Irish Charities Postal Users' Forum

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Submission to the Business Regulation Forum

Introduction

The Irish Charities Postal Users' Forum is made up of 18 registered charities that are large users of the national postal service. The objective of the Forum is to co-ordinate the views of members on postal related issues that affect member organisations. We have working relationships with:

- the Irish Missionary Union representing 76 religious charities
- the Irish Periodical Publishers' Association representing 45 businesses
- the Irish Charities Tax Reform Group representing 125 charities.

Our member organisations have a heavy dependence on the national postal service. We make regular submissions to ComReg in response to its public consultation. Recently, we made a submission to the European Commission in response to its public consultation on planned full liberalisation of the postal market in January 2009.

An Post is a vital part of the national infrastructure for enterprise and economic activity. The postal service has been regulated in recent years under EU Directives transcribed into Irish law. An Post, as the successor to the Dept of Posts & Telegraphs, is protected by a wide range of both primary and secondary / delegated legislation enacted since the 1847 Act. The extent of the legal protection afforded to An Post as a commercial semi-state organisation is quite unique, and gives it a very significant competitive advantage over potential private sector service providers in that market.

Terms & Conditions. In addition to the primary legislation, the former Dept and now An Post have created very extensive regulations through secondary / delegated legislation and administrative rules and circulars. The principal secondary legislation for the national service is the Inland Post Warrant, 1939. Section 70 of the Postal and Telecommunications Services Act, 1983 provides that An Post can draw up Terms and Conditions – copy attached. These absolve An Post from any responsibility for failures in the provision of its services to users – see Section 6. For example, if a postal order is repaid by a post office to the incorrect payee, An Post is not responsible to the purchaser in the same way as a bank would take responsibility in the case of a bank draft. Or if a letter is lost or damaged in transit, An Post is not responsible to the sender or addressee for the loss or damage. There is **no equality or balance in the responsibility of An Post vis-à-vis users of its services.**

Customers – who are dependent on An Post because there is no alternative service provider for delivery of standard letters nationwide – are obliged to comply in full with every postal rule and regulation but An Post is not so obliged because of the unique legal protection it is afforded. Legal instruments allow it to amend, to suspend, or to cease

services at its discretion. For example, the suspension of the Postaim service (discount service for bulk direct mail) permitted under the Inland Post Amendment (No. 36) Scheme, 1986 (copy attached) can have a serious and direct **cost burden** for users, or an indirect cost by forcing users to adjust their mail production processes in ways that add to their operating costs. Postaim is suspended during election campaigns and from 20th November each year for illogical reasons internal to An Post. We submit that there is **no necessity** for this suspension and our view is borne out by no other postal administration in the world suspending a core service in a similar manner.

The general Terms and Conditions do not have sufficient **transparency** because they are not easily accessible by users. Hence, the full implication of them is not readily understood by users until a problem arises and the rules are applied.

An Post contends that its Terms and Conditions for its services cannot be examined / reviewed by ComReg. However, a decision of the European Court involving France determined that such terms and conditions should be subject to external review. This is common sense because terms and conditions are an integral part of the price charged for postal services.

In particular I draw your attention to the following issues:

1. Postal legislation in a series of primary and secondary legislative instruments is scattered around without co-ordination that makes sense to users of the service. These are un-necessarily wieldy and complex. Many derived from EU Directives are very difficult to understand. We submit that they **need to be consolidated** into a modern format that is user-friendly, worded more clearly / easy to understand, and is based on the commercial reality of the postal market of today and the future.

2. We are concerned at the failure of Government to review postal regulations, particularly Statutory Instruments, Schemes, administrative circulars (that are tantamount to quasi legislation), etc. that have evolved over many decades, and the appropriateness or **necessity** of which is questionable in a modern and regulated market. Most of these regulations were introduced in a monopoly era on a 'command and control' basis to shelter the Dept / An Post. They retain the **non-market and non-competition orientation** of that era, and fail to take account of the evolution of the modern postal service. We submit that postal regulations should contain a "sunset" clause that requires regular reviews of their relevance and how well they are working.

3. We are also concerned at the apparent failure of Government to undertake proper **regulatory impact assessments** (RIA) of postal regulations introduced by Statutory Instrument, Schemes, etc. We note that secondary legislation does not appear to require a regulatory impact assessment according to the *Cabinet Handbook* as amended in 1999. This was a specific issue noted in 2001 by the OECD in its report "*Regulatory Reform in Ireland*" – Chapter Two refers. Whilst the *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* in 1995 emphasised the role of RIA in systematically ensuring that the most efficient and effective policy options were chosen,

regulatory quality disciplines in the postal service in Ireland are primarily aimed at legal quality rather than regulatory efficiency and performance.

An Post has failed to introduce a Customer Service Charter to bestow normal and expected rights on customers and as a counter balance for the rigidity of its rules and regulations. It does not inform its customers that un-resolved complaints against it can be referred to the Ombudsman for remedy.

Whilst it chooses to use the word "Agreement" for its contracts (that appear to be outside the law of contract) with customers, these contracts are presented in a 'take it or leave it' fashion irrespective of whether a customer agrees to the terms. This is a direct continuation of the 'command and control' nature of the protectionist and privileged legislation under which the company operates.

In the absence of competing services in standard letter delivery nationwide, customers have no option but to sign these rigid and inflexible contracts. Whilst An Post need not / will not agree to changes in the terms of a contract when sought by a customer, it can amend the terms itself whenever it chooses. Hence, there is **no proportionality or equality between the parties to the contract.**

4. Another concern is the method of introducing rules and regulations through various secondary / delegated legislation that has not been approved (by positive motion) by the Oireachtas as the body with the "sole and exclusive power of law making for the State" under Article 15.2.of Bunreacht na hEireann.

   We understand the legal debate about the **law-making status** of such legislation, and accept that there appears to be no problem when it merely gives effect to the principles and policies contained in an Act. However, we are unsure if all of the myriad of postal rules and regulations introduced by this means are exactly what the Oireachtas had intended. We note that the function of the Senate Select Committee on Statutory Instruments was devolved to the Joint Oireachtas Committee on Legislation in 1983 but that Committee was not re-established after the 1989 General Election. Hence, parliamentary control / scrutiny are diminished.

   The law-making status of delegated legislation has been questioned by the Ombudsman on at least four occasions, most notably in an appendix to a report on Social Welfare issues in March 1997 – copy attached, and in "*An Investigation by the Ombudsman of Complaints Regarding Payment of Nursing Home Subventions by Health Boards*" - Chapter 6, Pages 44-53. It was also referred to briefly in the 1996 Report on the Constitution, as well as in a number of books on administrative law and the constitution written by imminent legal experts, notably Kelly, Hogan, and Morgan.

   However, according to Written Reply to PQ No. 136 on 27-4-2006 the Minister for Justice, Equality & Law Reform indicated that he and the Attorney General are comfortable with the current procedures and have no plans to refer the issue to the Law Reform Commission. We believe that the Business Regulation Forum should seek such a referral in order to provide **greater clarity and transparency**.

5. A further concern is the **negative impact on the development of competition** in the Irish postal sector as a direct consequence of the unique legal protection bestowed on An Post. Most of this dates from pre-regulation of postal services, and we would regard it as fitting neatly into the description – "outdated, inefficient, or disproportionate" used by Minister Micheal Martin when announcing the *Business Regulation Forum* on 2nd November 2005.

   An Post is so protected and privileged that it will be extremely difficult, perhaps impossible, for a private sector service provider in letter services to gain market entry or to trade successfully on a nationwide basis. The consequence of this stifling of competition is that **An Post will remain as the dominant player or de facto a monopoly**, and ComReg will have less power to control postal rates after planned full liberalisation of the market in January 2009.

   In the absence of competition we believe that users of the postal service will bear an **extra financial burden** through the rates charged by An Post. Whilst these rates may be "geared to costs" as required under EU Directives, ComReg has no control over the cost base of An Post that is in-ordinately high and a major factor in rate determination. We fear that this will present a **major affordability problem** for postal customers post January 2009.

   In a policy paper entitled *Governance and Accountability in the Regulatory Process* published in March 2000, the government justified regulatory intervention as a way "to facilitate market entry, ensure fair market conditions …." Whilst ComReg has been put in place as a sectoral regulator, we believe that the legislative protection afforded to An Post as described here and over which ComReg has no jurisdiction will neither facilitate market entry or ensure fair market conditions.

6. We have major concerns about **lack of consultation with users** prior to a) the Government's agreement to EU postal proposals, and b) the implementation of these proposals into Irish legislation. What suits the larger postal markets that are very suitable for competition does not necessarily suit the small restricted Irish market. But when these proposals become Directives, Irish postal users are stuck with them irrespective of their impact, proportionality, or reasonableness in an Irish context.

   The Minister for Communications and the Oireachtas have failed to consult in any meaningful way with postal users as major stakeholders. During the recent public consultation by the European Commission (Public Consultation on Postal Services - Part 2) on proposed full liberalisation of the market in January 2009, the Minister failed to take any initiative to inform users about that consultation. But yet he claims that "full consideration is being given to the effect of liberalisation on the market place in 2009" during discussions on the issue with the Commission and the Council of Ministers. How can "full consideration" be given when key stakeholders, i.e. postal users, are being ignored?

   Despite a number of specific requests to the Department of Communications, we can find no evidence that the *Quality Regulation Checklist* mentioned in the

Cabinet Handbook has been applied since 1999 to postal legislation derived from European Directives. That Checklist includes a test concerning the impact of legislation on market entry and restriction on competition, and asks if affected parties have been consulted. We believe that the Minister for Communications is failing to comply with this requirement that is critically important for postal users, and will be even more important post January 2009 as envisaged by the European Commission.

The Oireachtas Joint Committee on Communications invites An Post management, the postal trade unions, and postmasters to meet it annually, but ironically postal users / groups are not so invited.

There is a major information deficit in the **process** of policy / regulation making for postal services in Ireland. For example, when the European Commission aired its intention in June 2000 with Member States concerning its proposal to impose VAT on postage, it appears that the Government did not make any formal submission for over three years.

The Government has not consulted or engaged in any way with postal users / groups regarding the financial burden of VAT on postage. We are aware that ComReg prepared a report in June 2003 for the Dept of Finance but that has remained secret, even under the FOI Act. Whilst we can appreciate the need for some confidentiality of the Government's negotiating position at EU levels, we note with interest the position in the UK where reports and analysis prepared by Postcomms and the Treasury are accessible to users.

Charities are concerned about VAT on postage because we cannot reclaim it. But there is the additional problem with the postage VAT proposal and one that the Government does not appear to either understand or appreciate, i.e. the extra financial burden it will impose on charities here as against, say, charities in Northern Ireland.

The official position of the Commission is that when VAT on inputs representing approx 2.5% of postal rates is taken into account by service providers in calculating their rates, plus the availability of a lower VAT rate of 5% in a Member State, the consequential increase in postal rates should be only 2.5%. The Commission's position on this appears to be derived from a British example where the lower rate of VAT is 5%.

This level of postal rate increase will not be the case in the Republic because our lower VAT rate is 13.5%, and the Minister for Finance has been very clear that he will not contemplate a new lower rate of 5% (as promoted by the European Commission) because of its wider implications for the National Exchequer.

The consequence of the Commission's position, if adopted by the Council of Ministers in due course, is that **Irish charities will incur an 11% increase in postal rates**, i.e. a VAT imposition that we will not be able to reclaim unless the Government introduces a refund scheme. It is very evident that the Government

has neither recognised or accepted this scenario, nor is there evidence that it intends to consult with postal users as major stakeholders, or to carry out a RIA.

Implementation

The objectives of the Business Regulation Forum are admirable in an environment where there is such a myriad of regulations from such a very wide variety of statutory agencies. These agencies generally operate on a 'solo' basis without any meaningful co-ordination or co-operation.

Undoubtedly, the Business Regulation Forum will produce a report with recommendations applicable across a very wide and diverse range of agencies of the State. We believe that an Implementation Body will need to be put in place to follow through on the recommendations and to drive subsequent action to implement them. Otherwise, the exercise will be wasteful because many statutory agencies will ignore the recommendations applicable to them.

Conclusion

We believe that what has been outlined above contains issues within the White Paper criteria of **necessity, proportionality, and transparency** relating to:

- current postal regulations, and
- the processing of pending regulations

that warrant the attention of the Business Regulation Forum.

If we can be of further assistance we will be happy to assist wherever possible.

Matt Moran
Chairman

16th May 2006

THE ADMINISTRATIVE NATURE OF STATUTORY INSTRUMENTS

(This is an Appendix to "Investigation Report into the payment of non-contributory pensions" published by the Office of the Ombudsman on 14th March, 1997)

"It is generally held that statutory instruments, often referred to as "secondary legislation" or "delegated legislation", are "law" in the strict sense of that term. It would follow, therefore, that the making of such instruments constitutes law-making. For a number of reasons this may be an incomplete description and there are arguments to support the view that statutory instruments might not constitute "law" in the strict sense of that term.

Firstly, Article 15.2 of **Bunreacht na hÉireann** explicitly confers the "sole and exclusive power of making laws for the State" on the Oireachtas. That article also provides for the creation by law of "subordinate legislatures" but this has never been done. Secondly, the definition of "statutory instrument" as given in the **Interpretation Act, 1937** says it "means an instrument made, issued, or granted under a power or authority conferred by statute". The **Statutory Instrument Act, 1947** provides a virtually identical definition of "statutory instrument" viz. " an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute". What is clear from these definitions is that a statutory instrument involves the exercise of a power conferred by statute where "statute" is defined as an Act of Parliament (whether of the Oireachtas or of its predecessors).

The Constitutional aspects of this issue are dealt with in some detail in the analysis of Article 15.2 contained in **The Irish Constitution** (3rd edition, 1994) by J.M. Kelly. Many of the judgments reported in *Kelly* relate to cases where it was argued that the delegation of powers of regulation to a Minister, by the Oireachtas, was unconstitutional because the delegation was one to make legislation and was thus contrary to Art. 15.2 of the Constitution. The essential points to emerge from these cases might be summarised as follows:

1. No provision has been made in law for the creation of "subordinate legislatures".

2. Where the Oireachtas gives to an administrative authority (including a Minister) the power to make regulations, these bodies are not "law makers" nor do they constitute "subordinate legislatures"

3. Other than by creating subordinate legislatures (which it has not done), the Oireachtas may not delegate the power to make, repeal or amend the law.

4. The power to make a regulation is no more than the power to put into effect the views of the Oireachtas. A regulation is no more than the mere putting into effect of the principles and policies of the Oireachtas as set out in the statute itself.

5. Where the Oireachtas appears to give wide discretion to a Minister, but fails to give clear guidance as to the exercise of this discretion (policies and principles), then the delegation by the Oireachtas is likely to be unconstitutional.

6. In exercising powers delegated by the Oireachtas under an Act, a Minister must act "with basic fairness, reasonableness and good faith".

7. The fact that the Dáil or Seanad may annul a regulation provides some measure of control by parts of the Oireachtas; it does not amount to control by the full Oireachtas**.**

The effect of all these points, taken together, is to question the notion that a statutory instrument is "law" in its own right. Indeed, this line of thinking is not particularly new. Basil Chubb's **A Source Book of Irish Government** (1st ed. 1964) deals with this very question and reproduces a short article entitled "The Constitution and Delegated Legislation" by Paul Jackson from *Public Law* (1962). Jackson's conclusions in 1962 were virtually identical with those set out above. Jackson begins his article with the following: "To speak of delegated legislation, except as a convenient name for ministerial and other administrative regulations, orders, schemes, rules etc., is, in the light of the 1937 Constitution, a complete misnomer"

There is also the argument that the making of statutory instruments involves the exercise of both administrative and legislative functions. In this approach, the two functions are not necessarily mutually exclusive. An interesting observation on this issue - in the UK context - is provided in Wade's **Administrative Law** (5th ed.) which opens its discussion with the comment:
"There is no more characteristic administrative activity than legislation. Measured merely by volume, more legislation is produced by the executive government than by the legislature" (P. 733)

Wade goes on to observe that "there is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading". Commenting on the position of the UK Parliamentary Commissioner (Ombudsman), Wade notes that the Commissioner was initially hesitant to criticise regulations but was induced to change his position by the Select Parliamentary Committee. For as long as the Commissioner did not deal with regulations the anomalous situation was that, as Wade puts it, "what was mal-administration if done once apparently ceased to be so if done repeatedly under a rule". The Commissioner, according to Wade, eventually overcame "these conceptual controversies" and treats mal-administration "as meaning simply bad administration, i.e. any action or inaction by government departments which he feels ought to be criticised, including anything which is unreasonable, unjust or oppressive".

There is one further consideration of relevance. This is the fact that, in general terms, there is no effective parliamentary monitoring of statutory instruments and the opportunities for Oireachtas members to amend or rescind them are inadequate. It is true that certain instruments require a positive motion of acceptance by the Dáil and Seanad; but these are a minority of statutory instruments. Most regulations are required to be laid

before the Houses of the Oireachtas and they come into effect automatically unless they are rejected by motion of the Oireachtas. There is no longer any Oireachtas Committee dedicated to the examination of statutory instruments and it appears the mechanisms for raising such instruments in the Oireachtas - even if the volume of such statutory instruments allowed - are far from ideal. In any event, failure to lay a statutory instrument before the Houses of the Oireachtas might not, it appears, necessarily invalidate it - see **Administrative Law in Ireland** (2nd edition) by G. Hogan and D. Morgan at Page 25 (Note 68). This suggests that the validity of a statutory instrument might not be dependent on the approval of the Oireachtas as is the case with primary law”