

Enforcement Guidance for considering and investigating complaints in relation to licence contraventions

A decision by the Postal Services Commission

October 2008

**Enforcement Guidance for considering and investigating complaints in
relation to licence contraventions**

A decision by the Postal Services Commission

October 2008

Contents

	Summary	3
1.	Postcomm's approach and decision	4
2.	Postcomm's analysis of responses from stakeholders	8
	Annex A - Enforcement Guidance for considering and investigating complaints in relation to licence contraventions	

Summary

- S1. The Postal Services Act 2000 (the Act) sets out the procedures for making an enforcement order or proposing a financial penalty. Postcomm has not previously had a stand alone document setting out its procedures when considering complaints, investigating, taking enforcement action and imposing financial penalties in relation to possible licence contraventions. Its current procedures are detailed in a number of documents.
- S2. With the Better Regulation Executive's five "Principles of Good Regulation" in mind, Postcomm decided in 2007 to consolidate and clarify its enforcement procedures.
- S3. On 2 August 2007, Postcomm published a consultation document setting out its proposals for making available enforcement guidance for considering and investigating complaints in relation to licence contraventions.
- S4. This document summarises some of the key issues raised by stakeholders in response to this consultation and our analysis of these issues. All non-confidential responses are available on Postcomm's website. As a result of the consultation, Postcomm has decided to make minor amendments to the proposed guidance. The amended guidance is attached to this document at **Annex A**.

1. Postcomm's approach and decision

Purpose of this document

- 1.1 This document explains Postcomm's decision in relation to its Enforcement Guidance for considering and investigating complaints in relation to licence conditions.
- 1.2 It summarises the key issues raised by stakeholders in response to the consultation published on 2 August 2007, Postcomm's analysis of these issues and the reasoning behind Postcomm's subsequent decision to make or not make changes to the proposed guidance.
- 1.3 Postcomm's Enforcement Guidance is attached to this document (see **Annex A**). This guidance can be referred to with immediate effect.

Context

- 1.4 Prior to its consultation, Postcomm did not have a stand alone document setting out its procedures when considering complaints, investigating, taking enforcement action and imposing financial penalties in relation to possible licence contraventions. Previously Postcomm's procedures were detailed in a number of documents available on different parts of Postcomm's website.
- 1.5 With the principles of good regulation in mind, Postcomm decided to consolidate and clarify its procedures when considering complaints in relation to investigating possible licence contraventions.

Responses to the consultation paper

- 1.6 On 2 August 2007, Postcomm published a document consulting on proposed guidance. Five responses to the consultation were received and have been reviewed and fully considered. The significant points made in the responses to the consultation are discussed in the section below. All non-confidential responses to the consultation are available on our website.

Postcomm's decision

1.7 Following consideration of the responses Postcomm has decided to make the following changes to the proposed guidance (as reflected in the Enforcement Guidance attached at **Annex A**):

- the addition to paragraph 34 that “the timeframe for allowing confidentiality claims will be considered on a case by case basis”.
- the addition of a paragraph (paragraph 35) to provide further explanation relating to Postcomm’s approach to dealing with confidentiality claims during an investigation and the information gathering process;
- the addition to paragraph 37 (now paragraph 38) that “the minded to decision document may be published on Postcomm’s website, within a reasonable time from the date the document was served on the licence holder, *allowing sufficient time for issues of confidentiality to be determined*”;
- the addition to paragraph 15 (now paragraph 78) that “there may be cases where an investigation may lead to no enforcement action and possibly no penalty, for example where it has been found that there was an accidental licence contravention which caused limited harm and that could be rectified promptly”. This paragraph has been moved to paragraph 78 in the section on *Imposing a Financial Penalty*;
- the addition to paragraph 17 (now paragraph 16) that “Postcomm will aim to complete its preliminary assessment within six weeks of receiving information of sufficient quality relating to a complaint”;
- the wording in paragraph 22 (now paragraph 21) that “Postcomm will normally publish on its website a document setting out the likely scope of the investigation, *after informing* the relevant parties [...] that *it is* to open a full investigation;

- the addition of a paragraph (paragraph 23), to state that “If a complaint becomes a full investigation, Postcomm will give an indicative timescale of how long it will take Postcomm to reach a decision, within six months after the announcement of the scope of the investigation”;
- the addition to paragraph 24 that “if a complainant wishes to challenge a decision by Postcomm not to launch a full investigation, the complainant would need to raise the issue with the Parliamentary and Health Service Ombudsman or seek a Judicial Review of Postcomm’s decision”;
- the addition to paragraph 10 to note specifically that “Postcomm will also consider issues raised by Consumer Focus¹”;
- the addition of a paragraph (paragraph 39) to state that “Postcomm will allow the licence holder minded to be found to be in contravention of its licence access to the investigation file. Only documents to which parties have a right of access will be disclosed, and as a general rule, all documents held on an investigation file may be disclosed other than internal documents and those containing confidential information. Legally privileged information will not be disclosed”;
- the removal of the word “normally” from the first sentence in paragraph 38 (now paragraph 40) which now states “the licence holder will be invited to make written and oral representations”;
- the removal of the word “normally” from paragraph 39 (now paragraph 41), which now states “the licence holder can request an oral hearing in order for it to present its representations in person”. The purpose of oral hearings has also been clarified in

¹ Consumer Focus refers to the National Consumer Council, established by the Consumer Estate Agents Redress (CEAR) Act which has changed the framework for consumer advocacy. The CEAR Act abolished the Consumer Council for Postal Services (Postwatch) on 30 September 2008 and replaced it with the National Consumer Council (Consumer Focus).

this paragraph.

- the addition to paragraph 11 that “Postcomm accepts that in some cases, specific information cannot be obtained by complainants and must be gathered by Postcomm, but it will require parties to provide available evidence to support a complaint”;
- the addition of a flowchart at annex 1 of the Enforcement Guidance to further clarify the enforcement process; and
- the addition to paragraph 4 to state that the guidance will be reviewed and updated from time to time.

1.8 Postcomm has also changed the guidance where relevant to refer to “Consumer Focus”, which was established under the CEAR Act and replaced Postwatch in September 2008.

2. Postcomm's analysis of responses to the consultation from stakeholders to the proposal

Introduction

2.1 Below we have summarised the key issues raised by stakeholders in response to the consultation document published on 2 August 2007, Postcomm's analysis of these issues and the reasoning behind Postcomm's subsequent decision to adopt the Enforcement Guidance attached at Annex A.

Summary of responses

2.2 The following issues raised during the consultation are discussed below:

- *Confidentiality and use of third party data;*
- *Circumstances in which Postcomm may depart from its guidance;*
- *Postcomm's ability to impose a financial penalty;*
- *Timescales for completing investigations;*
- *Complaint handling, initiation and the scope of the investigation;*
- *Sending Requirements for Information (RFIs);*
- *Access to file / rights of defence / oral hearings;*
- *Providing evidence of contraventions; and*
- *Clarifying the complaints process further*

Confidentiality and use of third party data

2.3 Royal Mail states that it would expect Postcomm to set out its intended

practices and timescales at each stage of the process in relation to assessing confidentiality issues. Sufficient time should be allowed for operators to make confidentiality claims, Postcomm to assess them and a reasonable conclusion be reached and communicated on each claim.

- 2.4 Royal Mail states that it would welcome clarification that Postcomm will take account of sensitivities associated with a licence holder providing third party data so that there is enough time for the licence holder to discuss with third parties who may be affected and to consider data protection concerns.
- 2.5 Royal Mail states that Postcomm should ensure that the timeframe for claiming confidentiality is reasonable and that in the event of Postcomm rejecting any such confidentiality claim, it should provide the licence holder with its reasoning in writing. Sufficient time should be allowed to challenge Postcomm and Royal Mail believes that the information should be kept confidential until the claims have been fully considered.
- 2.6 Royal Mail is concerned that issues of confidentiality should be discussed with the licence holder before publication of a “minded to” document.

Postcomm's response

- 2.7 Postcomm agrees that sufficient time should be allowed for operators to submit confidentiality claims during an investigation and the information gathering process. Postcomm believes, however, that the time allowed for making confidentiality claims should be decided on a case by case basis.
- 2.8 When third party data is requested issues surrounding confidentiality will be considered on a case by case basis. Postcomm, when setting the deadline for responding to an RFI which requires third party data, will consider any steps licence holders are obliged to take under the

Data Protection Act 1998 (the “DPA”) to ensure that disclosure to Postcomm of any personal data complies with data protection legislation.

2.9 The timeframe for allowing confidentiality claims will be considered on a case by case basis. However, Postcomm would normally allow 48 hours for an operator to make its confidentiality claims before publishing any document. Postcomm will inform a licence holder when it decides to publish information that a licence holder has claimed is confidential and the basis on which that decision was made. In its consideration of a confidentiality claim from a licence holder, it will firstly consider whether it has been provided with evidence to support the licence holder’s claim that publication would or might seriously and prejudicially affect the licence holder’s interest or interests, and if so, it will secondly consider whether disclosure is necessary to facilitate the performance of a statutory function, or if one of the other exceptions in schedule 7 to the Act apply. Paragraph 34 of the guidance has been amended and a new paragraph has been inserted (paragraph 35) to reflect this position on confidentiality claims.

2.10 Postcomm agrees that issues of confidentiality should be considered before the publication of a document, if not done earlier during the course of the investigation or information gathering process. Paragraph 37 (now paragraph 38) of the guidance states that “the minded to decision document may be published on Postcomm’s website, within a reasonable time from the date the document was served on the licence holder”. This should allow time for issues of confidentiality to be determined. This has been made clear in paragraph 37 (now paragraph 38) of the Enforcement Guidance.

Circumstances in which Postcomm may depart from its guidance

2.11 Royal Mail states that only in exceptional circumstances should Postcomm be able to depart from its published procedures, and in such cases only where it has provided its “detailed reasons for doing so”.

- 2.12 Royal Mail requests that throughout the Enforcement Guidance, Postcomm delete the word “normally” and 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”.

Postcomm’s response

- 2.13 Some of the procedures set out in the Enforcement Guidance are required by statute and some are not. Where Postcomm is not bound to follow certain procedures it will aim to apply the approach set out in the guidance on a consistent basis, and in the event that Postcomm decides to depart from the guidance, it will explain its reasons for doing so.
- 2.14 This document is intended as guidance and is not a requirement of the Act. Therefore, Postcomm believes that it has used the word “normally” appropriately within this guidance document.

Postcomm’s ability to impose a financial penalty

- 2.15 Royal Mail stated that it is concerned by Postcomm’s statement (at paragraph 15 of the proposed Enforcement Guidance) that, when considering whether to pursue an investigation, it will consider its ultimate ability to impose a financial penalty
- 2.16 Another respondent to the consultation also stated that fines do not assist a damaged operator and that there needs to be clearer guidance on the routes available to secure financial redress.

Postcomm’s response

- 2.17 Postcomm will as part of an overall consideration consider the availability of possible outcomes when considering whether or not to take forward a complaint. For example, consideration of a financial penalty will not be the only factor, and it along with other factors (such

as the evidence suggesting a breach) will be considered in the round. Postcomm has added to paragraph 15 (now paragraph 78) of the Enforcement Guidance that an investigation may lead to no enforcement and possibly no penalty, for example where it has been found that there was an accidental licence contravention that has been rectified promptly. We have also moved this paragraph to paragraph 78 such that it falls within the section on Imposing a Financial Penalty.

- 2.18 Sections 13(6) and (7) of the Act state that: "no action shall lie in respect of a contravention by a licence holder of a condition of his licence" and this does not affect "a right of action in respect of an act or omission which takes place in the course of the provision of any postal services or the doing of anything else to which the condition relates". Those affected by a contravention of a licence condition would have to consider the nature of their claim and whether there was any scope for them to bring a claim against the operator in question. This would not be a role for Postcomm.

Timescales for completing investigations

- 2.19 Royal Mail is concerned that Postcomm ensures that it will always inform relevant parties within a reasonable period before any announcement of a full investigation is made.
- 2.20 Royal Mail notes that complainants and licensees would benefit from greater certainty as to the likely duration for completing preliminary and full investigations.
- 2.21 Royal Mail is concerned that timescales set out in a Requirement for Information are realistic. Postcomm should be open to representations by a licence holder as to the feasibility of providing the information.

Postcomm's response

- 2.22 Each announcement about a full investigation will need to be made on a case by case basis but generally Postcomm will inform the parties

before any announcement is made. Paragraph 22 (now paragraph 21) of the guidance states that Postcomm 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.

- 2.23 Postcomm recognises the importance of the certainty of timescales to the industry and has previously proposed² that it will aim to complete the first stage of its investigation process, the preliminary assessment, within six weeks of receiving a complaint. Paragraph 17 of the Enforcement Guidance (now paragraph 16) has been updated to reflect this timescale. If a complaint becomes a full investigation, Postcomm will, wherever possible, give an indicative timescale of how much longer it will take to reach a decision, within six months after the announcement of the scope of the investigation. This has been made clear in a new paragraph (paragraph 24) of the Enforcement Guidance.
- 2.24 The likely duration of an investigation will, however, depend on the nature and complexity of the issue under investigation. Previous investigations, from opening the full investigation to closing the case, have taken from three to eighteen months. Postcomm will keep complainants and licence holders informed at regular intervals on the progress of a full investigation.
- 2.25 Paragraph 29 of the Enforcement Guidance states that “when the information to be requested is complex, Postcomm may issue the requirement in draft, allowing for representations to be made on the scope of the information required and the practicality of providing the information by the deadline provided”. Where the information is straightforward or required quickly, Postcomm will not send a draft information requirement.

Complaint handling, initiation and the scope of the investigation

- 2.26 Royal Mail would welcome more thorough guidance on Postcomm’s

² In the Competitive Market Review – November 2005 (S3.6.1)

administrative priorities in pursuing cases and the order of importance in which they will be applied so there is clarity on whether Postcomm is likely to pursue a case. It would also welcome an indication of “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”.

- 2.27 Royal Mail states that it would be helpful to have some formal indication over the circumstances in which Postcomm is likely to start its own initiative enquiries.
- 2.28 An operator questions whether it is wise to publish a document on Postcomm's website that provides details and scope of a full investigation before the investigation takes place. The operator states that the party being investigated could sustain commercial damage as a result of conjecture arising from the announcement, yet the investigation itself could then reveal that no transgression was committed. It questions whether the party would have right of recourse and believes that Postcomm should ensure that such announcements do not lead to the prejudging of a company.
- 2.29 An operator states that Postcomm must explain how a complainant should proceed if Postcomm does not take forward a complaint. It questions whether the complainant has the right to appeal or complain to an ombudsman and what the complainant can do in the event that it is not satisfied with Postcomm's decision that there is no case to answer.
- 2.30 Postwatch says that it may be useful to add to paragraph 10 of the guidance, that Postcomm will also consider suspected licence contraventions if Postwatch (now Consumer Focus) brings them to the Regulator's attention.

Postcomm's response

- 2.31 The Enforcement Guidance is designed purely to explain the process Postcomm is likely to follow when considering complaints, investigating, taking enforcement action and imposing financial penalties in relation to possible license contraventions and is not intended to set out Postcomm's prioritisation criteria. As a small organisation, Postcomm's priorities may change in accordance with circumstances.
- 2.32 Postcomm has adopted a set of enabling resolutions dealing with, amongst other things, the reservation of certain functions to the Commission and the delegation of functions to staff. If a decision is taken by non Commissioners, it will have been delegated and therefore binding.
- 2.33 Postcomm has stated in paragraph 10 of the guidance that it will consider own initiative enquiries if it identifies a particular issue or believes that a licence holder is not operating as it should in accordance with its licence conditions.
- 2.34 The purpose of a preliminary assessment is to assess whether there are reasonable grounds to conduct a full investigation, based on the information gathered in a preliminary assessment. So once a case passes into the full investigation stage, reasonable grounds to suspect a contravention will have been established. However, when moving from a preliminary to a full investigation, Postcomm has not made a contravention decision; it has simply made the decision that it has reasonable grounds for suspecting a contravention. The Scope of the Investigation will make it clear in that no conclusions in relation to a contravention have been reached, just that there are reasonable grounds to suspect a contravention. The Scope of the Investigation will be sent to all parties involved and they will be asked to comment on commercial confidentiality issues before it is published. Publishing a Scope of the Investigation at the point of initiating a full investigation is common practice among regulators.

- 2.35 If a complainant wishes to challenge a decision by Postcomm not to launch a full investigation, the complainant would need to raise the issues with the Parliamentary and Health Service Ombudsman or launch a judicial review of Postcomm's decision. Paragraph 24 of the Enforcement Guidance has been amended to reflect this point. In addition, in response to Postwatch's comment, paragraph 10 of the guidance has been amended to note that Postcomm will consider issues raised by Consumer Focus.

Sending Requirements for Information (RFIs)

- 2.36 Royal Mail states that it is concerned that Postcomm largely intends to use the formal route to require information, unlike the informal route which is the norm with other regulators. Royal Mail sees this as heavy handed.
- 2.37 Royal Mail's view is that Postcomm deals with the possibility of issuing a draft formal request or informally requesting information, only in a cursory way and this is not tailored towards particular circumstances. Royal Mail invites Postcomm to act appropriately to the circumstances in question when requesting information.
- 2.38 Royal Mail is keen to ensure that any request should be clear as to its aim and how information will be used. Royal Mail states that Postcomm should formally state that it will circulate drafts of all formal RFIs with a view to considering representations on the relevance of the information requested and the reasonableness of the timescales proposed.

Postcomm's response

- 2.39 Postcomm does not believe that using an informal route is the norm with other regulators. For example, Ofcom states in its enforcement guidelines that it will generally use its formal powers to collect the information it needs to pursue investigations. Ofgem states that it has formal powers to require the provision of information and may need to

issue several information requests in the course of an investigation. Investigations are formal procedures and Postcomm is concerned to uphold the formal process. Postcomm will however consider the situation on a case by case basis when requiring information.

- 2.40 Postcomm has powers to carry out its duties under Section 47 of the Act and in Condition 17 of Royal Mail's licence which permits it to formally require information. Postcomm has explained in paragraph 29 of the Enforcement Guidance when it is likely to send a draft RFI. Postcomm should be able to exercise its judgement as to whether it considers information is straightforward.

Access to file / rights of defence / oral hearings

- 2.41 Royal Mail takes the view that a licensee should be able to inspect the documents and evidence on which Postcomm will rely when reaching a contravention decision.
- 2.42 Royal Mail asks that Postcomm changes its guidance to state 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 given the right to respond to allegations made against it and provide any necessary factual evidence in its defence. Royal Mail claims that it 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".
- 2.43 Royal Mail raises further concerns relating to paragraph 38 in the proposed Enforcement Guidance, in which Postcomm states that if it issues a "minded to" document, a licensee will normally be given the right to make oral and written representations. Royal Mail is concerned that by using the word "normally" Postcomm has discretion over whether a licensee can make representations. Royal Mail states that it would urgently recommend that Postcomm reconsider the process it proposes to follow at this stage bearing in mind the processes of other regulators, the OFT and the EC.

- 2.44 An operator stated that the complainant should be equally entitled to receive the 'minded to' decision document, make both oral and written representations and request an oral hearing. Furthermore, the Enforcement Guidance needs to explain what a complainant can do in the event that it is not satisfied with a decision by Postcomm that there is no case to answer.

Postcomm's response

- 2.45 Postcomm will allow licensees access to the investigation file, and would normally follow procedures similar to those of the OFT when deciding which documents can be inspected. Only documents to which parties have a right of access will be disclosed. As a general rule, all documents held on an investigation file may be disclosed other than internal documents and those containing confidential information. We would not allow access to information that is legally privileged. Paragraph 39 has been added to the Enforcement Guidance to reflect this position.
- 2.46 Postcomm has removed the word “normally” from paragraph 38 (now paragraph 40). Postcomm has taken into consideration the policies of other regulators when drafting the guidance.
- 2.47 The purpose of an oral hearing is for the licensee that Postcomm is “minded to” find in contravention of its licence to make a representation in response to the findings. It is not intended to provide a forum where Postcomm is required to justify its approach. Postcomm will not make any decisions at the hearing nor will it necessarily respond to any points made. Ofgem has stated that all licensees receiving a “minded to” letter will be offered the opportunity for an oral hearing. It does not extend that offer to a complainant. Postcomm has clarified its position in relation to oral hearings in paragraph 39 (now paragraph 41) of the Enforcement Guidance.

Providing evidence of contraventions

- 2.48 An operator expressed concern that requiring evidence of contraventions of licence conditions is often difficult as it relies on circumstantial evidence and hearsay evidence in most cases, meaning that only those with regulatory powers to demand information can find actual evidence in many cases.

Postcomm's response

- 2.49 Due to limited resources, Postcomm can only consider complaints that are substantiated. It is in the complainant's interest to gather as much information as possible so that Postcomm is able to investigate the complaint fully. Like Ofcom, Postcomm has amended paragraph 11 of the Enforcement Guidance to state that it accepts in some cases specific information cannot be obtained by the complainants and must be gathered by Postcomm, but it will require parties to provide available evidence to support a complaint.

Clarifying the complaints process further

- 2.50 Postwatch requests that a flowchart be included in the Enforcement Guidance to illustrate the complaints process from a clear visual perspective.
- 2.51 Postwatch believes it would be appropriate to review the document after a number of complaints have been assessed and feedback has been received from those involved, to establish whether the Enforcement Guidance has been useful.

Postcomm's response

- 2.52 Postcomm has added a flowchart to the Enforcement Guidance to further clarify the enforcement process and has also added to the paragraph 4 that the Enforcement Guidance will be reviewed from time to time.

Annex A

Enforcement Guidance for considering and investigating complaints in relation to licence contraventions

October 2008

INTRODUCTION

1. The Postal Services Commission (Postcomm) has a number of statutory duties under the Postal Services Act 2000 (the Act). Under the Act, Postcomm has the power to grant licences to allow the conveyance of letters from one place to another. It is also required to ensure that licensees comply with their licences in that, if Postcomm is satisfied that a licence holder is contravening any condition of its licence or is likely to contravene any such condition, Postcomm must take steps to ensure that compliance is secured, except in specified circumstances. When non-compliance is suspected, Postcomm may choose to investigate.
2. Postcomm's work is steered by its Commissioners. A number of the decisions described in this Guidance must be made by Postcomm's Commissioners, others may be made by Postcomm's staff.¹ However, for convenience, this Guidance only refers to "Postcomm" when indicating that a decision will be made.
3. This Guidance describes the enforcement procedures when Postcomm considers complaints, conducts investigations, takes enforcement action and imposes financial penalties in relation to suspected licence contraventions.² In particular, it sets out:
 - what happens before the full investigation procedure;
 - the full investigation and information gathering procedure;
 - the decision making and enforcement action procedure; and
 - what happens after the enforcement procedure
4. The aim of this document is to ensure that all postal industry stakeholders and others understand Postcomm's enforcement procedures when considering complaints, investigating, taking enforcement action and imposing financial penalties in relation to possible licence contraventions. A flowchart illustrating Postcomm's enforcement procedures can be found at Annex A to this guidance. Postcomm believes that published guidance facilitates transparency and consistency. Postcomm will review and update the guidance from time to time.
5. Where enforcement action is necessary and / or Postcomm decides to impose a financial penalty, Postcomm will act in accordance with the

¹ A separate document has been published describing the roles and responsibilities of Postcomm's commissioners, chairman, chief executive and directors. See <http://www.psc.gov.uk/postcomm/live/about-postcomm/commissioners-and-directors/Constitution.pdf>

² A separate document has been published describing Postcomm's enforcement policy in relation to investigations into alleged or suspected Postal Services Act 2000 criminal offences. See <http://www.psc.gov.uk/policy-and-consultations/consultations/postcomm--enforcement-policy.html>

requirements set out in the Act. When seeking to impose a financial penalty, Postcomm will have regard to its Statement of Policy in relation to Financial Penalties. This policy can be found on Postcomm's website.

6. Postcomm is aware of the need to complete investigations in a timely fashion and will always endeavour to do so. The time it takes to complete an investigation is dependent on the issues being considered and, to some extent the degree of cooperation Postcomm receives in obtaining information. In addition, Postcomm has to take into account the need for due process. However, Postcomm can, when appropriate, take swift enforcement action, through the use of a provisional order if it appears to Postcomm that the licence holder is contravening or is likely to contravene any conditions of its licence and a provisional order is needed (see paragraphs 45 to 51).
7. This Guidance is not a substitute for the Act, or any other statutory material. It should be read in conjunction with the Act, any licence granted by Postcomm and other relevant EC and domestic law. Any person in doubt about how he or she may be affected should seek independent legal advice.
8. The aim of providing the Enforcement Guidance is to provide transparency to the procedures and to set out for Postcomm, postal operators, postal customers and other postal stakeholders the general principles and approach involved when considering complaints, investigating, taking enforcement action and imposing financial penalties in relation to possible licence contraventions. Some of the procedures set out in the Enforcement Guidance are required by statute, some are not. Where Postcomm is not bound to follow certain procedures, it will aim to apply the approach set out in the Enforcement Guidance on a consistent basis and, in the event that Postcomm decides to depart from the Enforcement Guidance, it will explain its reasons for doing so.

PRE-FULL INVESTIGATION PROCEDURE

9. There are a number of procedures Postcomm will follow before launching a full investigation into a suspected licence contravention. These are set out below.

Complaints and own-initiative enquiries

10. Postcomm will consider suspected licence contraventions either as a result of a complaint or on its own initiative. It will do so on its own initiative if it identifies a particular issue or believes that a licence holder is not operating as it should in accordance with its licence conditions. Postcomm will also consider issues raised by Consumer Focus³.
11. Postcomm will only consider complaints that demonstrate or allege a possible contravention of a licence condition. Postcomm will be able to advance the assessment of a complaint more effectively if a complaint:
 - specifically refers to the relevant licence condition(s) and provides reasoning as to why a contravention is suspected;
 - includes sufficient factual evidence backing up the allegation, including evidence of harm suffered or expected to be suffered by postal stakeholders; and
 - includes a statement setting out preferences regarding confidentiality of the complaint (see below).

Postcomm accepts that in some cases, specific information cannot be obtained by the complainants and must be gathered by Postcomm, but it will require parties to provide available evidence to support a complaint.

12. Complaints should be sent to:

Complaints - licence contraventions
Postal Services Commission
Hercules House
Hercules Road
London
SE1 7DB
Email: complaints@psc.gov.uk

13. Before submitting a complaint to Postcomm, complainants should consider whether their complaint relates to an actual or potential contravention or whether it is a commercial dispute (which is not a matter for Postcomm).

³ Consumer Focus refers to the National Consumer Council, established by the Consumer Estate Agents Redress (CEAR) Act which has changed the framework for consumer advocacy. The CEAR Act abolished the Consumer Council for Postal Services (Postwatch) on 30 September 2008 and replaced it with the National Consumer Council (Consumer Focus).

14. Postcomm will not necessarily progress all complaints addressed to it. For example, Postcomm will not consider a complaint it believes to be vexatious or a complaint that raises allegations or issues upon which Postcomm has already made a decision. Equally, Postcomm will have regard to whether a complaint falls within the jurisdiction of another agency and whether it is felt that another agency is better placed to handle a complaint. For example, a complaint about a lost mail item should first be directed to the operator handling the item and then, if the matter is still unresolved, to Consumer Focus, the consumer body. Postcomm will act in accordance with its Memorandum of Understanding with the OFT when it receives a complaint regarding anti-competitive behaviour. The Memorandum of Understanding can be found on Postcomm's website.
15. When making a complaint to Postcomm, the complainant should indicate to Postcomm whether it wishes to i) remain anonymous and / or ii) keep any part of the complaint confidential. Postcomm will, as far as possible, act to protect the identity of complainants in the event that they wish to remain anonymous. Postcomm's treatment of confidential information is discussed below.

Preliminary assessments

16. Having received a complaint or identified an issue on its own initiative Postcomm will normally conduct a "preliminary assessment" of the suspected licence contravention. The preliminary assessment is Postcomm's opportunity to ensure that it fully understands the nature of the complaint and the issues involved. The purpose of the preliminary assessment is to decide whether or not to conduct a full investigation and, if the decision is to investigate, to establish the scope of the investigation. Postcomm will aim to complete its preliminary assessment within six weeks of receiving information of sufficient quality relating to a complaint.
17. Postcomm will normally seek the views of the licence holder in question during the preliminary assessment stage. The licence holder will either be given a non-confidential copy of the complaint or sufficient indication of the nature of the issues involved, in order for it to be able to respond to the matter. Postcomm may also seek to hold meetings with the complainant and / or the licensee that is the subject of the complaint.
18. Information may be gathered during this preliminary assessment in order to clarify the issues involved and obtain evidence relating to the issues alleged. Postcomm may require information to be produced formally (under the powers in the Act or licence conditions – see below) or request it informally. Decisions on whether to use formal powers to require information during the preliminary assessment stage will be taken on a case by case basis.

Full investigations

19. Postcomm may choose to open a full investigation if it can satisfy itself that it has reasonable grounds for suspecting that:
 - there is a continuing contravention of a licence condition;
 - there has been a contravention of a licence condition; or
 - there is likely to be a contravention of a licence condition.

20. Whether there are reasonable grounds for suspicion will depend upon Postcomm's assessment of the information available. However, Postcomm will only open a full investigation where it would be an appropriate use of Postcomm's resources to do so. For example, Postcomm may decide not to undertake a full investigation if the issues raised are likely to be considered in a current or planned policy project or work-stream and / or it is believed that the possible contravention is likely to have or have had little or no effect on either the licensee, Postcomm and / or a third party. Therefore a decision by Postcomm not to investigate should not be taken as any statement by Postcomm about the merits of a complaint or own initiative enquiry, unless it is clearly stated otherwise. Postcomm will make decisions about whether to open full investigations on a case by case basis.

21. If the outcome of the preliminary assessment is to open a full investigation, Postcomm will normally publish on its website a document setting out the likely scope of the investigation after informing the relevant parties (usually the complainant and the licensee that is the subject of the complaint) that it is to open a full investigation.

22. Postcomm's ability to gather information does not change between the preliminary assessment and full investigation stages. The key distinction between the stages is that Postcomm, once satisfied that there are reasonable grounds for suspecting a licence contravention, will formally decide whether to take forward a complaint / investigate an issue.

23. If a complaint becomes a full investigation, Postcomm will give an indicative timescale of how long it will take Postcomm to reach a decision, within six months after the announcement of the scope of the investigation.

24. If the outcome of the preliminary assessment is that a full investigation should not be launched, Postcomm will inform the relevant parties of this decision explaining its reasons. If a complainant wishes to challenge a decision by Postcomm not to launch a full investigation, the complainant would need to raise the issue with the Parliamentary and Health Service Ombudsman or seek a Judicial Review of Postcomm's decision.

INVESTIGATION AND INFORMATION GATHERING PROCEDURE

25. Postcomm will endeavour to complete investigations as soon as practicable. However complainants should be aware that investigations can be complex and generally require detailed information gathering and analysis. The procedure Postcomm will normally follow to gather and analyse information is set out below.

Gathering information

26. Postcomm needs to obtain accurate information during investigations into suspected licence contraventions. Those responding to requirements and requests for information should provide accurate information within the timescales stated.
27. Postcomm has been given statutory powers to gather information. Postcomm can serve a notice requiring the production of documents and / or information under Section 47 of the Act. In addition, licences granted by Postcomm contain a provision requiring the licensee to furnish Postcomm with such information as Postcomm may require.
28. Postcomm can informally request information from parties during the course of an investigation. However, delays in the provision of information can have a significant impact on overall timescales of an investigation. Postcomm therefore will generally use its statutory powers or the relevant provision in a postal licence to require the information and evidence it needs to be produced. Postcomm has the power to take enforcement action against businesses that fail to respond to a formal requirement for information.
29. When the information to be required is complex, Postcomm may issue the requirement in draft, allowing for representations to be made on the scope of the information required and the practicality of providing the information by the deadline provided. After considering any comments, Postcomm will then issue the information requirement with or without amendments. Where the information required is straightforward, or the information is required quickly, normally Postcomm will not send a draft information requirement for comment.
30. Postcomm will consider requests for an extension for responding to an information requirement on a case by case basis, but expects such requests to be made only in exceptional circumstances. A party seeking an extension would need to demonstrate that there are compelling reasons in order for its extension request to be granted. When an information requirement is issued under Section 47 of the Act it is an offence not to respond in time “without a reasonable excuse”.

When an information requirement is issued under a licence condition and is not complied with, Postcomm could find that a contravention of a licence condition has occurred.

Legal Privilege

31. Postcomm's powers do not allow it to require documents or information that a person would not be compelled to produce or supply in evidence in civil proceedings. This covers documents and information that are covered by legal professional privilege. These are communications between a professional legal advisor and their client, or those which are made in connection with, or in contemplation of, legal proceedings, and for the purposes of those proceedings. An example of a privileged communication would be a letter from a person's lawyer to the person advising on licensing issues. Under domestic law, the communications of in-house lawyers as well as those of lawyers in private practice can be privileged.

Confidentiality of information

32. If a person thinks that any information he is going to submit relates to his affairs and that publication might seriously and prejudicially affect his interests (confidential information), he should:
- provide two submissions, with the first being the full submission (containing the confidential information), and the second being a non-confidential version of the submission (redacting the confidential information), and
 - give a written explanation as to why the information regarded as confidential by the person should be considered confidential by Postcomm.
33. A blanket claim of 'confidential', marking all information supplied, is unhelpful to both Postcomm and the person submitting the information. Postcomm may need to take a view on what is, and what is not, genuinely confidential and the process of checking these views with the person concerned can be a lengthy and time consuming process.
34. Postcomm will decide whether or not information needs to be published on a case by case basis. If Postcomm proposes to publish information identified as confidential by a person, Postcomm will give prior notice of the proposed action, allowing a reasonable opportunity for the person to make his or her views known. The time frame for allowing confidentiality claims will be considered on a case by case basis.
35. In Postcomm's consideration of a confidentiality claim by a person, Postcomm will firstly consider whether it has been provided with evidence to support a person's claim that publication would or might seriously and prejudicially affect the person's interest or interests, and if so, Postcomm will secondly consider whether disclosure is necessary to facilitate the performance of a statutory function, or if one of the

other exceptions in schedule 7 to the Act apply. If Postcomm considers that the publication of a matter would be in the public interest, Postcomm will publish such information.

Analysis of information

36. Before proposing to make any decision on whether there is, has been or is likely to be a contravention of a licence condition, Postcomm will carefully examine and consider all the information it has obtained during the course of the preliminary assessment and full investigation.

DECISION-MAKING AND ENFORCEMENT ACTION PROCEDURE

A 'minded to' contravention decision

37. If Postcomm is satisfied that a licence holder is contravening or has contravened a licence condition or is likely to contravene a condition of its licence, the licence holder will be sent a 'minded to' decision document, which is, in effect, a proposal of a contravention decision. This document will notify the recipient that Postcomm is minded to decide that there is, has been or is likely to be a contravention of a licence condition. Normally a 'minded to' contravention decision will be served and representations sought and considered before a final order or confirmation of a provisional order and / or financial penalty is proposed.
38. The 'minded to' decision document may be published on Postcomm's website, within a reasonable time from the date the document was served on the licence holder, allowing sufficient time for issues of confidentiality to be determined.
39. Postcomm will allow the licence holder minded to be found to be in contravention of its licence access to the investigation file. Only documents to which parties have a right of access will be disclosed, and as a general rule, all documents held on an investigation file may be disclosed other than internal documents and those containing confidential information. Legally privileged information will not be disclosed.
40. The licence holder will be invited to make written and oral representations. The deadline for making representations will be determined on a case by case basis, taking into account factors such as the length of the 'minded to' decision document and the complexity of the issues set out in the document. As with information requirements, Postcomm will consider requests for extensions for making representations on 'minded to' decision documents on a case by case basis, but expecting only to grant extensions in exceptional circumstances.
41. The licence holder can request an oral hearing in order for it to present its representations in person. Oral hearings are not public hearings, only Postcomm and the licence holder, who may be accompanied by legal and other professional advisers, will be permitted to attend the hearing. An oral hearing is not a forum where Postcomm is required to justify its approach. Postcomm will not make any decisions at the hearing, nor will it necessarily respond to any points made. The purpose of an oral hearing is for the licence holder who Postcomm is 'minded to' find in contravention of its licence to make representations in response to the provisional findings.

42. Postcomm will consider any written representations from third parties, made in relation to the published 'minded to' decision document.

A contravention decision

43. Following consideration of any representations made, Postcomm will make a decision as to whether it is satisfied that the licence holder under investigation is or has contravened a licence condition or is likely to contravene a licence condition. A copy of Postcomm's decision document will be served on the licence holder and published on Postcomm's website.

Enforcement action and imposing financial penalties

44. Postcomm has the power to take enforcement action in relation to contraventions of licence conditions and is compelled to do so in some cases. Postcomm also has the discretionary power to impose a financial penalty on a licence holder. When referring to the making of representations in the following paragraphs, Postcomm will normally only allow for written representations to be made (an oral hearing will not be offered, in contrast to the position in relation to the making of a 'minded to' decision). In addition, when referring to publishing a notice, Postcomm believes that publishing any notice on its website will ensure that it is brought to the attention of persons likely to be affected by its contents.

Making a Provisional Order

45. If Postcomm is not, or not yet, satisfied that a licence holder is contravening or is likely to contravene any conditions of its licence, but it appears to Postcomm that the licence holder is contravening or is likely to contravene any conditions of its licence and a provisional order is needed, Postcomm must make a provisional order that sets out what is needed to ensure compliance (subject to paragraph 47 below).

46. Under the Act, when deciding whether a provisional order is needed, Postcomm will have regard, in particular, to the extent to which any person is likely to sustain loss or damage as a result of the contravention of the licence condition before a final order may be made.

47. In certain circumstances, Postcomm cannot make a provisional order. The Act states that Postcomm must not make a provisional order if it is satisfied that:

- its statutory duties preclude it from doing so;
- the licence holder has agreed to take, and is taking, all the steps that Postcomm considers appropriate to secure or facilitate compliance with the condition concerned;

- the contraventions or apprehended contraventions are trivial;
 - additionally, Postcomm would be unlikely to make a provisional order if such an order has already been made in respect of the same contravention or apprehended contravention on a licence holder.
48. Postcomm will not issue a 'minded to' decision document before making a provisional order.
49. The provisional order:
- must require the licence holder to do, or not to do, certain things;
 - takes effect at the time (the earliest practicable) set out in the order; and
 - may be revoked by Postcomm at any time.
50. A provisional order (unless revoked, see below) has effect for no longer than three months. When a provisional order is confirmed, it continues in effect until such time (if any) that Postcomm revokes it.
51. Once Postcomm has made a provisional order, it will gather and analyse further information in order to decide whether it should confirm or revoke the provisional order.

Confirming a Provisional Order

52. Postcomm must confirm a provisional order (with or without modifications) if:
- it is satisfied that a licence holder is contravening, or is likely to contravene, any conditions of its licence; and
 - it considers that the confirmation of that order (with any modifications) is needed for the purpose of securing compliance with the licence condition concerned.
53. Before confirming a provisional order, Postcomm must give notice of the proposed confirmation by serving a notice on the licence holder and Consumer Focus and a copy of the order proposed to be confirmed and by publishing the notice of the proposed confirmation.
54. Postcomm will publish the notice of the proposed confirmation on Postcomm's website.
55. The notice of the proposed confirmation must state:
- that Postcomm proposes to confirm the provisional order;
 - the effect of the order;
 - which licence condition the order is dealing with;

- the acts or omissions which Postcomm considers constitute, or would constitute, contraventions of that condition;
 - any other facts which Postcomm considers justify the making of the order; and
 - the period within which representations may be made in relation to the proposed confirmation.
56. The Act states that Postcomm must allow a period of not less than 21 days, starting with the date of publication of the notice, for representations to be made. The actual period allowed in each case for making representations will be determined on a case by case basis.
57. Postcomm will decide whether it must confirm the provisional order having considered the representations made. Postcomm will serve a notice containing the confirmation on the licence holder and Consumer Focus, and publish the notice on Postcomm's website as soon as practicable after making the order.
58. If, after giving notice of the proposed confirmation of the provisional order, Postcomm decides not to confirm the provisional order, it will give notice of that decision to the licence holder and Consumer Focus and publish the notice on Postcomm's website.
59. Under the Act, if the proposed provisional order (for confirmation) needs to be modified, there are two alternative procedures depending on whether or not the licence holder consents to the modifications. If the licence holder consents, Postcomm will only give notice of the proposed modifications to Consumer Focus, whereas if the licence holder does not consent to the modifications, Postcomm must give notice of the proposed modifications to Consumer Focus and the licence holder, and publish the notice proposing the modifications.
60. Under the Act, a notice proposing to modify the terms of a provisional order (for confirmation) must set out:
- the proposed modifications;
 - the reasons for them; and
 - the period within which representations may be made.
61. The Act states that Postcomm must allow a period of not less than 7 days from giving of the notice (when consent is given), or publication of the notice (when consent is not given), for representations to be made. The actual period allowed in each case for making representations will be determined on a case by case basis.
62. Where Postcomm confirms a provisional order it shall continue to have effect until such time (if any) as Postcomm decides to revoke it.

Making a Final Order

63. If Postcomm is satisfied that a licence holder is contravening, or is likely to contravene, any condition of its licence, Postcomm must make a final order that sets out what is needed to ensure compliance.
64. In certain circumstances, Postcomm cannot make a final order. The Act states that Postcomm must not make a final order if it is satisfied that:
- its statutory duties preclude it from doing so;
 - the licence holder has agreed to take, and is taking, all the steps that Postcomm considers appropriate to secure or facilitate compliance with the condition concerned; or
 - the contraventions or apprehended contraventions are trivial.
65. To make a final order, Postcomm must follow a similar process to that set out above when confirming a provisional order. Before making a final order, Postcomm must serve a notice proposing the final order, together with a copy of the proposed order on the licence holder and Consumer Focus, and publish the notice of the proposed final order.
66. Postcomm will publish the notice proposing the final order on its website.
67. The notice of the proposed final order must state:
- that Postcomm proposes to make an order;
 - the effect of the order;
 - which licence condition the order is dealing with;
 - the acts or omissions which Postcomm considers constitute, or would constitute, contraventions of that condition;
 - any other facts which Postcomm considers justify the making of the order; and
 - the period within which representations may be made in relation to the proposed order.
68. The Act states that Postcomm must allow a period of not less than 21 days starting with the date of publication of the notice for representations to be made. The actual period allowed in each will be determined on a case by case basis.
69. Postcomm will decide whether it must make the final order having considered all the representations made. Postcomm will serve a copy of the final order on the licence holder and Consumer Focus, and publish the notice on Postcomm's website as soon as practicable after making the order.
70. A final order has effect until the time (if any) that Postcomm revokes it.

71. If, after giving notice of the proposed final order, Postcomm decides not to make a final order, it will give notice of that decision. Postcomm will serve a notice on the licence holder and Consumer Focus, and publish the notice on Postcomm's website as soon as practicable after deciding not to make a final order.
72. Under the Act, if the proposed final order needs to be modified, there are two alternative procedures, depending on whether or not the licence holder consents to the modifications. If the licence holder consents, Postcomm must only give notice of the proposed modifications to Consumer Focus, whereas if the licence holder does not consent to the modifications, Postcomm must give notice of the proposed modifications to Consumer Focus and the licence holder, and publish the notice proposing the modifications. In both cases Postcomm must consider any representations made in accordance with the notice. In the interest of transparency, Postcomm however will normally give notice of the proposed modifications to Consumer Focus and the licence holder, and publish the notice proposing the modifications.
73. Under the Act, a notice proposing to modify a proposed final order must set out:
- the proposed modifications;
 - the reasons for them; and
 - the period within which representations may be made.
74. The Act requires that Postcomm allows a period of not less than 7 days from giving the notice (when consent is given), or publication of the notice (when consent is not given), for representations to be made. The actual period allowed in each case for making representations will be determined on a case by case basis.
75. If, after giving notice of the proposed modifications, Postcomm decides not to make the final order, it will give notice of that decision. Under the Act, in the case of consent, notice must be given to the licence holder and Consumer Focus, whereas, if there is no consent, notice must be given to the licence holder and Consumer Focus and the notice must be published on Postcomm's website.

Imposing a Financial Penalty

76. If Postcomm is satisfied that a licence holder has contravened or is contravening any conditions of its licence, Postcomm may impose a reasonable penalty.
77. The Act states that Postcomm may impose a penalty in respect of a contravention of a licence condition irrespective of whether it has made

or may make a final or provisional order in respect of that contravention.

78. As far as financial penalties are concerned, Postcomm cannot impose a penalty unless a notice has been given within six months of a provisional order being imposed (if it is not confirmed and no final order has been made in respect of it), or within three months of a provisional order being confirmed or a final order being made. If Postcomm has not made a provisional or final order or proposed a financial penalty within twelve months from the time of the contravention, it cannot impose a penalty in respect of a licence contravention. Postcomm will consider these provisions in the Act when considering taking forward a complaint. There may be cases where an investigation may lead to no enforcement action and possibly no penalty, for example where it has been found that there was an accidental license contravention which caused limited harm and that could be rectified promptly.
79. Postcomm must prepare and publish a Statement of Policy in relation to Financial Penalties and then have regard to that Statement of Policy when deciding whether to impose a penalty and when determining the amount of the penalty. Postcomm's Statement of Policy in relation to Financial Penalties can be found on its website.
80. Before imposing a penalty, Postcomm must give notice of the proposed penalty by serving a notice on the licence holder and Consumer Focus and publishing the notice.
81. Postcomm will publish the notice proposing the penalty on its website.
82. The proposed penalty notice must state:
- that Postcomm proposes to impose a penalty;
 - the amount of the proposed penalty;
 - the condition which Postcomm is satisfied has been contravened or is being contravened;
 - the acts or omissions which Postcomm considers constitute the contravention;
 - any other facts which Postcomm considers justify the imposition of a penalty and the amount of the proposed penalty;
 - the manner in which, and place at which, it is proposed to require the penalty to be paid; and
 - the period within which representations may be made in relation to the proposed penalty.
83. The Act states that Postcomm must allow a period of not less than 21 days, starting with the date of publication of the notice for representations, to be made. The actual period allowed in each case will be determined on a case by case basis.

84. Following consideration of the representations made, if Postcomm wishes to vary the amount of the penalty set out in the notice of proposed penalty:
- the licence holder must consent; or
 - Postcomm must give notice of the proposed variation (to the licence holder and Consumer Focus and by publishing the notice), and consider any representations made in accordance with the notice.
85. To give notice of a proposed variation, the notice must state:
- the proposed variation;
 - the reasons for it; and
 - the period within which representations may be made in relation to the proposed variation.
86. The Act states that Postcomm must allow a period of not less than 7 days, starting with the date of publication of the notice, for representations to be made. The actual period allowed in each case will be determined on a case by case basis.
87. After giving notice of the proposed penalty, or giving notice of a proposed variation, Postcomm will give notice of its decision either to impose a penalty or not to impose a penalty by serving a notice on the licence holder and Consumer Focus and publishing the notice on Postcomm's website.
88. When giving notice of a decision to impose a penalty, the notice will state:
- that Postcomm has imposed a penalty on the licence holder;
 - the amount of the penalty;
 - the condition which Postcomm is satisfied has been contravened or is being contravened;
 - the acts or omissions which Postcomm considers justify the imposition of a penalty and the amount of the penalty;
 - the manner in which, and place at which, the penalty is required to be paid; and
 - the date or dates, no earlier than the end of the period of 42 days from the date of service of the notice on the licence holder, by which the penalty or (as the case may be) different portions of it are required to be paid.
89. If the licence holder wishes to apply to Postcomm for a different deadline for payment of all or part of the penalty, it must do so within 21 days of the service of the notice.

POST-ENFORCEMENT PROCEDURE

Failure to comply with an order / penalty notice

90. If a licence holder fails to comply with an enforcement order it may be enforced by civil proceedings brought by Postcomm. It is possible for any person affected by a licence holder's failure to comply with such an order to bring an action against the licence holder if he or she has suffered loss or damage as a result of that failure.

91. If a financial penalty has been imposed and all or part of it has not been paid by the date required (and no appeal has been made or if it has, has been concluded), then Postcomm may recover from the licence holder any of the penalty and any interest which has not been paid; and in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to Postcomm.

Revocation of an order

92. Postcomm is also able to revoke a confirmed provisional order and a final order. Postcomm must give notice of the proposed revocation by serving a copy of the notice on the licence holder and Consumer Focus, and by publishing the notice. It must also consider any representations made.

93. A revocation notice must state that:

- Postcomm proposes to revoke the order;
- the effect of the proposed revocation;
- the period within which representations may be made in relation to the proposed revocation.

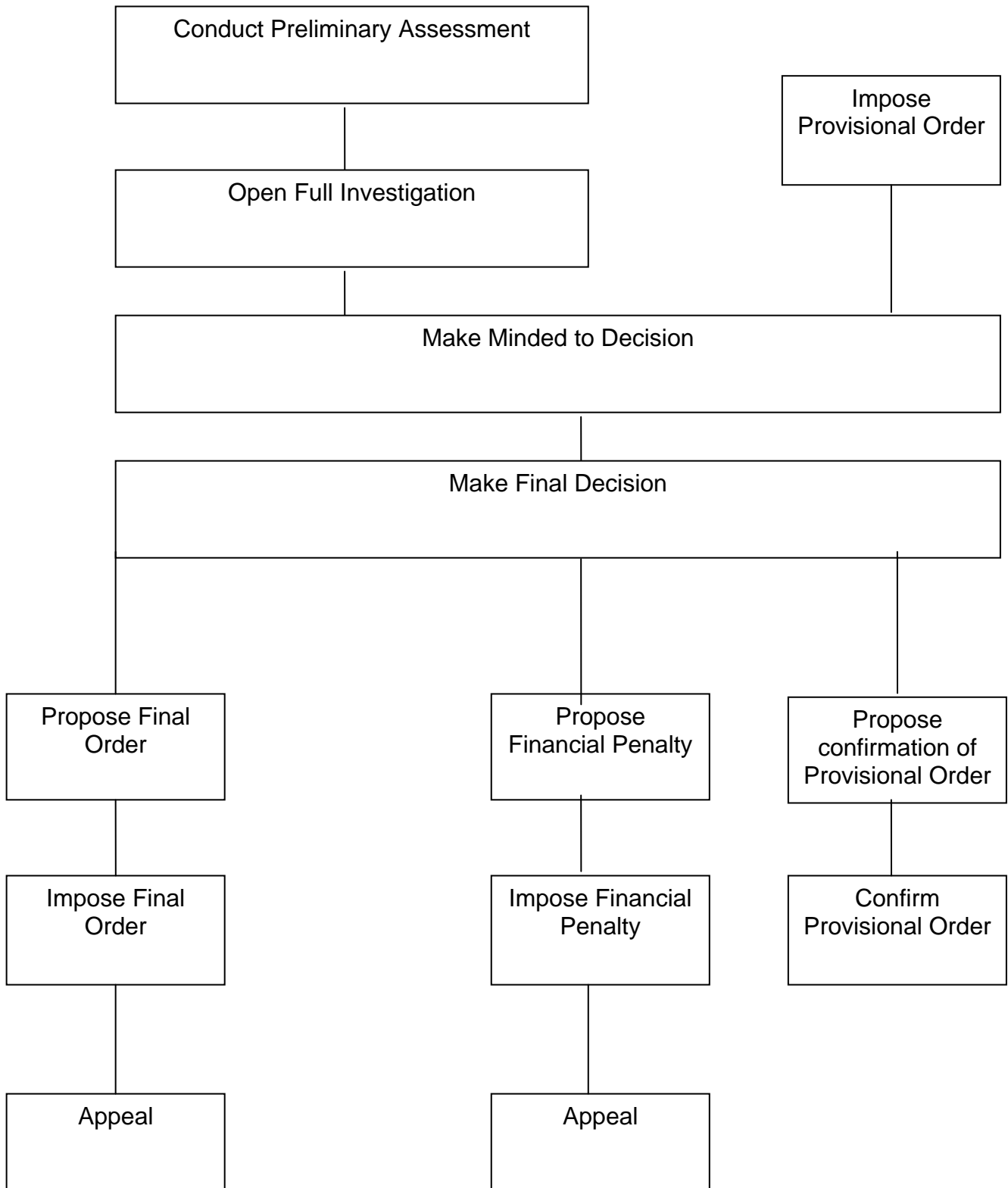
94. The Act states that Postcomm must allow a period of not less than 21 days, starting with the date of publication of the notice for representations to be made. The actual period allowed in each case for making representations will be determined on a case by case basis, but will not be less than the required 21 days.

Appeals

95. If a licence holder to whom a final or provisional order relates is aggrieved by the order and wants to question its validity it may apply to the court. The Act set out the grounds upon which the validity may be questioned. An application must be made within 42 days of the order being served on the licence holder. If an application has been made, the licence holder will not be required to comply with the order until the application has been determined, withdrawn or otherwise dealt with.

96. Equally, if a licence holder is aggrieved by the imposition of a penalty, the amount of a penalty, or the date by which the penalty is required to be paid, it may apply to the court. The court may quash the penalty, substitute the penalty (for a lesser amount) or substitute the date by which the penalty must be paid if it is satisfied that it is appropriate to do so and is satisfied of certain grounds set out in the Act. An application must be made within 42 days of notification. If an application has been made, the licence holder will not be required to pay until the application has been determined, withdrawn or otherwise dealt with.

Annex 1: Flowchart of the enforcement process



Annex 2

Sections 22 to 37 of the Postal Services Act 2000

Enforcement orders

Final orders.

22. - (1) If the Commission is satisfied that a licence holder-

- (a) is contravening any condition of his licence, or
- (b) is likely to contravene any such condition,

the Commission shall by order make such provision as is needed for the purpose of securing compliance with the condition.

(2) An order under subsection (1)-

- (a) shall require the licence holder to do, or not to do, such things as are specified in the order or are of a description so specified,
- (b) shall take effect at such time, being the earliest practicable time, as is determined by or under the order, and
- (c) may be revoked at any time by the Commission.

(3) An order under subsection (1) shall have effect until such time (if any) as the Commission revokes it.

(4) This section is subject to section 25.

(5) In this Act "final order" means an order under this section.

Provisional orders.

23. - (1) If-

- (a) the Commission is not satisfied that a licence holder is contravening any condition of his licence or is likely to contravene any such condition, but
- (b) the requirements in subsection (2) are met,

the Commission shall by order make such provision as it considers is needed for the purpose of securing compliance with the licence condition.

(2) The requirements are that it appears to the Commission-

- (a) that the licence holder is contravening any condition of his licence or is likely to contravene any such condition, and
- (b) that an order under subsection (1) is needed.

(3) In deciding whether an order under subsection (1) is needed the Commission shall have regard, in particular, to the extent to which any person is likely to sustain loss or damage as a result of anything likely to be done or omitted in contravention of the licence condition before a final order may be made.

(4) An order under subsection (1)-

- (a) shall require the licence holder to do, or not to do, such things as are specified in the order or are of a description so specified,
- (b) shall take effect at such time, being the earliest practicable time, as is determined by or under the order, and
- (c) may be revoked at any time by the Commission.

(5) An order under subsection (1) shall, subject to any earlier revocation by the Commission, have effect for such period not exceeding three months as is determined by or under the order and which starts when the order takes effect.

(6) An order under subsection (1) shall not be made in any case where a previous such order has been made in respect of the same contravention or apprehended contravention by the licence holder.

(7) This section is subject to section 25.

(8) In this Act “provisional order” means an order under this section.

Confirmation of provisional orders.

24. - (1) The Commission shall confirm a provisional order (with or without modifications) if-

- (a) it is satisfied that the licence holder is contravening any condition of his licence or is likely to contravene any such condition, and
- (b) it considers that confirmation of the order (with any modifications) is needed for the purpose of securing compliance with the condition.

(2) Where the Commission confirms a provisional order under subsection (1), the order continues to have effect until such time (if any) as the Commission revokes it.

(3) This section is subject to section 25.

Exceptions from duty to make or confirm enforcement orders.

25. The Commission shall not make a final order or make or confirm a provisional order if it is satisfied that-

- (a) the duties imposed on it by sections 3 and 5 preclude it from doing so,
- (b) the licence holder has agreed to take and is taking all the steps that the Commission considers appropriate to secure or facilitate compliance with the condition concerned, or
- (c) the contraventions or apprehended contraventions are trivial.

Enforcement orders: main procedural requirements.

26. - (1) Before making a final order or confirming a provisional order, the Commission shall-

- (a) give notice of the proposed order or confirmation, and
 - (b) consider any representations made in accordance with the notice and not withdrawn.
- (2) The notice shall state-
- (a) that the Commission proposes to make or confirm the order,
 - (b) the effect of the order,
 - (c) the condition for the purpose of securing compliance with which the order is to be made or confirmed,
 - (d) the acts or omissions which the Commission considers constitute or would constitute contraventions of that condition,
 - (e) any other facts which the Commission considers justify the making or confirmation of the order, and
 - (f) the period (not less than 21 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed order or confirmation.
- (3) A notice under subsection (1) shall be given by-
- (a) serving on the licence holder and the Council a copy of the notice and a copy of the order proposed (or proposed to be confirmed), and
 - (b) publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.
- (4) As soon as practicable after making a final order, or making or confirming a provisional order, the Commission shall-
- (a) serve a copy of the order on the licence holder and the Council, and
 - (b) publish the order in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.
- (5) This section has effect subject to section 27.

Enforcement orders: further procedural requirements.

27. - (1) The Commission shall not make a final order with modifications, or confirm a provisional order with modifications, unless-

- (a) the licence holder consents to the modifications and the Commission complies with the requirements of subsection (2), or
 - (b) the Commission complies with the requirements of subsection (3).
- (2) The requirements of this subsection are that the Commission shall-
- (a) give notice of the proposed modifications to the Council, and

- (b) consider any representations made in accordance with the notice and not withdrawn.
- (3) The requirements of this subsection are that the Commission shall-
 - (a) give notice of the proposed modifications, and
 - (b) consider any representations made in accordance with the notice and not withdrawn.
- (4) A notice under subsection (2) or (3) shall state-
 - (a) the proposed modifications,
 - (b) the reasons for them, and
 - (c) the period (not less than 7 days starting with the date of the giving of the notice under subsection (2) or (as the case may be) the publication of the notice under subsection (3)) within which representations may be made in relation to the proposed modifications.
- (5) Before revoking a final order or a provisional order which has been confirmed, the Commission shall-
 - (a) give notice of the proposed revocation, and
 - (b) consider any representations made in accordance with the notice and not withdrawn.
- (6) The notice shall state-
 - (a) that the Commission proposes to revoke the order,
 - (b) the effect of the proposed revocation, and
 - (c) the period (not less than 21 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed revocation.
- (7) As soon as practicable after revoking a final order or a provisional order which has been confirmed, the Commission shall give notice of the revocation.
- (8) If, after giving notice under section 26(1) or subsection (3) or (5) of this section, the Commission decides not to make a final order or confirm a provisional order or (as the case may be) revoke the order, it shall give notice of that decision.
- (9) If, after giving notice under subsection (2), the Commission decides not to make a final order or confirm a provisional order, it shall give notice of that decision to the licence holder concerned and the Council.
- (10) A notice under subsection (2) shall be given by serving a copy of the notice on the Council and a notice under subsection (9) shall be given by serving a copy of the notice on the licence holder and the Council.
- (11) Any other notice under this section shall be given by-
 - (a) serving a copy of the notice on the licence holder and the Council, and

- (b) publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

Validity of enforcement orders.

28. - (1) This section applies if a licence holder to whom a final or provisional order relates is aggrieved by the order and wants to question its validity on the ground that-

- (a) its making or confirmation was not within the powers conferred by section 22, 23 or (as the case may be) 24, or
- (b) any of the requirements of sections 26 and 27 have not been complied with in relation to the making or confirmation of the order.

(2) The licence holder may apply to the court.

(3) If a copy of the order as made or confirmed was served on the licence holder the application to the court shall be made within the period of 42 days starting with the day on which the copy was served on the licence holder.

(4) On an application under this section the court may quash the order or any provision of it if the court considers it appropriate to do so and is satisfied that-

- (a) the making or confirmation of the order was not within the powers conferred by section 22, 23 or (as the case may be) 24, or
- (b) any of the requirements of sections 26 and 27 have not been complied with in relation to the making or confirmation of the order and the interests of the licence holder have been substantially prejudiced by the non-compliance.

(5) Where an application has been made under this section, the licence holder concerned shall not be required to comply with the order to which the application relates until the application has been determined, withdrawn or otherwise dealt with; and section 29 shall be construed accordingly.

(6) Except as provided by this section, the validity of a final or provisional order shall not be questioned in any legal proceedings.

(7) In this section "the court" means,

- (a) in relation to England and Wales or Northern Ireland, the High Court,
- (b) in relation to Scotland, the Court of Session.

Effect of enforcement orders.

29. - (1) The licence holder to whom a final or provisional order relates shall have a duty to comply with it.

(2) The duty shall be owed to any person who may be affected by a contravention of the order.

- (3) Any breach of the duty which causes such a person to sustain loss or damage shall be actionable by him.
- (4) In any proceedings brought against a licence holder under subsection (3) it shall be a defence for the licence holder to show that he took all reasonable steps and exercised all due diligence to avoid contravening the order.
- (5) Compliance with a final or provisional order shall also be enforceable by civil proceedings brought by the Commission for an injunction or for interdict or for any other appropriate relief or remedy.
- (6) Subsection (5) shall not prejudice any right that a person may have by virtue of subsection (3) to bring civil proceedings for contravention or apprehended contravention of a final or provisional order.

Financial penalties

Financial penalties.

30. - (1) If the Commission is satisfied that a licence holder-

- (a) has contravened any condition of his licence, or
- (b) is contravening any such condition,

the Commission may impose on the licence holder a penalty of such amount as is reasonable.

(2) No such penalty shall exceed 10 per cent. of the turnover of the licence holder (determined in accordance with provisions specified in an order made by the Secretary of State).

(3) The Commission may impose a penalty under this section in respect of a contravention of a licence condition irrespective of whether it has made or may make a final or provisional order in respect of that contravention.

Statement of policy in relation to penalties.

31. - (1) The Commission shall prepare and publish a statement of policy in relation to the imposition of penalties and the determination of their amount.

(2) In deciding whether to impose a penalty, and in determining the amount of any penalty, the Commission shall have regard to the statement of policy which was most recently published at the time when the contravention concerned occurred.

(3) The Commission may revise its statement of policy and, where it does so, it shall publish the revised statement.

(4) Publication under this section shall be in such manner as the Commission considers appropriate for the purpose of bringing the matters contained in the statement of policy to the attention of persons likely to be affected by them.

(5) The Commission shall consult the Council and such other persons as it considers appropriate when preparing or revising its statement of policy.

Imposition of penalties: main procedural requirements.

32. - (1) Before imposing a penalty under section 30, the Commission shall-

- (a) give notice of the proposed penalty, and
- (b) consider any representations made in accordance with the notice and not withdrawn.

(2) The notice shall state-

- (a) that the Commission proposes to impose a penalty,
- (b) the amount of the proposed penalty,
- (c) the condition which the Commission is satisfied has been contravened or is being contravened,
- (d) the acts or omissions which the Commission considers constitute the contravention,
- (e) any other facts which the Commission considers justify the imposition of a penalty and the amount of the proposed penalty,
- (f) the manner in which, and place at which, it is proposed to require the penalty to be paid, and
- (g) the period (not less than 21 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed penalty.

(3) As soon as practicable after imposing a penalty, the Commission shall give notice of the penalty.

(4) The notice shall state-

- (a) that the Commission has imposed a penalty on the licence holder,
- (b) the amount of the penalty,
- (c) the condition which the Commission is satisfied has been contravened or is being contravened,
- (d) the acts or omissions which the Commission considers constitute the contravention,
- (e) any other facts which the Commission considers justify the imposition of a penalty and the amount of the penalty,
- (f) the manner in which, and place at which, the penalty is required to be paid, and
- (g) the date or dates, no earlier than the end of the period of 42 days from the date of service of the notice on the licence holder, by which the penalty or (as the case may be) different portions of it are required to be paid.

(5) The licence holder may, within 21 days of the date of service on him of a notice under subsection (3), apply to the Commission for it to specify a different date or (as the case may be) different dates by which the penalty or (as the case may be) different portions of it are to be paid.

- (6) A notice under this section shall be given by-
- (a) serving a copy of the notice on the licence holder and the Council, and
 - (b) publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.
- (7) This section has effect subject to section 33.

Penalties: further procedural requirements.

33. - (1) The Commission shall not vary the proposed amount of a penalty as stated in a notice under section 32(1) unless-

- (a) the licence holder consents to the variation, or
- (b) the Commission complies with the requirements of subsection (2).

(2) The requirements are that the Commission shall-

- (a) give notice of the proposed variation, and
- (b) consider any representations made in accordance with the notice and not withdrawn.

(3) The notice shall state-

- (a) the proposed variation,
- (b) the reasons for it, and
- (c) the period (not less than 7 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed variation.

(4) If, after giving notice under section 32(1) or subsection (2) of this section, the Commission decides not to impose a penalty, it shall give notice of that decision.

(5) A notice under this section shall be given by-

- (a) serving a copy of the notice on the licence holder and the Council, and
- (b) publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

Time-limits on the imposition of penalties.

34. - (1) No penalty shall be imposed under section 30 in respect of a contravention of a licence condition-

- (a) where a provisional order has been made but not confirmed in respect of the contravention and no final order has been made in

respect of it, unless a copy of the notice under section 32(1) has been served on the licence holder no later than six months starting with the date on which the provisional order was made,

- (b) where a provisional order has been confirmed or a final order made in respect of the contravention, unless a copy of the notice under section 32(1) has been served on the licence holder no later than three months starting with the date on which the order was confirmed or (as the case may be) made.

(2) No penalty shall be imposed under section 30 in respect of a contravention of a licence condition for which no provisional or final order has been made unless a copy of the notice under section 32(1) has been served on the licence holder within twelve months from the time of the contravention.

Interest and payments by instalment.

35. - (1) If the whole or any portion of a penalty is not paid by the date by which it is required to be paid, the unpaid balance from time to time shall carry interest at the rate for the time being specified in section 17 of the Judgments Act 1838.

(2) Where an application has been made under section 32(5), the penalty shall not be required to be paid until the application has been determined, withdrawn or otherwise dealt with.

(3) If a portion of a penalty has not been paid by the date required for it, the Commission may, where it considers it appropriate to do so, require so much of the penalty as has not already been paid to be paid immediately.

Appeals.

36. - (1) This section applies if a licence holder on whom a penalty is imposed under section 30 is aggrieved by-

- (a) the imposition of the penalty,
- (b) the amount of the penalty, or
- (c) the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.

(2) The licence holder may apply to the court.

(3) If a copy of the notice under section 32(3) was served on the licence holder, the application to the court shall, subject to subsection (4), be made within the period of 42 days starting with the day on which the copy was served on the licence holder.

(4) If the application relates to a decision of the Commission on an application by a licence holder under section 32(5), the application to the court shall be made within the period of 42 days starting with the day on which the licence holder is notified of the decision.

(5) On an application under this section, the court may-

- (a) quash the penalty,
- (b) substitute a penalty of such lesser amount as the court considers appropriate, or
- (c) in a case falling within subsection (1)(c), substitute for the date or dates imposed by the Commission an alternative date or dates,

if it considers it appropriate to do so and is satisfied of one or more of the grounds mentioned in subsection (6).

(6) The grounds are-

- (a) that the imposition of the penalty was not within the powers of the Commission under section 30,
- (b) that any of the requirements of section 32 or 33 have not been complied with in relation to the imposition of the penalty and the interests of the licence holder have been substantially prejudiced by the non-compliance,
- (c) that it was unreasonable of the Commission to require the penalty to be paid by the date concerned or (as the case may be) to require portions of it to be paid by the dates concerned.

(7) Where an application has been made under this section, the penalty shall not be required to be paid until the application has been determined, withdrawn or otherwise dealt with.

(8) Where the court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers appropriate.

(9) Where the court specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application under this section it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers appropriate.

(10) Except as provided by this section, the validity of a penalty shall not be questioned in any legal proceedings.

(11) In this section “the court” means-

- (a) in relation to England and Wales or Northern Ireland, the High Court, and
- (b) in relation to Scotland, the Court of Session.

Recovery of penalties.

37. Where a penalty imposed under section 30, or any portion of such a penalty, has not been paid by the date on which it is required to be paid and-

- (a) no application relating to the penalty has been made under section 36 during the period within which such an application may be made, or
- (b) any such application which has been made has been determined, withdrawn or otherwise dealt with,

the Commission may recover from the licence holder any of the penalty and any interest which has not been paid; and in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the Commission.