

Memorandum of Understanding between Postcomm and the Office of Fair Trading

The Aims and Coverage of the MoU

1. In certain sectors of postal services, the Postal Services Commission (Postcomm) and the Office of Fair Trading (OFT) have overlapping powers. This is because a breach by a postal operator of one of its licence conditions may also infringe one or more of the prohibitions in the Competition Act 1998 (CA98), or Articles 81 or 82 of the Treaty establishing the European Community (the EC Treaty). Postcomm has powers under the Postal Services Act 2000 (PSA2000) to grant licences to postal operators subject to appropriate conditions and to investigate and enforce the conditions in any licence. These may include conditions aimed at promoting competition between postal operators and/or at promoting efficiency and economy on the part of postal operators. The OFT has powers to investigate and take enforcement action against infringements of the Chapter I and Chapter II prohibitions in the CA98 (the Chapter I prohibition and Chapter II prohibition respectively) and, since 1 May 2004, the prohibitions in Articles 81 and 82 of the EC Treaty (Article 81 and Article 82 respectively) ¹The Chapter I prohibition and Article 81 prohibit anti-competitive agreements, decisions and concerted practices. The Chapter II prohibition and Article 82 prohibit conduct which constitutes abuse of a dominant market position. Consequently, there is a risk of the same behaviour being investigated both by Postcomm and the OFT.

2. This MoU is, therefore, made between Postcomm and the OFT and aims to:

- promote co-operation and coordination between Postcomm and the OFT when dealing with cases of anti-competitive behaviour for which they have overlapping powers;
- facilitate the treatment of cases of anti-competitive behaviour within postal services markets and cases that affect both postal services and related markets;
- minimise duplication of activity, wherever possible; and
- improve transparency with respect to the respective roles of Postcomm and the OFT for relevant third parties.

3. It is not intended that this MoU be legally binding or create expectations whose non-fulfilment would give rise to rights at law.

4. This MoU includes:

- a description of the respective roles of Postcomm and the OFT that are relevant to this MoU;

¹ EC Regulation 1/2003 (the Modernisation Regulation), which came into force on 1 May 2004, requires national competition authorities (NCAs) of the Member States and the courts of the Member States to apply and enforce Articles 81 and 82 as well as national competition law where they apply national competition law to an agreement or conduct which may affect trade between Member States.

- undertakings to which both Postcomm and the OFT commit, with respect to the day-to-day handling of competition cases involving postal services;
- provisions for dealing with cases within the postal services market and cases that affect both postal services and related markets; and
- arrangements for the implementation of this MoU and its review.

The Role of Postcomm, in Relation to this MoU

5. Postcomm was established as a regulator of the postal services market under the PSA 2000. It is a body corporate whose functions are performed on behalf of the Crown. In exercising its functions it has a primary statutory duty to ensure the provision of a universal postal service (which broadly includes, as defined in the PSA 2000, a daily collection and delivery across the UK of postal items, and a registered post service, at affordable and geographically uniform tariffs). Subject to this primary duty, Postcomm must exercise its functions so as to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators. It must also act in a manner best calculated to promote efficiency and economy on the part of postal operators. In performing all its duties, Postcomm must have regard to the need to ensure that licensed operators are able to finance activities authorised or required by their licence.

6. Having regard to its duty to promote effective competition between postal operators, Postcomm included a condition in the licence it granted under the PSA 2000 to Royal Mail requiring Royal Mail not to behave anti-competitively. Condition 11.2 of Royal Mail's licence requires that Royal Mail, in the terms on which it supplies or offers to supply services to customers:-

- (i) shall not show undue preference to any persons or class of persons;
- (ii) shall not exercise any undue discrimination against or seek to impose any undue restriction on any person or class of persons;
- (iii) shall not set terms of charges for the supply of postal services which are excessive, or which are predatory

7. The condition only applies to those services where Postcomm has control, through the licence, over prices Royal Mail may charge for the provision of postal services or where there is no effective competition in the sector of the market in which the relevant postal services are provided. Notwithstanding the requirements of the PSA 2000, Condition 11.3 provides that, where conduct is prohibited under section 18 of the Competition Act 1998 or Article 82 Treaty, questions as to whether Condition 11.2 has been breached by that conduct shall be dealt with in a manner which is consistent with the treatment of corresponding questions arising under section 18 of that Act or Article 82 EC Treaty. Condition 11.4 provides that, where conduct under Condition 11.2 is not prohibited by

section 18 of the Competition Act 1998 or Article 82 EC Treaty, questions as to whether Condition 11.2 has been breached shall be dealt with in a manner which is consistent in so far as possible with the treatment of questions arising under section 18 of that Act or Article 82 EC Treaty.

The Role of the OFT, in Relation to this MoU

8. The OFT's role, with respect to the UK's competition regime, includes enforcing the Chapter I and Chapter II prohibitions in the CA98 and, since 1 May 2004, Articles 81 and 82. This includes investigating and taking action against: cartels and other damaging anti-competitive agreements; and abuses of a dominant market position.

9. Under the Enterprise Act 2002 (EA02), the OFT may also make a market investigation reference to the Competition Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.

Potential Overlap between the Functions of Postcomm and the OFT

10. There exists a potential overlap between the functions of Postcomm and the OFT with respect to competition cases affecting Royal Mail and potentially other operators and the postal services market in general (and particularly if the conduct involved may affect the provision of a universal postal service).

11. In a case of anti-competitive behaviour involving Royal Mail, Postcomm may have a duty (under PSA 2000 and Royal Mail's licence) and the OFT may have a power (under the CA98 or under Articles 81 and/or 82) to take appropriate action.

12. As is the case within other utility sectors which have sector-specific legislation, a decision will need to be taken whether any suspected anti-competitive conduct should be investigated under the PSA 2000, the CA98 or Articles 81 and/or 82. Generally, in sectors where the regulator has concurrent powers under the CA98, the regulator is required to make a decision whether it is more appropriate to proceed under the CA98 (and apply the Chapter I prohibition, the Chapter II prohibition, Article 81 and/or Article 82). If so, his duty to proceed under the sector-specific legislation does not apply. There is no similar procedure in relation to the postal sector because Postcomm does not have concurrent powers under the CA98 and is not an NCA for the purposes of applying and enforcing Articles 81 and 82 under the Modernisation Regulation. Nevertheless, in general, Postcomm will take the view that it is precluded from taking licence enforcement action if it considers, for the purposes of the duties imposed on it, among others under section 3 PSA 2000 (duty to ensure a universal postal service) and section 5 PSA 2000 (duty to further the interests of

users wherever appropriate by promoting competition between postal operators, and efficiency and economy on the part of postal operators), that it is more appropriate that the conduct in question is considered by the OFT under the CA98, Article 81 and/or Article 82. This decision will be taken in consultation with the OFT. Such decisions will be pragmatic and taken on a case-by-case basis, at least in the early years following the introduction of competition. But where action under the licence or under CA98, Article 81 and/or Article 82 would be equally effective, one of the latter will be the natural choice.

13. Such a decision would normally be taken upon receipt of a complaint or at or towards the beginning of an own-initiative investigation. However, it may not always be possible to make such a decision in the early stages of an investigation. There may be cases in which the decision on how best to proceed can only be made following significant progress in an investigation. Such a situation will require close cooperation between Postcomm and the OFT until sufficient information is obtained for a decision to be taken.

14. Where Postcomm and the OFT decide that it is more appropriate to proceed under the PSA 2000 in relation to a competition issue, Postcomm will seek to coordinate its approach with that of the UK and European competition authorities and will follow the OFT's analytical approach, so far as this is compatible with fulfilling its statutory duties.

Postcomm's Responsibilities, in Relation to this MoU

15. Subject to paragraph 17, Postcomm undertakes to:

- Inform the OFT of formal complaints received which give rise to reasonable grounds to suspect that Royal Mail may be in breach of Condition 11 of its licence.
- Inform the OFT of any cases of anti-competitive behaviour that Postcomm decides to investigate under Condition 11 of Royal Mail's licence, and keep the OFT up to date with progress made.
- Inform the OFT prior to any decisions and actions being taken against Royal Mail, under Condition 11 of its licence.
- Meet with the OFT at an early stage in any investigation under Condition 11 of Royal Mail's licence, with a view to reaching a decision on the relevant legislation under which to proceed (i.e. PSA 2000, CA98, Articles 81 and/or 82, or EA02).
- Consult with the OFT whenever it considers that enforcement action by the OFT under the CA98 or Articles 81 and/or 82 is more appropriate than licence enforcement action, bearing in mind Postcomm's duties under section 3 and section 5 of the PSA 2000.
- Inform the OFT of its views when notified of a CA98, Article 81 and/or 82 or EA02 investigation that directly involves Royal Mail, or when a case may have an impact upon the provision of a universal postal service in the UK, or may involve a definition of the universal postal service in the UK.

- Take into account the views of the OFT as to the analytical approach to take concerning any competition issue in respect of which it takes action under PSA 2000. Postcomm will consult with the OFT if it is minded to disagree with any material aspects of its advice.
- Refer to the OFT complaints concerning competition matters to which Postcomm cannot respond under its powers.
- Inform the OFT of cases in the postal services market which it believes may have consequences for related markets.
- Continue to take part, as an 'observer' member, in the regular Concurrency Working Party meetings.

The OFT's Responsibilities, in Relation to this MoU

16. Subject to paragraph 17, in relation to the postal services sector and Royal Mail, the OFT undertakes to:

- Notify Postcomm prior to any investigations of suspected infringements of the Chapter I or Chapter II prohibitions, Article 81 and/or Article 82, or of any market investigations under the EA02.
- Take account of any views of Postcomm when an investigation directly involves Royal Mail, when a case may have an impact upon the provision of a universal postal service in the UK, or may involve a definition of the universal postal service in the UK. The OFT will also further consult Postcomm if minded to disagree with certain aspects of its advice.
- Inform Postcomm of the issue of any written notices, that the OFT proposes to make a decision that the Chapter I prohibition, Chapter II prohibition, Article 81 and/or Article 82 has been infringed or requests for information or site visits under sections 26, 27, 28 and 28A of the CA98.
- Inform Postcomm prior to taking any decision that the Chapter I prohibition, Chapter II prohibition, Article 81 and/or Article 82 has been infringed, or making any reference to the Competition Commission relating to a market investigation under the EA02.
- Arrange to meet with Postcomm at an early stage in any investigation under the CA98, Article 81 and/or Article 82, with a view to reaching a decision on the relevant legislation under which to proceed (i.e. PSA 2000, CA98, Article 81 and/or Article 82).
- Consult Postcomm whenever it considers that licence enforcement action is more appropriate than enforcement action under the CA98.
- Inform Postcomm whenever a super-complaint is received and prior to taking any decision to act in response to a super-complaint.
- Inform Postcomm of cases in other markets which it believes may have consequences for postal services markets.

Disclosure of Confidential Information

17. Each party will respect the confidentiality and/or secrecy of information exchanged which has been obtained as a result of the other party's statutory

powers or other legal obligations and relates to the affairs of any individual, business or undertaking. Each party will comply with any non-disclosure obligations that are binding on the other, in particular those set out in Part 9 EA02, sections 55 and 56 CA98, section 119 and Schedule 7 of the PSA 2000, the Modernisation Regulation, and Council Regulation (EC) No 139/2004.

Review and Implementation

18. This MoU comes into effect immediately. The MoU and the practices set out within will be reviewed as the need arises, or by written request of either party and in particular in relation to modernisation of EU competition law. Any changes will be subject to the agreement of both parties.