

ENFORCEMENT GUIDANCE FOR CONSIDERING AND INVESTIGATING COMPLAINTS IN  
RELATION TO LICENCE CONTRAVENTIONS  
ROYAL MAIL'S RESPONSE TO  
POSTCOMM'S AUGUST 2007 CONSULTATION DOCUMENT

**Executive summary**

1. Royal Mail welcomes Postcomm's initiative in setting out its "Enforcement Guidance for considering and investigating complaints in relation to licence contraventions" ("the Guidance"). It also welcomes Postcomm's expressly stated commitment to the five Principles of Better Regulation.
2. Royal Mail endorses several of the practical suggestions Postcomm makes for dealing with complaints more effectively, for example:
  - a. complaints should be structured and refer to the relevant licence condition, supported by evidence as proposed; and
  - b. Postcomm's proposal to test issues raised by complainants at a preliminary assessment stage, prior to any full investigation.
3. In order for the postal services industry to benefit from the Guidance in terms of practical regulatory certainty of process, the Principles of Better Regulation and public law considerations of reasonableness and procedural fairness need to underpin the enforcement system which Postcomm is empowered by statute to undertake. Royal Mail is most concerned that Postcomm has not in fact given full effect to these principles in its draft Guidance and takes the view that further practical consideration needs to be given to their application in the following areas in particular (these are covered more fully in the body of the response below).
  - a. **Clarity on Postcomm's intentions** as to administration and governance e.g. case prioritisation and delegated authorities and responsibilities within Postcomm.
  - b. **Matters of substance and procedure**, e.g. duration of investigations, the reasonable conduct of preliminary and full investigations and ensuring that a consistent and reasonable practice is developed and operated transparently.
  - c. **The Defendant's right to be heard** in every case within reasonable timescales, e.g. the creation of a consistent process for issuing requests for information, allowing licence-holders under investigation the right to inspect the file, for ensuring that there is the opportunity to be fully aware of the allegations made against them, and to make representations in writing and orally. Postcomm needs to go much further to indicate the process it will consistently follow in the issuance of a "minded to" document and following receipt of representations given subsequent to that.
  - d. **Treatment of confidential and sensitive information**. As a practical matter, in the application of s. 46 of the Postal Services Act ("PSA") Postcomm also needs to give

sufficient time to persons affected to make confidentiality claims over the disclosure of information, which could seriously and prejudicially affect business interests.

4. Royal Mail requests that, as a matter of urgency, Postcomm considers the detailed response it has made below, particularly as regards these issues, and reflects these points in its final Guidance. Royal Mail believes that, by taking on board these points Postcomm will be able to establish much greater procedural certainty, and instil confidence among the industry as to the regulator's normal practice in its enforcement of licence conditions. As a consequence, Postcomm will also better reflect the principles of transparency and consistency of process, which Postcomm itself believes its Guidance should provide, and ensure that the industry as a whole has a better understanding of Postcomm's processes and knows what to expect in the course of an investigation.
5. As will be seen at the end of this document, where Royal Mail sets out its answers to the specific questions raised by Postcomm in its consultation, Royal Mail does not think that the proposed Guidance would significantly improve Postcomm's existing processes which to date, in Royal Mail's view, have proved to be on occasion inconsistent and unpredictable.

## Introduction

6. Royal Mail welcomes Postcomm's initiative in setting out this Guidance, and its expressly stated commitment to the five Principles of Better Regulation. Royal Mail strongly supports this commitment and believes these principles must be applied, not only to the Guidance itself, but also to the conduct and assessment of individual cases.
7. Royal Mail believes that the postal industry as a whole will benefit from, and therefore be supportive of, Postcomm's recognition of a need for greater clarity and consistency in its enforcement procedure.
8. Royal Mail also endorses several of the practical proposals in Postcomm's draft Guidance for dealing with complaints more effectively, for example:
  - a. that complaints need to be structured and supported by evidence<sup>1</sup>; and
  - b. Postcomm's proposal to test issues raised by complainants at a preliminary assessment stage, prior to any full investigation<sup>2</sup>;
9. There are however a number of other important issues which would contribute greatly to an environment of regulatory certainty, but which Postcomm has failed to address in its draft Guidance. Royal Mail (and, it is sure, the industry as a whole) would welcome clearer and more practical statements on these issues when Postcomm publishes its final Guidance document.
10. These matters relate first to the need for Postcomm to provide much greater clarity on its intentions as to administration and governance in carrying out its statutory functions. Examples include:
  - (i) being clear on case prioritisation in the context of its overall enforcement work plan (as indeed the OFT makes public its "competition prioritisation framework"); and
  - (ii) indicating formally which decisions in the course of an enforcement exercise are the responsibility of the different parts of Postcomm, whether the Executive or the Commissioners, and confirming that all decisions taken by Postcomm (at whatever level) are binding on it<sup>3</sup>.
11. Second, on matters of substance and procedure, Royal Mail has particular concern with Postcomm's statements in the document as to:
  - (i) the intended duration for the conduct of investigations;
  - (ii) the actual conduct of preliminary investigations; and
  - (iii) Postcomm's proposals for ensuring that a consistent and reasonable practice as to the basis upon which Postcomm opens a full investigation is developed and operated transparently.<sup>4</sup> As an example of the latter in particular, Royal Mail is concerned that

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<sup>1</sup> Paragraph 11.

<sup>2</sup> Paragraph 18.

<sup>3</sup> Paragraph 3 of the Guidance Consultation document states only that "*a number of decisions must be made by the Commissioners whilst others may be taken by Postcomm staff*".

<sup>4</sup> Examples include the process for issuing requests for information, giving those under investigation the right to inspect the file and the overall reasonable procedural conduct of that investigation.

Postcomm needs to go much further than is currently proposed to indicate the consistent process it will follow in the issuance of a “minded to” document and following receipt of representations given subsequent to that. This is particularly important given that there is currently no “statement of objections” stage in Postcomm’s procedure, which would give those under investigation the opportunity to exercise formally their rights of defence, to be allowed to answer the issues which are being raised against it.

12. Lastly, Royal Mail would expect Postcomm to set out its intended practice and timescales at each stage of the process and also to take into account the need for operators to have sufficient time to make confidentiality claims over information which could seriously and prejudicially affect their business interests if disclosed. This is a matter, which Postcomm is required to consider under statute, being required not to publish confidential information if it considers that its publication would or might seriously and prejudicially affect a person’s interests<sup>5</sup>. Postcomm may override a confidentiality claim only on the grounds of public interest, using the powers given to it under statute<sup>6</sup>. It is therefore only fair and reasonable that time be factored into the investigation process for representations to be made by the person concerned, considered by Postcomm and a reasonable conclusion reached and communicated on each claim.
13. Royal Mail would welcome procedural certainty on the issues highlighted above in order that the transparency and consistency of approach, which Postcomm believes the published guidance will provide, can be fully achieved, and in order for the industry as a whole to understand fully Postcomm’s processes and know what to expect in the course of an investigation. Only in exceptional cases should Postcomm be able to depart from its published procedures, and in such cases, as Postcomm has stated, only where it has provided its detailed reasons for so doing.
14. Royal Mail’s response below addresses each section of Postcomm’s chronology of events in the enforcement process, as set out in the consultation paper. It provides comments on the proposals and highlights where Royal Mail believes further transparency and consistency as to process should be achieved by Postcomm. It also identifies the areas in which Postcomm does not currently appear to have a settled policy but which, if such were developed, would go a significant way towards providing operators with the regulatory certainty and transparency expected of a regulator in fulfilling its statutory functions, and also in setting out a consistent approach to managing the day to day communications in the course of an investigation. The areas Royal Mail identifies below have been recognised and tackled by regulatory authorities in other sectors. Indeed it is considered standard practice to provide the guidance and practices suggested by it below in order to give industry regulatory and procedural certainty.
15. Finally, at the end of this document, Royal Mail has summarised briefly its responses to the six questions which Postcomm has posed in Chapter 4 of its consultation, all of which are addressed in the main body of the text below.

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<sup>5</sup> Section 46(3) of the Postal Services Act 2000.

<sup>6</sup> Section 46(4)(b) of the Postal Services Act 2000.

## Response to Postcomm's specific proposals

### *Pre-Full Investigation procedure*

**Paragraphs 9-24 of the proposed guidance deal with Postcomm's proposed procedures prior to the launch of a full investigation into a suspected licence contravention.**

16. Royal Mail welcomes the proposed Guidance Postcomm provides on the circumstances in which it will consider pursuing a complaint, or indeed commence an investigation on its own initiative. In particular, it endorses the structure which Postcomm offers complainants in paragraph 11, i.e. that complainants should identify the reason for suspecting a contravention of a postal operators' licence condition, set out sufficient factual evidence to back up any allegation, and any evidence of harm suffered or which may be expected and also include a statement with preferences regarding confidentiality of the complaint. Presumably Postcomm is intending to impose on itself certain criteria for commencing an "own initiative" investigation. In the interests of transparency it would be helpful to have some formal indication over the circumstances in which it is likely to start its own initiative enquiries and what enforcement priority Postcomm attaches to the various licence conditions.

### ***Royal Mail concern – imposition of penalties is a factor in considering whether to take enforcement action***

17. However, Royal Mail is concerned by Postcomm's statement (at paragraph 15) that, when considering whether to pursue an investigation, it will consider its ultimate ability to impose a financial penalty.
18. While this is clearly an important factor for a regulator, it is not the only important factor relevant to considering whether to take a case forward to full investigation. Nor is it axiomatic that fines should follow from all regulatory actions. Indeed there may be cases where the correct proportionate approach is enforcement action which does not conclude with the imposition of a fine. The statutory obligation in s. 30 of the Postal Services Act ("the PSA") states simply that if Postcomm is satisfied that a licence holder has contravened or is contravening any condition of his licence, then it *may* impose on the licence holder a penalty of such amount *as is reasonable*. This test implies the need for Postcomm to consider in a structured and transparent fashion whether it would be a proportionate response to a contravention it has found to fine the offending operator, and if so what amount is reasonable in the circumstances<sup>7</sup>.

**Paragraphs 17-19 of the proposed guidance deal with Postcomm's approach to the conduct of "preliminary assessment" of a suspected licence condition.**

19. Postcomm rightly states that the aim of a preliminary assessment is for Postcomm to ensure that it fully understands the nature of the complaint and the issues involved, so that it can decide whether or not to conduct a full investigation. If it is decided to do so, then the preliminary assessment enables Postcomm to establish the scope of the investigation. Later in

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<sup>7</sup> Royal Mail is responding separately on Postcomm's Consultation on its Statement of Policy in relation to Financial Penalties and its views are expressed more fully in that document.

this section Postcomm also states that once it is satisfied that there are reasonable grounds for suspecting a licence contravention, it will formally decide whether to take forward a complaint or fully investigate an issue.

20. Royal Mail welcomes the fact that Postcomm intends, in the normal course, to seek the views of the licence holder in question at this stage, and for that operator to receive sufficient indication of the nature of the issues in order to be able to respond and provide the factual evidence required to clarify the issue. Royal Mail is concerned however to ensure that Postcomm amends its proposals in order to provide further certainty that it will “as a matter of course” rather than in the “normal” course, always seek the views of the licence holder so that it is always given the right to respond to allegations made against it, and provide any necessary factual evidence in its defence. This is one of the basic rights of defence and is a necessary part of ensuring that the procedure followed is fair, and therefore obviates the need for challenge.

***Royal Mail concerns: Timing and Advance notice for opening a full investigation***

21. Royal Mail would note two additional points with regard to this part of the process:
- a. Timing
    - i. Postcomm’s stated aspiration earlier in the document (paragraph 6) is to complete investigations in a timely fashion, albeit that it recognises (as does Royal Mail) the difficulties of imposing fixed deadlines on investigations. However, both complainants and licensees would benefit from greater certainty as to the likely duration, or at least Postcomm’s administrative target, for completing preliminary investigations (and indeed full investigations).
    - ii. Royal Mail notes that the OFT, in its guidance “Under investigation”<sup>8</sup> acknowledges that “*while the duration of an investigation will depend on the complexity of the particular case and the amount of evidence to be considered, the following page shows an illustration of the steps leading up to an infringement decision*”. The OFT Guidance goes on to state that “*the time given to respond will...typically be two to four weeks from receipt of the notice*”. [Emphasis added]
  - b. Advance notice of a full investigation
    - i. In relation to the opening of a full investigation, Postcomm appears to propose that it will “normally” publish on its website a document setting out the “likely” scope of the investigation and will inform the relevant parties that it has opened a full investigation. Again, as indicated above, in the interests of procedural and administrative certainty, (e.g. in order to prepare press releases and brief senior management accordingly) Royal Mail is concerned that Postcomm ensure, as a matter of being reasonable, courteous and in the interests of regulatory certainty, that it will always inform relevant parties within a reasonable period of working hours before any such announcement is made.
    - ii. In the interests also of transparency, Royal Mail is of the view that Postcomm should state in detail at that stage its reasons for opening a full investigation. This practice is consistent with that adopted by other regulators and would ensure that full investigations were only opened where a prima facie case could be made and that reasonable grounds for suspecting licence contravention existed. In line with

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<sup>8</sup> March 2005, OFT 426.

comments already given above, Royal Mail therefore requests that, throughout the Guidance, Postcomm delete the word “normally” and simply set out the process which will always be followed as a matter of course, save in exceptional circumstances where a procedural departure from the Guidance Policy will be set out in reasons and published for all concerned to see and understand<sup>9</sup>.

- iii. Finally, Royal Mail notes that within the proposed Guidance Postcomm gives itself very wide discretion as to whether it will undertake a full investigation or not (paragraph 21). In this connection, and as indicated already above in the Executive Summary and Introduction, Royal Mail would welcome more thorough guidance on Postcomm’s administrative priorities in pursuing cases and the order (of importance) in which these will be applied so that there is a degree of regulatory clarity as to whether or not Postcomm will be likely to pursue a case.

22. The question of Postcomm’s proposals for the procedure to be followed in the gathering of information and considering confidentiality claims is considered in the next section below on Investigation and Information Gathering Procedure. Comments made below should however be read as also relevant to the information gathering process at the pre-investigation stage.

#### Investigation and Information gathering procedure

**Paragraphs 26-34 of the proposed guidance deal with Postcomm’s proposals for the gathering of information in the context of a full investigation, including consideration of issues of confidentiality and the public interest test for disclosure of such information into the public domain.**

23. Aside from Postcomm’s expressed consideration of the five “Principles of Better Regulation”, as a general statement public law principles need to be applied to the exercise of a regulator’s statutory functions when investigating and information gathering pursuant to a preliminary or full investigation into licence contravention.
24. While the statutory provisions of sections 3 and 5 (and also sections 46 and 47) of the PSA give Postcomm a wide remit to conduct its functions in such a way as it considers fit (e.g. in order to ensure provision of the universal service and to further the interests of postal users), it does not confer on Postcomm an unfettered ability to behave, make requests, or indeed reach decisions on subjective grounds or on any other basis that is not reasoned and transparently reached. Quite the opposite: an objective legitimate purpose must be served by Postcomm in each decision that it makes under its statutory aegis, applying the public law principles of transparency and fairness in particular. It is these principles therefore which should govern the processes which Postcomm identifies and proposes in this Guidance.

#### ***Royal Mail concern over the use of formal requests as a matter of course***

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<sup>9</sup> Royal Mail is also concerned that, in relation to Postcomm’s publication of a document setting out the “likely” scope of an investigation, once it has decided that it has reasonable grounds for suspecting licence breach, the potential uncertainty in using the word “likely” is incompatible with the test Postcomm has also set itself of having found a prima facie case, and having reached a point where reasonable grounds for suspecting licence breach exist such that a full investigation can be opened. Accordingly Royal Mail would suggest that the word “likely” is in fact unnecessary and redundant in this context.

25. Therefore, in response to the proposal set out in paragraphs 26–30 of the proposed guidance, Royal Mail would comment, in relation to the requirement of a licensee to provide information as follows:
- a. Royal Mail is concerned by Postcomm’s paragraph 28, that given that delays in the provision of information can have a significant impact on the overall timescales of an investigation, it will generally use its statutory or licence powers to collect information and evidence.
  - b. Postcomm has the power to request information under a postal service operator’s licence and may choose to serve formal notice under s. 47 of the PSA in order to obtain evidence and information it needs to progress an informal or a formal investigation. It is also able to request information without resorting to its formal powers. It appears from the draft Guidance that Postcomm intends largely to use the formal route, rather than an informal route (which is indeed the norm in many other regulated sectors where regulators rarely issue a formal request). This seems to Royal Mail a rather heavy-handed and potentially disproportionate approach, depending on the circumstances.
  - c. Postcomm deals only in a cursory way with the possibility that is open to it of circulating a draft formal request for information, or indeed informally requesting information from a licence holder. Royal Mail’s view is that this is not a reasonable approach nor does it seem to be intended to be tailored to the circumstances of a particular contravention. Rather it seems to be a “blanket” approach, irrespective of the facts. Further it creates the impression that Postcomm believes that it may need to coerce a licence holder to provide information, even where it may be complex, not necessarily feasible to provide, nor available in the timescales Postcomm will unilaterally set.
  - d. Royal Mail therefore invites Postcomm to revisit this approach to the regular use of its statutory powers and to state that it will endeavour instead to act appropriately to the circumstances in question when it is requesting information from any licence holder.

***Royal Mail’s concern as to the relevant purpose served and timescales***

- e. Royal Mail is keen to ensure that any request, whether formal or informal should be clear, on its face, as to the *aim* of the information request and *how the information requested will be used with regard* to the suspected licence contravention it relates to. Postcomm’s duty under statute is to ensure that such a request is made for a relevant purpose and accordingly Royal Mail does not feel that the step it requests at this stage is unreasonable. Royal Mail takes the view that as a matter of course, and in the interests of transparency and procedural fairness, Postcomm should formally state that it is prepared to establish the good practice of circulating drafts of *all* formal RFIs<sup>10</sup> with a view to considering any representations on the relevance of the information requested and the reasonableness of the timescale it proposes for it to be provided<sup>11</sup>.

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<sup>10</sup> Rather than simply in the case of “complex” requests (paragraph 29).

<sup>11</sup> Note that where a formal request is made, section 47 provides that the Commission may require this information for any “relevant purpose”. Royal Mail welcomes Postcomm’s initiative to test the scope and feasibility of information requests with recipients as these can often be more extensive than necessary and also encompass materials not relevant to the issues (paragraph 28).

- f. Royal Mail is also concerned that Postcomm ensure that the timescales set out in a request for information issued pursuant to either s.47 PSA, or a relevant licence condition or indeed informally should be realistic. If a draft or formal request is issued, Postcomm should be open to any representations made by a licence holder as to the feasibility of providing the information (if indeed it is known to exist in the form requested) and the timescales stipulated. Postcomm should also be receptive to genuine difficulties which may be encountered (in the course of sourcing the information which requested) in providing information by certain deadlines and accordingly communicate with the licence holder and agree an alternative in a reasonable fashion.
  - g. Royal Mail would also welcome clarification from Postcomm that it will take account of any sensitivities associated with a licence holder providing third party data, such that there is enough time for the licence holder who is obliged to provide the information to discuss and inform relevant third parties who may be affected by the request, and to consider any data protection concerns in advance of submission.
26. In the light of the public law considerations and practical suggestions set out above, Royal Mail therefore urges Postcomm to re-consider its apparent edict in the Guidance that where information is “*straightforward*” or required “*quickly*” (paragraph 29), it will not normally send a draft information request for comment. Postcomm cannot necessarily know whether or not the information it has requested is straightforwardly obtained, or can be provided in the timescale it sets, without first communicating reasonably with those concerned in providing the information. It is only reasonable for a regulator to engage in discussion at this stage, especially, Royal Mail would hold, if the request is indeed urgent. Indeed, as Postcomm is already aware, the PSA requires only that it will be an offence not to respond in time “*without a reasonable excuse*”, which appears to be a test which anticipates that these matters have to be viewed on their own facts in each case, and not narrowly or prescriptively in advance of the situation arising.
27. Royal Mail also urges re-consideration by Postcomm that it will expect extensions to be given for requests for information in response to requests “*made only in exceptional circumstances*” and also of the requirement that in such circumstances only “*compelling*” reasons may be brought by the recipient of the request for information (paragraph 30).
28. A genuine assessment of the facts in each case where a licensee provides a reasonable excuse seems the course most likely to lead to appropriate and proportionate behaviour and use of Postcomm’s statutory powers. Accordingly, Royal Mail recommends that Postcomm instigate a system of sharing with the licence holder draft RFIs in all cases for the purposes of ascertaining that the request is relevant and required within reasonable time scales that can be met, a practice that it acknowledges has been emerging (albeit sometimes sporadically and unpredictably to date) in its dealings with Postcomm.

***Royal Mail’s concern over managing confidential and non confidential versions of any response***

29. As Postcomm is aware, any claims that the disclosure of information provided to it “*would or might seriously and prejudicially affect*” a person’s interests would have to be considered carefully.

30. Postcomm has stated that it will deal with such claims for confidentiality on a case by case basis, and give prior notice of proposed action, allowing a reasonable opportunity for the person to make his or her views known. However, where Postcomm considers that publication of a matter would be in the public interest, it *will* publish such information (paragraph 34).
31. Royal Mail is concerned that Postcomm makes no mention of the process to be followed by respondents to an information request, in terms of preparation of arguments that the disclosure of certain information would or might seriously and prejudicially affect that respondent's interests.
32. Specifically, Postcomm has also not indicated in its Guidance consultation at what stage a licence holder should make its submissions as to confidentiality, although it has stated that it expects two versions of such a response to be made, one which is confidential and one that is a non-confidential version (redacting confidential information which has been identified). This is not the current practice nor is it practical given the time constraints involved. If it were to become the accepted practice, then Royal Mail would seek confirmation from Postcomm that claims for confidentiality for consideration under s. 46(3) with regard to a response to a request for information could be submitted *following* the submission of the full response should this be required (for the purposes of considering disclosure by Postcomm), i.e. outside the timescale which has been set in the information request. This is common practice in EC competition cases. It is often not feasible, given the timescales involved, to carry out the necessary confidentiality checking in order to be in a position to put the arguments for a confidentiality claim at the time of responding to a request for information. Royal Mail does not believe that s46 (or any other provision of the Act) requires such claims for confidentiality / of serious and prejudicial harm to be made at the time that information is supplied to Postcomm where there is no indication that Postcomm is minded to publicly disclose the information in question. In any event, a failure by the licence holder to identify such information (other than where expressly asked to do so within a reasonable time period) does not obviate Postcomm's public law obligations as described below.

***Royal Mail's concern over the consideration of claims for confidentiality under s. 46(3)***

33. Royal Mail would remind Postcomm of its wider public law obligations in proposing to exercise its powers as indicated above. Postcomm is obliged under these principles to behave in a manner which is procedurally fair and reasonable. Accordingly, in considering such claims, Royal Mail is keen to see further express commitment on the part of Postcomm, both in its Guidance and in practice, to taking the following reasonable steps in considering any such claim:
- a. Ensuring that the time frame provided for a person to claim confidentiality over the final version of an announcement or decision / consultation document, prior to publication in the public domain, is reasonable (and, for example, never less than 72 hours);
  - b. Ensuring that any response by Postcomm that it believes that the information would not seriously and prejudicially harm the licence holder's interests or that the public interest test is met (such that in either case a confidentiality claim fails) is provided in writing and is reasoned (with reference to the statutory function which Postcomm believes it has a public interest to pursue). In doing so, Postcomm should give sufficient time for the recipient of this announcement or other decision to take steps to challenge Postcomm through the courts if it believes this is necessary.

- c. Ensuring that the initial information provided is at all times kept confidential until such claims have been put forward and have been considered by Postcomm as set out in a and b above.

34. In view of this, it would be helpful if Postcomm could provide, in its final version of the Guidance, both examples of the exercise Postcomm would follow to ascertain, and the circumstances in which it believes that, a public interest test would be sufficiently met as to “override” the request for confidentiality made pursuant to the test set out in s. 46(3) of the PSA.

*Decision making and enforcement action procedure*

**In paragraphs 36–86 of the proposed guidance Postcomm sets out the basis upon which it will make a “minded to” contravention decision, the procedure it will adopt in inviting recipients to respond and make oral representations and relevant timescales; It also deals with the process for taking enforcement action and imposing any financial penalties.**

35. As a general comment, in the course of six years of regulatory governance over the postal sector, Postcomm has not yet established a policy on how a licensee may inspect the file when it is being investigated. It is however a principle which is mature and firmly embedded in the practice of other regulators and competition authorities, in the UK, EU and US as an important right of a company under investigation when a statement of objections (or its equivalent) has been issued. This point is developed further below.

*Royal Mail’s concern*

- a. Inspection of the file
  - i. Royal Mail takes the firm view that a licensee should be able to inspect the documents and the evidence which Postcomm intends to rely upon when reaching a contravention decision against it. Such documents should be provided to a licensee with any “minded to” document, where necessary excised in order to protect commercial confidentiality claims which have been made by the person providing that information, if relevant. Currently such a process is not provided for in the Guidance.
- b. Confidentiality
  - i. Additionally, Royal Mail is concerned to reiterate to Postcomm that issues of confidentiality should be identified and discussed with the licence holder before any publication of a “minded to” decision is made on its website, so that any justifiable excisions can be made. Whilst Postcomm states (paragraph 37) that publication will be made “*within a reasonable time from the date the document was served on the licence holder*”, the proposed extent of that time frame is not clear, nor is it evident when representations may be made within the process to claim confidentiality over certain information.

36. Right to be heard

- a. Postcomm also again reserves to itself in its draft Guidance a wide discretion over how it will behave in circumstances where it has reached the stage of investigation so that it is satisfied that a licence contravention has or is occurring, or is likely to occur. It states that if it issues a “minded to” document, a licensee will “*normally*” be given the right to

make oral and written representations (paragraph 38). This raises the following concerns:

- i. In essence Royal Mail is very concerned that by using the word “normally”. Postcomm reserves to itself an absolute discretion over whether a licensee may make oral and/ or written representations in response to the allegations made against it.
- ii. Royal Mail is strongly of the view, that (based on public law principles and as a basic principle of natural justice), the right of the licensee, or indeed any defendant being prosecuted for a statutory offence, to answer the case against it, is a crucial right of defence which should not be denied in any case, including in the course of an administrative process. It should not be left to the absolute discretion of the regulator, who is also the decision maker, to decide when a defendant may or may not answer the case which has been made against it. The defendant should always have the right to decide whether or not to respond. This right of defence is recognised, for example, in Regulation EC 1/2003, which sets out the European Commission’s competition law enforcement powers: *“The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected.”*<sup>12</sup>
- iii. The proposal that Postcomm will “normally” allow a defendant a right to be heard therefore, *without* guaranteed access to the file as a matter of course and *within timescales* which shall be *decided by Postcomm* and *extended* in only *exceptional* circumstances, *without any reference to the licence holder* is a wholly unacceptable non-transparent way to proceed. The current proposal (that *“a licence holder will normally be invited to make comments”* (paragraph 38)) simply does not suffice to meet the requirement for the defence to be heard. If such a process were indeed followed, it would clearly be open for a recipient to challenge the fairness of the process which the regulator has followed. As a natural complement to Postcomm’s other stated proposed moves towards better and more open regulatory practice, Royal Mail would welcome as a matter of urgency a review of the current draft Guidance and encourage much greater procedural allowance and transparent indication here as to how and at what stage Postcomm will allow licensees to inspect the file, in order to ensure a consistent and fair approach is followed on each occasion.
- iv. In fact, Royal Mail believes that Postcomm’s proposal simply to produce a “minded to” reject/ accept/ find an infringement (or otherwise) itself misses out a crucial step, that of transparently and objectively presenting back to the licensee in question the issues raised and what Postcomm’s emerging thinking is and permitting representations to be made back to it in defence.
- v. Although at paragraph 38 of the Guidance consultation Postcomm states that the *“licence holder will normally be invited to make written and oral representations”*,

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<sup>12</sup> Regulation EC 1/2003, 32.

Royal Mail would urgently recommend that Postcomm re-consider the process it proposes to follow at this stage of an investigation, particularly bearing in mind the process that other regulatory bodies, and indeed the UK competition authority the OFT and the European Commission, follow in circumstances where there is a view that a business has infringed competition law. The process involves the authority sending a “statement of objections” which is in effect a proposed infringement decision, on which views are invited from the relevant business generally, in the case of OFT, in a minimum time frame of 40 days<sup>13</sup>. In such cases the business is allowed to inspect the file in order to enable the business to understand the case made against it. Those written representations are then considered. There is no mention of the document being made available to third parties unlike Postcomm’s proposals in this Guidance document.

37. A further distinction between Postcomm and the OFT’s standard practice, is the certainty which OFT gives businesses that, should they indicate in written representations that they wish to make oral representations at a meeting, they will be allowed to do so. Postcomm does not confirm that this will be the case in its enforcement timetable, nor what the timescales would be in such circumstances. By contrast, OFT has stated a 10-20 working days normal timescale following the deadline for written representations and where a business wishes to have the opportunity to expand on its written representations further.
38. In summary, Royal Mail is concerned by Postcomm’s proposals under this heading because they:
- do not give a licence holder any certainty that they will have the chance to make representations to defend itself upon receipt of a “minded-to” decision;
  - propose to make the “minded-to” decision available to the public with no guarantee of the time frame within which representations for confidentiality can be made;
  - do not guarantee that the evidence behind any such decision will be made available to the business against whom any “minded-to” decision is made;
  - do not guarantee the opportunity to be heard in oral representations.

#### Imposing a Penalty

39. Postcomm has proposed a separate statement of policy in relation to Financial Penalties. Royal Mail’s comments will be provided separately in response to these and by the deadline requested by Postcomm.

#### Questions for Consultation – summarised response

40. Royal Mail briefly summarises the views it has expressed above as follows in order to answer the questions which Postcomm has set out in Chapter 4 of the Guidance consultation:

**(i) Is the Enforcement Guidance clear and easy to follow?**

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<sup>13</sup> See “Under investigation?” p. 16 of the OFT Guideline 426.

As set out above, Royal Mail takes the view that the Guidance is as yet incomplete in terms of establishing the clear process it purports to create. In its current state the Guidance fails to take into account both regulatory precedent in the way investigations in other sectors are conducted, and does not appear to implement or imbue its processes with the Principles of Better Regulation. Notwithstanding that Royal Mail welcomes the expressed intention that Postcomm proposes to make its procedures clearer and easier to follow, in fact what is proposed does not cover in a comprehensive or systematic realistic fashion, the scenarios in the course of an investigation which Royal Mail has highlighted above. As it stands it therefore simply creates uncertainty throughout the process, a result which is obviously not desirable.

- (ii) Are there any issues that you feel are not covered in the Enforcement Guidance, or areas where further elaboration may help?**

Please refer to Royal Mail's responses above, taking the chronology of events of a typical investigation.

- (iii) Do you disagree with any of the Enforcement Guidance proposed?**

Royal Mail takes the view that as yet, the Guidance does not take the full picture of the process into account, and has not paid adequate attention to the public law principles and principles of better regulation which overlay the statutory powers given to Postcomm under the PSA. It has indicated above where it recommends Postcomm revisit its proposals, or at the least modify the extent to which it seems to expect to apply its statutory powers narrowly.

- (iv) Has the Enforcement Guidance enhanced your understanding of the procedures which Postcomm will follow?**

Royal Mail refers to the comments it has made in the main body of the response document above.

- (v) Do you believe that the Enforcement Guidance (or any particular aspect of it) is transparent and aids Postcomm in meeting the five Principles of Good Regulation?**

Royal Mail welcomes the expressed intention of Postcomm to attain transparency in its processes, but as indicated above does not feel as yet that this aspiration has been thought through in practical terms and implemented realistically.

- (vi) Do you believe that the Enforcement Guidance (or any particular aspect of it) will aid or hinder the timely completion of complaint handling, the conduct of investigations, the taking of enforcement actions and/ or the imposition of financial penalties?**

Royal Mail does not think that the current Guidance document improves significantly upon Postcomm's existing processes for the conduct of investigations.