issues:

- a) Whether a particular dispute over access merits ComReg's intervention in the first place
- b) How a particular dispute is to be adjudicated and resolved, once ComReg's intervention has been sought and achieved.

1.2 Rationale for Downstream Access as part of postal regulatory framework in Ireland

By way of introduction to our comments on the draft procedures provided by ComReg, Nightline reiterates our belief that an equitable and efficient DSA mechanism is required in order to create the

¹ ComReg 12/82 paragraph 2 (section 1.1). ComReg's expectation that the procedures are likely to be used only sparingly is mentioned also in paragraph 19 (section 3.1) and paragraph 23 (section 4.1)

necessary distinction in Ireland's postal sector between the 'wholesale' market on the one hand and the 'retail' market on the other – a distinction which must be created and maintained in order for our sector to prosper and grow. Given the positive outcomes for end-users and service providers alike which have been achieved in the energy and telecommunications sectors by creating and maintaining a similar distinction between 'wholesale' and 'retail', we argue that such an approach is vital for the postal sector also.

It is our belief that a clear wholesale/retail distinction in postal services will result in multiple benefits to all stakeholders within the sector.

At the retail level it will:

- Stimulate commercial flexibility and service innovation by service providers across the board
- Provide greater value-for-money to postal users, both business and residential, as postal service providers compete more widely on service and on price.

At the wholesale level it will:

- Facilitate operational efficiencies by consolidating mail presentation, in agreed formats. This can be timed to optimise scheduling
- Allow An Post to achieve similar network efficiencies to those achieved by Royal Mail whereby competitive forces have stimulated commercial and operational innovation and contributed significantly to the turnaround in the financial fortunes of that organisation.

At all levels, it will:

- **Grow mail volumes** across the market as a whole: as service providers make use of the DSA product, business customers will respond by increased use of the mail channel.
- **Increase the competitiveness of the Irish economy overall**, as retail prices fall for a key input – postal services to businesses. Competitiveness is a key macroeconomic goal set by successive governments. The most recent scorecard published by the National Competitiveness Council in July 2012 states that:

“[Ireland's] Costs competitiveness has improved but further cost reductions are required... It is important that policymakers continue to focus on taking the necessary actions to reduce enterprise and consumer costs. In this regard the focus on maximising competition and removing barriers to competition in sheltered sectors is paramount.”²

We recall again ComReg's statutory duty under the Act to promote competition in the postal sector:

- Section 10 a) of the Act requires ComReg “...to **facilitate the development of competition** and innovation in the market for postal service provision” *[emphasis ours]*, and
- Section 10 b) of the Act requires ComReg “...in so far as **the facilitation of competition** and innovation is concerned, [to] **ensur[e] that postal service users derive maximum benefit in terms of choice**, price and quality” *[emphasis ours]*

We also note that Section 34 (3) of the Act stipulates that:

- “The Commission [ComReg] may give a direction under subsection (2) [of the Main Act] where it considers that it is necessary for either or both of the following purposes:
 - (a) to protect the interests of postal service users;
 - (b) to promote effective competition** *[emphasis ours]*

Thus we believe that the criteria which ComReg employs in deciding whether and when to become involved in an access dispute, and how that dispute should be resolved, must be informed by a pro-competition agenda, as per ComReg's statutory duty.

² [NCC Ireland's Competitiveness Scorecard 2012](#), pages 11-12.

2. Comments on draft procedures

In the present consultation ComReg has asked respondents to address the following question:

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

Our general comment in respect of the draft procedures described is that precise timelines should be established and followed for each step, as described. Otherwise there is a risk that the whole process may become drawn out. The various iterations of information exchange envisaged in the process as described offer considerable scope for strategic procrastination for a party interested in delaying the implementation of a mandated solution. We believe that any delays in the process are likely to disadvantage the access seeker in particular, and we urge ComReg to be vigilant in this respect. We accept ComReg's point that a one-size-fits-all approach will not be appropriate, given the different nature of the access requests which will be made. Nevertheless we believe that greater specification and tightening of the timelines for each step is possible.

We believe that it will be helpful for the process in general if ComReg proceeds immediately to define a set of default values for the price, terms and conditions of downstream access, under various scenarios, and a methodology for determining these, based on its knowledge of Ireland's postal market, so that the market is not waiting for a dispute process to trigger such a definition. We explore this in further detail in our comments below.

For ease of reference Nightline has opted to comment on each section of ComReg's draft procedures separately.

[a\) Optional preliminary step: Serving of notice upon commencement \(section 4.1, paragraphs 23-24 of ComReg 12/82\)](#)

Nightline comment: In general we welcome the inclusion of this preliminary step, which we believe should be compulsory and not optional. We recommend that all access seekers should serve notice to ComReg as soon as they commence access negotiations with An Post. Serving notice of the access request, at the level of detail specified, will give ComReg the opportunity to review the access request in parallel with An Post, to ensure that no issues are likely to arise which give cause for delay in issuing an offer of access. This should be of major benefit to the access seeker in particular. It will also have the effect of reducing frivolous or vexatious access requests to a minimum, and as such should be welcomed by An Post.

We recommend the removal of clause 24 a) of the current draft which states that [\[The notice should set out\] \(a\) The reasons why the postal service provider is serving notice on ComReg](#)

We do not believe that this clause is necessary. The right to serve notice on ComReg is already provided for under section 33(1) of the Act 2011. We do not believe that there is any need for the postal service provider to state why such notice is being served. The reasons should be taken to be self-evident, namely that the access seeker is notifying ComReg that an access request is being made to An Post and that the access seeker a) expects the support of ComReg in ensuring that the request is responded to in a timely manner, b) expects that an acceptable commercial and technical offer will be made by An Post, and will be implemented in a timely manner, and c) expects that ComReg will undertake to inform itself, and to seek expert advice if necessary, on any special issues which may be raised by the statement of notice. If ComReg is pro-active in informing itself on the issues likely to arise in negotiations, the process is likely to move more quickly and a result is likely to be arrived at earlier. Otherwise there is a risk that the process will be too long, which would not be to the advantage of the access seeker.

We agree with the level of detail which ComReg proposes should be provided in any notice sent by an access seeker to ComReg, as per parts b) to h) of paragraph 24. Nightline offers our comments on each of these sections in further detail below:

(b) *The length of contract being sought with detail of start date being sought* By stating the desired start-date in the notice served on ComReg, the access seeker can give ComReg a clear indication of the desired timetable – from offer to implementation of the access request.

(c) *The type and number of postal packets it is proposed will access the universal postal provider's network* It is reasonable to expect that the access seeker will include an indication of volumes and nature of packages in an access request to An Post, and that this information should also be provided to ComReg. However, Nightline is expecting that An Post's DSA offer will allow for a 'build phase' during which volumes injected into An Post's network by other postal service providers would be ramped up gradually from initially low levels. It would also be Nightline's expectation that many aspects of the access offer would not be volume dependent.

(d) *What part of the universal postal service provider's postal network would be involved, e.g. the part used for clearance, the part used for routing and handling and / or the part used for distribution* It is reasonable to expect that the access seeker will give a general indication of what part(s) of a universal postal service provider's postal network the access seeker believes might be involved in providing access. In Nightline's case the main requirement will be for entry points for mail into at either of one or more of An Post's main mail centres or at the postal town level. However, ultimately it is An Post as access giver who will determine precisely what elements might be involved in satisfying a particular access request. Thus we expect that this information will have a general character only.

(e) *The proposed geographical scope* Nightline agrees that this information should be provided to ComReg by the access seeker. In Nightline's case the proposed geographical scope will be universal: that is, Nightline has no plans to deploy its own delivery network in areas of higher postal density and demand; Nightline intends to use the delivery network of An Post in all cases, subject to the availability from An Post of an equitable DSA offer.

(f) *The proposed time of deposit and the proposed time of completion* Nightline will indicate the time(s) of day at which it intends to present mail at the entry point(s) to An Post's network, and the timeframes within which Nightline expects delivery (completion) to be effected with respect to different types of items. We assume that the Quality of Service (QoS) levels offered by An Post as part of the DSA service will be at least equivalent to those applied to An Post's own retail mail streams. We ask ComReg to confirm that these QoS levels for DSA will be regularly monitored as part of the overall benchmarking with ComReg currently performs within the postal sector.

(g) *The proposed basis for remuneration of the designated universal postal service provider, e.g. a flat rate fee; or a per item rate subject to minimum and / or maximum amounts; or a cost sharing based on the actual use of the part(s) of the postal network concerned* Nightline believes that negotiation of commercial terms is likely to form a key element of access discussions. It is reasonable for ComReg to expect access seekers to share with ComReg their expectations in this regard. Ultimately, however, it is for the access giver to make the specific proposals. Nightline, as access seeker, expects that ComReg will be fully informed as to best industry practice from other jurisdictions, especially the United Kingdom, where DSA has already been implemented.

(h) *Any other relevant material the postal service provider wishes to provide.* Under this heading Nightline believes that it will be of most value if the access seeker highlights to ComReg those aspects of the access request which, in the opinion of the access seeker, are

likely to give rise to disagreement – for example, the level of remuneration which the access seeker expects to pay. This will give ComReg ample time to inform itself as to the key issues while the access request is being processed.

As a general comment, Nightline believes that the simplest way for the access seeker to provide ComReg with the details referred to in 24 b) to g) above will most likely be to copy ComReg on the entire access request, as made to An Post. There is no reason why this should not be done, provided that full commercial confidentiality of the request is respected by ComReg.

b) Step 1: Either party requests specification of period within which negotiations must be completed (section 4.2, paragraphs 25-31 of ComReg 12/82)

Nightline comment: In general terms Nightline supports the proposed step, which is provided for under section 33(2) of the Act. Nightline notes that it is not ComReg's intention to intervene to specify a date within which negotiations must be completed until a) the negotiations are at least underway, and b) the areas of agreement and disagreement between the negotiating parties have been established.

However, we believe that – the complexity of the access request notwithstanding – ComReg should be prepared to establish, at an early stage in the negotiations, where requested by either party, a maximum target duration for such negotiations. We submit that the maximum target duration for all negotiations, irrespective of complexity, should be set at one (1) calendar month, counting from the date of official submission of access request to the date on which either agreement is achieved between the parties or agreement is not achieved and Step 2 below is invoked.

We anticipate that it is likely to be predominantly access seekers (such as Nightline) – and not the access giver (An Post) – who will seek to invoke this clause, as our timeframes for securing access are likely to be more pressing than those of An Post to grant it. The lesson from other markets and other sectors is that access seekers are likely to form the belief – which may be well-founded - that access givers may be using the negotiation process as a tactic to avoid or delay the offer and/or implementation of access. We call upon ComReg to be watchful for any signs of such delay tactics in our postal market. In general, our concern with the measure as proposed is that the various iterative steps and requests for clarification outlined in paragraphs 29-31 may result in delays which are likely to have the effect of disadvantaging the access seeker only.

As we state further below, in addressing paragraph 44 of ComReg's draft procedures, we believe that in order to minimise all possible delays to the negotiation process ComReg should proceed immediately to define a set of default values for the price, terms and conditions of downstream access, and a methodology for determining these, so that the market is not waiting for a dispute process to trigger such a definition. That is, prior to any negotiations between the parties, parties would already have a set of standard or baseline commercial and technical parameters regarding access to An Post's network which could be used as the framework for agreement. This could serve as a template access proposal to be provided by An Post. This would mean that there would not be any undue lapse of time before an access seeker would receive an initial proposal for An Post for consideration. This baseline offer should include a set of standard technical parameters which would ensure non discriminatory treatment of wholesale mail from a quality of service targets perspective. We believe that this measure would greatly speed up the whole process, to the benefit of all market participants – especially end-users.

We accept that it is reasonable for ComReg to expect the party making the request to provide the details specified in paragraph 24, subject to Nightline's detailed comments on that paragraph, as per our response provided under 2a) above.

c) Step 2: Agreement not reached within the period specified (section 4.3, paragraphs 32-37 of ComReg 12/82)

Nightline comment: We note that this step, referred to as a ‘Preliminary Examination’, will apply in the event that agreement is not reached following application by ComReg of the preceding step 1. That is, Step 2 will apply in circumstances where ComReg has specified a date for agreement to be reached, but where agreement has not been reached by that date. We note also that Step 2 will be automatically triggered by the failure to meet the deadline, due to the fault of either party. Thus we expect that ComReg will have requested an update from the negotiating parties before or on the deadline date as specified during Step 1, and that ComReg itself – and not the either of the negotiating parties - will initiate step 2, if required. Nightline requests ComReg to provide clarification on this point.

Nightline believes that ComReg should specify a maximum duration for Step 2 of two (2) calendar weeks. That is, within 2 weeks of determining that agreement on access has not been reached within the period specified, ComReg will decide either to intervene in the dispute, or not to intervene, as per Step 3. It is important for the process that a timeframe for Step 2 be established. Otherwise there is a risk of further delay to the process, which will inconvenience the access seeker in particular.

Regarding paragraph 33, Nightline requests ComReg to clarify if “the person making the request” refers to a) the person who has made a request for specification of the period within which negotiations must be completed, as per Step 1, or b) “the access seeker” – as these may not be one and the same person.

We note that the current clause 33.2 reads: [\[ComReg will require\] Clear supporting evidence that the person making the request has taken all reasonable steps to reach an agreement on access to a universal postal service provider's postal network](#)

We accept that it is reasonable for ComReg to expect the party making the request (where this refers to the access seeker) to provide the details specified in paragraph 24, subject to Nightline’s detailed comments on that paragraph, as per our response provided under 2a) above.

However, as part of the Preliminary Examination, we also believe that ComReg **should make a similar request to the party receiving the access request, that is An Post**. That is a mirror clause to 33.2 should be included, along the following lines:

[\[ComReg will require\] 33.3 Evidence from the party not making the request of what steps have been taken to reach an agreement with the party making the request on access to a universal postal service provider's postal network.](#)

We note that according to paragraph 35 “[In carrying out a preliminary examination, ComReg may seek expert assistance of an independent advisor](#)”. Nightline requests ComReg to confirm:

- a) That a panel of suitably qualified advisors will be on standby to provide expert assistance at short notice. If a tender process is required to appoint an advisor or advisors, this is likely to cause a delay in the process – a delay which Nightline wishes to avoid.
- b) That any advisor appointed to assist ComReg will have specific practical expertise and experience of downstream access in international postal markets, including the UK market.

d) Step 3: ComReg intervenes or not (section 4.4, paragraphs 38-39 of ComReg 12/82)

Nightline comment: We understand that under certain circumstances, with respect to any given access request, ComReg is seeking to reserve the right either not to intervene in negotiations or to discontinue any such intervention once commenced. We understand Step 3 to be the outcome of Step 2, which we have proposed will have a maximum duration of 2 calendar weeks. Thus Step 3

itself will involve no duration as such – it will be a decision output of Step 2. Nightline requests that ComReg confirms that Step 3 will not involve any duration or time delay.

We have some comments on the rationale to be used by ComReg in determining whether to intervene in a dispute or not. As per draft paragraph 39:

ComReg may decide

(1) Not to intervene in the negotiations concerned, having carried out a preliminary examination of the matter which is set out in paragraph 33 above.

(2) To discontinue any intervention where ComReg considers that the request for intervention is trivial or vexatious; or the person making the request has not taken reasonable steps to reach an agreement on access to a universal postal service provider's network.

Nightline believes that, in the event that ComReg takes either of the decisions referred to in 39 (1) or 39 (2) above, ComReg has an obligation to document clearly to the negotiating parties, and in particular the requesting party, the grounds for its decision. A characterisation of any particular request for intervention as “trivial or vexatious” will necessarily be subjective. The requesting party is not likely to view it as such, and will require a full explanation of such a assessment, if made by ComReg. Similarly, ComReg will need to spell out what “reasonable steps” might otherwise have been taken, but have not yet been taken, by either party, to reach agreement on access to the universal postal service provider's network. Again, the interpretation of what constitutes a “reasonable step” may be subject to dispute.

Nightline believes that requesting parties should have right of appeal if, as a result of Step 3, ComReg decides not to intervene. As part of this appeal process, ComReg shall provide the requesting party with full reasoning behind its decision not to intervene, including any expert advice received from external experts. Such an appeal may be resolved by arbitration. We believe that it is reasonable to establish a timeframe of one (1) calendar month as the timeframe for such an appeal process to run its course. The result of this appeal should be taken as binding upon the parties.

e) Step 4: ComReg decision in accordance with procedures established and maintained by it (section 4.5, paragraphs 40-45 of ComReg 12/82

Nightline comment: We agree in broad terms with the nature of the process which will apply in cases where ComReg decides to intervene to resolve a dispute between access seeker and access giver, as outlined in section 4.5. However, as the definition of the criteria which are to be taken into account by ComReg in coming to a decision on resolution of the dispute will have a key bearing on the outcome, we will comment on each of the criteria identified in sub-paragraphs 40.1 to 40.12 of the proposed Step 4 below:

Where ComReg intervenes and takes such steps as are necessary to resolve the dispute, ComReg will require (at a minimum) the following information from both parties, by separate submissions, and within the time period specified by ComReg:

Nightline believes that ComReg should specify in its procedures what the maximum target time period should be for the provision by the parties of the details referred to in paragraphs 40.1 to 40.12 and 41 below. We propose that a maximum time of 1 (one) month be established by ComReg for receipt of these materials. Otherwise, as stated for other Steps, there is a risk that the process may be indefinitely extended while materials are being collected, to the particular disadvantage of the access seeker.

40.1 Full details on the access being requested as set out in paragraph 24, including full details as to where there is agreement and full details as to where there is not agreement. We accept that it is reasonable for ComReg to expect both parties to provide the details specified in paragraph 24,

subject to Nightline’s detailed comments on that paragraph, as per our response provided under 2a) above.

[40.2 Clear supporting evidence that both parties making the request have taken all reasonable steps to reach an agreement on access to the universal postal service provider's postal network concerned.](#)

We accept that it is reasonable for ComReg to expect both parties to provide evidence of what steps they have taken to reach agreement, although we believe that it may be difficult to reach objective agreement on what constitutes “reasonable” in the expression “reasonable steps”.

[40.3 Full details of the proposed terms and conditions relating to access to the postal network concerned so that ComReg can take into account their reasonableness as required by section 33\(8\)\(a\) of the 2011 Act.](#)

Nightline understands this clause to refer both to the ‘proposed terms and conditions’ sought by the access seeker and to those offered by the access giver, where such an offer has been made but not accepted by the access seeker. Nightline requests that ComReg provide further detail on how “reasonableness” will be assessed, in the terms of section 33(8)(a) of the 2011 Act.

[40.4 Full details on how the interests of postal service users will be served in the completion of this negotiation so that ComReg can take this into account as required by section 33\(8\)\(b\) of the 2011 Act.](#)

Nightline agrees that it is reasonable to expect parties to document to ComReg how the interests of postal service users will be served by the granting of access.

[40.5 The universal postal service provider to provide full details as to the impact of completion of this negotiation will have on the need to ensure and maintain the efficient provision of universal postal service so that ComReg can take this into account as required by section 33\(8\)\(c\) of the 2011 Act.](#)

Nightline requests that ComReg provides some scenarios to illustrate in what ways a request for access by a postal service provider might impact upon the provision of universal postal service by An Post. We do not believe that there is necessarily any connection between these two activities. It is our expectation that the request for access would be evaluated by An Post, and hence by ComReg, on its own merits.

[40.6 Full details as to the availability of alternatives to the access sought so that ComReg can take this into account as required by section 33\(8\)\(d\) of the 2011 Act.](#)

Nightline understands that ComReg is requiring access seekers to set out possible alternatives to DSA – even if these alternatives entail business cases which, for commercial, technical and environment reasons, may not be viable. One example of such an alternative might be the establishment by an alternative postal service provider of a parallel rural postal delivery mechanism to that already provided by An Post. We request that ComReg confirm that this is indeed what is being sought under this heading.

[40.7 Full details as to the impact of completion of this negotiation will have on the development of competition in the market for postal services so that ComReg can take this into account as required by section 33\(8\)\(e\) of the 2011 Act.](#)

Nightline welcomes ComReg’s explicit acknowledgement that the development of competition in the market for postal services will be a key criterion in evaluating the progress of access negotiations. As we have stated in 1.2 above, ComReg has a statutory duty under the Act to “facilitate the development of competition and innovation in the market for postal service provision”³, and “in so far as the facilitation of competition and innovation is concerned, [to] ensur[e] that postal service users derive maximum benefit in terms of choice , price and quality”⁴. Furthermore: “The Commission [ComReg] may give a direction under subsection (2) [of the Main

³ Section 10 a) of the Act

⁴ Section 10 b) of the Act

Act] where it considers that it is necessary for either or both of the following purposes: (a) to protect the interests of postal service users; (b) to promote effective competition.⁵

40.8 Full details as to the feasibility of granting the access sought so that ComReg can take this into account as required by section 33(8)(f) of the 2011 Act. Nightline requests ComReg to provide further details or examples of possible circumstances which might, in ComReg's view, impact on the feasibility of granting access. We do not believe that there could be any significant constraints on the time, materials or resources of the access giver (An Post) which might make access unfeasible.

40.9 Full details as to the capital investment in the postal network known by each party, that is, the postal service provider sets out its own capital investment in postal network and the universal postal service provider sets out its own capital investment in the postal network concerned so that ComReg can take this into account as required by section 33(8)(g) of the 2011 Act. Nightline notes that according to section 33(8)(g) of the 2011 Act "The Commission, in reaching a decision pursuant to the procedures referred to in subsection (5), shall take into account the capital investment in the postal network made by the universal postal service provider". There is no requirement in the 2011 Act, however, for ComReg to take into account capital investments made by service providers other than the universal postal service provider. Nightline requests ComReg to explain how it proposes to use this information, as may be provided by An Post and by the access seeker, in order to evaluate any given access request. We also request ComReg to specify whether it is seeking details of capital investment which has already been made, or in progress or planned, or all three of these.

40.10 Full details of any requirements imposed by enactment so that ComReg can take this into account as required by section 33(8)(h) of the 2011 Act. Nightline requests ComReg to give examples of requirements which may be imposed by any enactment, as mentioned in section 33(8)(h) of the 2011 Act.

40.11 Full details from the universal postal service provider in question as to any costs avoided by granting such access to its network so that ComReg can take this into account as required by section 33(9) of the 2011 Act. Nightline wishes to comment on paragraphs 40.11 and 40.12 together. Please see our comments under paragraph 40.12 below.

40.12 Full details from the universal postal provider in question as to the postal network costs involved in granting such access so that ComReg can take this into account as required by section 33(9) of the 2011 Act. Nightline notes that Section 33 (9) of the Act takes the points made in 40.11 and 40.12 together. This section states that:

Where the Commission makes a decision with respect to the price of access to the postal network concerned it shall take into account any costs avoided by a universal postal service provider by granting such access and postal network costs of the universal postal service provider involved in granting such access.

We understand this to be a reference to the approach which ComReg shall use in determining the appropriate commercial terms for DSA which must be offered by An Post in the event of a dispute between An Post and access seekers such as Nightline. Nightline requests that ComReg specify, as part of its response to the present consultation, how it proposes to use the details sought from the universal postal service provider regarding 'costs avoided' and 'costs involved' in granting access. Specifically we request ComReg to specify what methodology it proposes to use to arrive at a determination regarding DSA pricing or other key outputs.

Nightline believes that ComReg has considerable discretion in this regard, and should select a methodology which best enables the creation of full competition in the postal market. Crew and Kleindorfer (2008) identify three main types of possible rules to govern access pricing, as follows:

⁵ Section 34 (3) of the Act

- **Avoided cost pricing (ACP, a top-down approach, also known as retail-minus pricing:** Charge for access according to discounts off the price for the corresponding E2E service, based on the avoided cost of bypassed activities provided by the WSP [alternative postal operator]
- **Delivery-area access pricing (DAP), a subset of cost-based or bottom-up pricing:** Charge for access not only according to the work that is bypassed, but also according to the work yet to be performed in delivering the mail to be reposted by the WSP and delivered by the PO
- **Negotiated access pricing (NAP):** The outcome here is whatever price the PO and WSPs agree through negotiations. NAP may be subject to additional constraints on non-discriminatory treatment across WSPs, as well as floors and ceilings set by the regulator”⁶.

As we have stated in our response to Consultation 12/38, we do not believe that the wording of the 2011 Act necessarily requires ComReg to adopt Avoided cost pricing (ACP) as the method by which to set access pricing in Ireland’s postal market. We note the hybrid method used in the UK, where in 2004 Royal Mail entered into DSA agreements with UK Mail, TNT and Deutsche Post on a ‘geographically averaged cost-recovery basis’, supplemented by ‘geographically de-averaged access pricing’ at a later stage, and – from 2006 – a requirement to maintain ‘headroom’ between access and retail pricing, as compared with equivalent E2E products, for a defined period. Crew and Kleindorfer explain geographically averaged pricing as follows:

This meant that licensed operators were required to present mail to Royal Mail in a form that reflected the overall letter volume of Royal Mail’s business, on the basis of individual postcode areas. Should volume vary from Royal Mail’s by more than 7.5% but less than 15% in any ‘reference period’ (each such period being approximately three months) Royal Mail had the right to levy a surcharge. If volume in any outward postcode area varied from Royal Mail’s by more than 15% in any ‘reference period’ Royal Mail had the right to levy a higher surcharge, ask the customer to transfer to a zonal agreement or, if all else fails, terminate the agreement.

Effective from October 2004, Royal Mail added to its set of generic agreements (described above) access contracts based on geographically de-averaged access prices. These de-averaged access contracts are negotiated freely between Royal Mail Wholesale, the access arm of Royal Mail and different operators and users, subject only to being offered on a non-discriminatory and non-preferential basis⁷.

As a general market model we favour adoption of a similar system to that which has evolved in the UK, where Royal Mail Wholesale operates at arm’s length to incumbent retail operator Royal Mail in offering cost-based DSA to other service providers. We note also the findings of the 2 reports, from 2008 and 2010, by Richard Hooper into the UK postal sector which are supportive of the DSA regime introduced after the Postal Act of 2000⁸.

We note that the UK Postal Act 2011 contains explicit provision for the regulator Ofcom to impose price controls on the USO operator regarding network access if it believes that “the provider

⁶ Michael A. Crew and Paul R. Kleindorfer (2008) “Pricing for Postal Access and Worksharing” in the “Handbook of Worldwide Postal Reform”, p. 32-66.

⁷ Crew and Kleindorfer (2008) pp. 50-51 ‘Worksharing and Access at Royal Mail’

⁸ First Report (December 2008): “Modernise or decline: Policies to maintain the universal postal service in the United Kingdom” www.bis.gov.uk/files/file49389.pdf, subsequently updated by Second Report (September 2010): “Saving the Royal Mail’s universal postal service in the digital age” <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/10-1143-saving-royal-mail-universal-postal-service>

concerned... (b) might otherwise impose a price squeeze with adverse consequences for users of postal services”⁹.

Thus Nightline’s preference is for ComReg to provide immediate certainty and definition around the mechanism for ‘negotiation’ of Network Access outline in Section 33 of the Act, so that it will actively promote competition in the sector by resulting in cost-based access for other postal service providers to An Post’s network, under acceptable technical and commercial terms, and in a timely manner. We would stress that time is of the essence here.

If it is not possible to arrive at this level of certainty, then Nightline would propose that ComReg should instead mandate a basic set of specific, regulated DSA access products, similar to the geographically averaged pricing introduced by Royal Mail Wholesale in the UK in 2004, or equivalent to the Fixed Termination Rates (FTRs) which ComReg sets for termination of telecommunications traffic to the fixed network of incumbent Eircom in the telecommunications sector. This would obviate the need for potentially lengthy negotiations between parties in establishing network access, as the basic framework would be a given. Furthermore it will reduce the call on the dispute resolution process – which will save ComReg, as well as market participants, considerable time and resources. We believe that ComReg already has the statutory remit to mandate an access product without any need to make changes to the Act.

41 ComReg may decide to ask either or both parties to provide the required information, who are postal service providers, under section 13F(1) of the Communications Act 2002 to 2011. Nightline agrees that it is reasonable for ComReg to request relevant information from both the negotiating parties. Indeed Nightline believes that it would be difficult for ComReg to come to a well-founded decision without receiving information from both access seeker and access giver alike.

42 ComReg may seek the expert assistance of an independent advisor. Such advisor will have signed an appropriate confidentiality agreement with ComReg in advance. As per our comments in response to Step 3 above, Nightline requests ComReg to confirm:

- c) That a panel of suitably qualified advisors will be on standby to provide expert assistance at short notice. If a tender process is required to appoint an advisor or advisors, this is likely to cause a delay in the process – a delay which Nightline wishes to avoid.
- d) That any advisor appointed to assist ComReg will have specific practical expertise and experience of downstream access in international postal markets, including the UK market.

43 Upon receipt of the information from both parties, ComReg will endeavour to give both parties an indication of the period of time that will be required to make its decision. Any such indication of the period of time required will be based on the particulars of the information provided. Consequently, a general indication of the period of time required cannot be provided in advance of the required information being presented. Nightline accepts that the amount of time required by ComReg to make its decision will depend on the amount and nature of the information provided in each case. However, we request that ComReg specify a maximum period of time which will apply, irrespective of the complexity and amount of the material involved. Nightline proposes that this maximum time within which a decision will be made by ComReg should be one (1) calendar month.

44 Within a reasonable period of time, ComReg will consider the submissions and make a draft report setting out its initial findings and recommendations. The submissions of both parties and ComReg’s

⁹ [Schedule 3 of the UK Postal Services Act 2011](#) specifies what terms may be specified by OfCom once an “Access Condition” is imposed on the USO operator. ‘USP Access Conditions’ and ‘General Access Conditions’ are defined in [section 38](#) and [section 50](#) of the Act respectively.

draft report will be sent to both parties with a request under section 13F(1) of the Communications Act 2002 to 2011 to submit such additional information as is necessary to enable to ComReg to decide how to bring the dispute to a conclusion, within the framework set out in section 33(7) of the 2011 Act. Nightline asks ComReg to specify what it is intended by a “reasonable period of time” for ComReg to consider the submissions and set out a draft report with initial findings and recommendations. Furthermore we request that ComReg set out a target timeline for the second phase of the process referred to in paragraph 44 above, namely the provision of additional information to enable ComReg to decide how to bring the dispute to a conclusion. Unless a timeframe is specified, we believe – as for other Steps in this process – that there is a risk for further delays to the process, which will disadvantage the access seeker in particular.

45 ComReg will then make its decision in accordance with these procedures established and maintained by it and notify both parties in writing of same.

Nightline requests ComReg to provide a target timeline for arriving at a decision, after receipt of such materials as may have been provided in the course of the process outlined in paragraph 44 above.

We also request ComReg to specify what sanctions will apply in the event that the access giver does not implement ComReg’s decision according to the terms specified in the decision, with particular respect to the timeline for implementation.

With respect to the decision itself, we note that Section 33(7) of the 2011 Act gives ComReg full discretion to establish and impose the technical and commercial terms of access to the network of the universal service provider. The Act states:

In making a decision in relation to a dispute, the Commission may impose or amend the conditions relating to access to a universal postal service provider’s postal network and such conditions may include—

- (a) the price of access,*
- (b) terms and conditions relating to matters other than price, and*
- (c) rules for the separation of accounts relating to access to the postal network,*

As we have stated in our response to 12/38, Nightline believes that ComReg does not need to wait until a dispute occurs before it specifies default values, or at least a methodology for determining, items (a), (b) and (c) above. Calculation of these elements will take time, and will involve consultation between multiple parties – for this reason we strongly believe that this process of consultation and information-gathering needs to begin **now**. If these conditions are to be determined by ComReg on an ad-hoc and case-by-case basis - between An Post on one side and individual postal service providers on the other, with ComReg as arbiter - there is no incentive on An Post, as access-giver, to reach agreement with individual access seekers in a timely fashion. In the meantime the market will have moved on – either to an equivalent non-postal service (e.g. e-mail) or back to the incumbent. This result would be contrary to ComReg’s explicit mandate to promote competition in the postal sector.

Experience in other markets shows that the delays which result from the negotiation process are likely to have a greater commercial and technical impact on the access seeker than on the incumbent. There is a risk, of which we ask ComReg to be aware, that the incumbent may “walk back slowly” by exploiting the mechanics of the dispute resolution scheme to the full.

To expedite the process, Nightline urges ComReg to proceed immediately to define a set of default values for the price, terms and conditions of downstream access, and a methodology for

determining these, so that the market is not waiting for a dispute process to trigger such a definition. That is, prior to any negotiations between the parties, parties would already have a set of standard or baseline commercial and technical parameters regarding access to An Post's network which could be used as the framework for agreement. The set of standard technical parameters should ensure non discriminatory treatment of wholesale mail from a quality of service targets perspective. In our view this would greatly speed up the whole process, to the benefit of all market participants – especially end-users.

We believe that the term “matters other than price” under Section 33(7)(b) of the Act should be taken to include the timeframe within which An Post will be required to implement the access conditions imposed by ComReg as part of resolution of any dispute. Clearly we need to have certainty not only as to the terms of agreement, but when that agreement will actually be implemented so that our customers can have real-time access to services based upon it. We believe that it is reasonable for ComReg to mandate technical implementation of project plan (go-live date with access seeker) within a maximum of 2 (two) calendar months of formal signing of an access agreement between the parties, or publication of a Decision by ComReg as part of the dispute process, whichever is sooner.

The remainder of our comments below relate to how we believe ComReg can take preparatory steps to speed resolution of any DSA disputes by ensuring that ComReg itself is well informed beforehand of all possible contingencies which may impact upon DSA discussions.

As stated in our introductory in order for end-users in Ireland to benefit from full market opening, as intended by the EU's Third Postal Directive, we believe that ComReg must proactively intervene to promote competition by defining from the outset the default standard set of commercial and technical terms which An Post shall be required to provide to access seekers, in the event of any dispute, as per Section 33(7) of the Act. These terms would be:

- Cost-plus, not retail-minus
- Priced per individual incremental item
- For presentation and injection at various levels, and at various locations, into An Post's network.

Nightline believes that it is crucial for ComReg, in addressing the issue of network access, to articulate clearly the distinction between the retail postal market on the one hand and the wholesale postal market on the other. A core principle is that **the terms and conditions (including price) offered by An Post to wholesale customers, that is, to alternative service providers including Nightline, must be different to those offered by An Post to its own large retail customers.** This reflects the difference in service requirements between these two categories of customer. There must however be clear non discriminatory treatment of wholesale mail from a quality of service targets perspective. In general terms, wholesale pricing should be cost-based (“cost-plus”), as distinct from the discounts which An Post makes available to large retail customers, e.g. banks, which are generally “retail-minus”.

As we have stated in our response to Consultation 12/38, Nightline sees a clear analogy between the postal sector and telecommunications and electricity supply sectors – two sectors in which this distinction between ‘wholesale’ and ‘retail’ has been made clear, and where the regulator – ComReg and CER respectively – controls the prices for those wholesale inputs required to create and maintain a competitive market.

- In telecommunications, alternative network operators purchase from Eircom (as the fixed network operator with Significant Market Power in the relevant wholesale market) a number of regulated input products, including fixed termination, at cost-base prices which

are regulated by ComReg. These wholesale prices are used by alternative network operators as the inputs on which they base their retail offerings¹⁰.

- In electricity supply, alternative electricity suppliers purchase distribution and supply services from ESB Networks, which is a separate wholly-owned subsidiary of ESB. ESB in turn is the licensed owner of Ireland's electricity distribution system assets. ESB Networks, as licensed Distribution System Operator (DSO), earns revenue through charges which are regulated by the Commission for Energy Regulation (CER). Thus CER is responsible for regulating the wholesale prices which are used by alternative network operators as the inputs on which their retail offerings are based. Similarly in electricity transmission, ESB is required to build and maintain the transmission network which is operated by Eirgrid. Electricity generators pay to the ESB Transmission Use of System Charges (TUoS). These TUoS charges are regulated by CER¹¹.

Similarly in the postal sector Nightline expects to avail of wholesale pricing and access conditions, which recognise the particular status of Nightline as a 'postal service provider' and not a retail customer. Clearly this pricing would be different to those which An Post makes available to retail customers, who would be injecting mail into the An Post network under different conditions, and typically in lower volumes than would be the case for a service provider.

Nightline notes that this distinction between retail and wholesale terms of access does not yet appear to have been accepted by An Post. For example we note the proposal made by An Post in 2009, as summarised by ComReg, to replace the various settlement systems then in place for incoming cross-border mail with "three Access Services, each of which will offer **the same prices and terms and conditions as are available under the corresponding service offered to its domestic customers...**" [emphasis ours]

"The three Access Services will be:

- Standard service (based on the early presentation pre 3pm service)
- Pre-sorted Service (152 selections)
- Early Presentation auto sort service

The new services will also be available to any domestic operator".¹² [emphasis ours]

By way of justification for the proposed change, now already implemented, to the system of terminal dues then prevailing, An Post says that "UPU rates represent approx. 50% of full domestic tariffs when applied to the incoming traffic from Royal Mail, and would contribute to endangering the financial position of An Post". The An Post documentation suggests that the corresponding UPU rate for a single letter would be around €0.35, ("remuneration based on 64% [2007] of the charge for a 20g priority letter in the domestic service"¹³) which Nightline believes would be an absolute ceiling rate for DSA. No evidence has been provided by An Post that such a rate does not adequately cover the marginal costs of injecting wholesale mail of this type into its network from these sources.

An Post specifies that these three Access Services are to be based on "existing discount schemes" – Scheme 78 (2007) and Scheme 79 (2008). However, the proposed price for a single letter under these schemes is in the range €0.43 - €0.46. This does not appear to be a wholesale price based on marginal cost. It seems to derive rather from the terms of the REIMS III agreement, which applies

¹⁰ Ireland's telecommunications market framework is based on strategic policy and subsequent legislation co-ordinated at an EU-level, as per http://www.comreg.ie/about_us/legislation.501.html and http://www.comreg.ie/about_us/telecoms.537.401.html

¹¹ [Competition in the Electricity Sector](#) - report by The Competition Authority (Ireland), December 2010

¹² [ComReg 09/94 "Information Notice - An Post's compliance with obligations in respect of inbound cross-border mail"](#) (published 17-Dec-09)

¹³ ComReg 09/94 p.6

between An Post and other European USPs whereby “remuneration [is] based on 75-80% of domestic tariff¹⁴”.

Nightline reiterates our belief that it will be impossible for ComReg to fulfil its brief to promote competition in the postal market unless this distinction between ‘wholesale’ and ‘retail’ aspects of the postal market is implemented. We call upon ComReg to consider implementation of functional separation between retail and wholesale arms of An Post, similar to that which exists between ‘Royal Mail’ and ‘Royal Mail Wholesale’, ‘Eircom’ and ‘Eircom Wholesale’, ‘ESB Electric Ireland’ and ‘ESB Networks’ etc.

As per our answer to Q 6 in ComReg 12/38 Nightline believes that the price point chosen for An Post’s ‘bulk mail service of last resort’ will provide a benchmark for the price below which An Post will be required to offer network access to other services providers, as per Section 33 of the Act. The price of the ‘bulk mail service of last resort’ in this offering will, however, be a VAT inclusive, retail price. We note that the price proposed for a 50g letter is 45c subject to a minimum quantity of 350.

Nightline submits that the pricing offered as part of the Downstream Access Product must be set substantially below it, to avoid anticompetitive behaviour and margin squeeze. It is our understanding that the price set for DSA will be exclusive of VAT. Nightline believes that it is part of ComReg’s regulatory remit to ensure that the DSA price for the 50g letter is set at levels which allow alternative operators to use it as an input to a competitive retail product offering.

In general we would point out that a number of reference points already against which ComReg can benchmark a standard DSA price offering. These include:

- **An Post’s existing PostAim service.** This provides us with a retail proxy price point of €0.31¹⁵ per item, which is 4 cent below the UPU rate of €0.35 cited above. The fact that An Post offers a retail price at the €0.31 level at all, even given volume commitment and restrictions on presentation, indicates that An Post can make a profit at this price level and that €0.31 per item represents a price point which is above cost. Thus Nightline maintains that the ‘Wholesale’ DSA price needs to be set below this level in order for a competitive postal market to develop in Ireland.
- **The principal of access is already in place for signatories to the UPC.** Terminal dues paid by UPU member companies and/or international bilateral partners of An Post for delivery in Ireland of mail which originates outside the state. Clearly this is already a wholesale product with strong similarities to DSA, in that An Post avoids many of the costs – including collection – which are included within its standard end-to-end retail service. We note that “a service for the sorting, transport and distribution of postal packets deposited with An Post at an Office of Exchange within the State by the designated operator of a signatory to the Universal Postal Convention” is included within the scope of USO services as per ComReg Annex 5 to the present consultation (Draft section 16(9) regulation)¹⁶.

We reiterate our conviction that fair DSA pricing is the single most important element in the development of healthy competition in Ireland’s postal service. We believe it will lead to significant growth in mail volumes across all service providers, by promoting competition and giving end-users a wider choice of service providers and service offerings - thus stimulating the market as a whole.

¹⁴ ComReg 09/94 p.7

¹⁵ Applies to 0-50g Letter / Postcard, in volumes of 500k +. See PostAim [pricing table](#) under section ‘How much? Price per item’

¹⁶ ComReg 12/38, Annex 5, Section (ix), p. 70

We expect that the dispute procedures proposed by ComReg in this Consultation, as amended to take into account the recommendations made by Nightline in this submission, will be a valuable tool in developing a dynamic and competitive postal sector in Ireland.

Response prepared by:

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3: TCo Mail Works



**Mail
Works**

24 August 2012

Mr. Stephen Brogan
Senior Manager
Postal Regulatory Policy
Commission for Communication Regulation

Re: Consultation Com Reg 12/82

Dispute Procedures for access by a postal service provider to the postal network of a universal postal service provider

Dear Mr. Brogan

On behalf of TICo Group Limited, trading as TICo Mail Works, I refer to Com Reg Consultation 12/82 of 26 July 2012.

First, we would like to thank you for producing a clear consultation document which identifies Com Reg's thinking in the matter and proposes steps on how dispute resolution could be handled. We have, however, some fairly fundamental concerns about a key principle of the document on which the proposed procedures are predicated. We also believe that exceptional emergency provisions are warranted.

Number 1: Triggering Dispute Resolution Procedures

Paragraph 18 of the document says that:

*"In **normal circumstances** these are commercial agreements and as such it is competition law that regulates the right to enter into such an agreement...."*

We would suggest that in this case, circumstances are not normal (due to the disparity in power between the parties) and it is for this reason that Section 33 of the Act provides for a specific right of a postal service provider to enter into negotiations with a universal service provider for access to the postal network.

Paragraph 19 goes on to say that Com Reg expects that the procedures to resolve disputes will be "sparingly used" on the basis that it is in the interests of both parties to reach an



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agreement. Earlier, in paragraph 2 of the document, the phrase “last resort” is used in the context of operating the proposed Com Reg dispute procedures.

We respectfully suggest that a more effective and fairer way to approach this issue would be to make it clear that Com Reg is readily available to speedily implement dispute procedures where a postal service provider identifies a problem in gaining access to the postal network. This is not a negotiation of equals. Clearly the incumbent, with its extensive resources and control of the postal network, is in a much stronger position than most postal service providers. For this reason, we believe that Com Reg should send a strong signal in its statutory procedures that parties can quickly and easily access Com Reg dispute resolution.

The bottom line here is that should a dispute not be speedily resolved, the postal service provider may suffer an inordinate delay in gaining access to the postal network, a delay which may threaten the viability of that service provider’s business.

Number 2: An Alternative Approach – Early Intervention

If Com Reg publishes procedures that send out a clear signal that it is available to become involved in dispute resolution, without delay and without an unduly onerous process for parties wishing to access dispute resolution, then we consider that there will indeed be an incentive for the universal service provider to reach early agreement. If, however, Com Reg chooses its proposed “*last resort*” model, then our expectation is that an application for access may not be treated with urgency.

Accordingly, we are strongly of the view that, if an “*early intervention*” approach is adopted, Com Reg’s goal of dispute procedures being “*sparingly used*” will be achieved in a much more equitable and efficient fashion.

Number 3: Nature of the Proposed Dispute Resolution Procedures

3.1 Straight forward application form(s)

We consider that the actual procedures, proposed in document 12/82, are such as to favour the stronger party, which owns the network and which has vastly more resources available to it.



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We believe that there is scope for Com Reg to get involved on the basis of a straight forward application form(s), where the postal service provider is required to identify details of the access sought and the universal service provider is required to immediately say why it has not been granted. Com Reg should then take the necessary steps to make a decision, without avoidable delay, under 33 (5) of the Act and with such conditions as may be appropriate under section 33 (7).

We do not believe that the majority of cases will be unduly complicated. If such a case arises, then we recognise that additional information and time may be required to resolve the dispute and nothing we have said above will inhibit consideration of any complex issues arising.

3.2 Prevention of retaliatory action

The procedures would benefit from provisions to ensure that during dispute resolution procedures both parties must refrain from any retaliatory action. One possible wording for such a provision could be as follows:

“Pending completion of dispute resolution procedures, both parties shall ensure that no unreasonable action is taken to detrimentally affect the other party. In the event that either party considers that such action has been taken, it may report such to Com Reg who will investigate the complaint in accordance with its Exceptional Circumstances Requiring Emergency Intervention” (See number 4 below)

Number 4: Exceptional Circumstances requiring Emergency Intervention

TICo Mail Works believes that Com Reg should now take the opportunity to provide for the implementation of procedures for emergency intervention. Such intervention may be necessary where a postal service provider considers that normal dispute resolution procedures would take too long to deal with an urgent and potentially catastrophic situation arising, which would seriously damage a postal service provider’s business.

To take an example, the designated Universal Service Provider is in a position to cease accepting mail as a bargaining tool to impose conditions on a postal service provider. Com Reg should establish a “hot line” so that, pending consideration of dispute resolution in the normal way, it can direct An Post to accept mail. This is not a hypothetical situation and the potential for driving complainants out of business is very real.



Number 5: Summary

Tico Mail Works commends to Com Reg our suggested

- early intervention approach and
- the addition of exceptional circumstances provisions

We would be happy to engage further with Com Reg should you feel that would be helpful.

Kind regards

Yours sincerely

A handwritten signature in blue ink, appearing to read "Michael O'Dwyer", is written over a horizontal dashed line.

Michael O'Dwyer

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