

# Dispute Resolution for postal disputes

## Supplement to Ofcom's guidelines for the handling of regulatory disputes

On 1 October 2011, the Postal Services Act 2011 (the "2011 Act") came into force, giving Ofcom the responsibility and powers to regulate postal services. Schedule 3 of the 2011 Act gives Ofcom powers to resolve access disputes in the postal services sector (referred to here as "postal disputes") where an access condition has been imposed. As set out in Ofcom's statement on Securing the Universal Postal Service which was published in March 2012<sup>1</sup>, we have decided to impose a USP access condition that requires Royal Mail to offer access at the Inward Mail Centre for the provision of D+2 and later than D+2 Letters and Large Letters services<sup>2</sup>. That condition came into effect on 1 April 2012. Accordingly, Ofcom now has the power to resolve postal disputes which relate to access required by virtue of that USP access condition, and any future access conditions that Ofcom imposes.

Ofcom has considerable experience of resolving disputes in the telecommunications sector and has published dispute resolution guidelines<sup>3</sup> (the "Guidelines"), which set out how Ofcom handles regulatory disputes in that sector.

As set out in Ofcom's March statement on Securing the Universal Postal Service, Ofcom intends to apply its Guidelines to postal disputes, subject to recognising any appropriate differences such as where the Communications Act 2003 (the "2003 Act") imposes different legal requirements. You should therefore read the Guidelines as applying to postal disputes, except as otherwise specified in this supplementary document, the purpose of which is to set out where Ofcom's application of the Guidelines may differ in relation to postal disputes.

### Section 1

### Scope of these Guidelines

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Duties and powers (1.1 – 1.2 <sup>4</sup> )	Ofcom's duties and powers in relation to postal disputes arise from sections 38 and 50 of and Part 2 of schedule 3 to the 2011 Act, which make provision about the resolution of access disputes by Ofcom.
Procedure for disputes (1.5)	Clause 17 of schedule 3 to the 2011 Act states that Ofcom shall follow the procedure that it considers appropriate for the consideration and determination of disputes. Ofcom considers it appropriate to follow the procedures set out in the Guidelines, subject to the exceptions noted in this supplementary document.

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<sup>1</sup> Ofcom, Securing the Universal Postal Service: Decision on the new regulatory framework, Statement, 27 March 2012.

<sup>2</sup> These are retail services that aim to deliver two working days (or later) after collection from the sender, also known as a day C service, or later.

<sup>3</sup> Dispute Resolution Guidelines, published on 7 June 2011:

<http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>

<sup>4</sup> References to paragraph numbers are to paragraphs in the Guidelines which do not apply or are supplemented by this supplementary document.

## Section 2

### Overview of Ofcom's dispute resolution function

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Ofcom's jurisdiction (2.5)	Ofcom has jurisdiction under the 2011 Act to resolve "access disputes", which are disputes between postal operators, or between a postal operator and a user of postal services, about the terms and conditions (including those as to price) on which access is currently provided or will be provided, where access is required by virtue of an access condition <sup>5</sup> . An access condition means a USP access condition or a general access condition <sup>6</sup> .
Ofcom's discretion (2.7 – 2.11)	Ofcom must consider whether it is appropriate for it to handle a postal dispute. However, it has a broad discretion as to whether to accept a postal dispute for resolution <sup>7</sup> . This contrasts with disputes under the 2003 Act where there are certain circumstances (identified in paragraphs 2.7 – 2.11) in which Ofcom has relatively little discretion about whether it is appropriate for it to handle a dispute. Further detail as to how Ofcom decides whether it is appropriate for it to handle a dispute is set out in section 4.
Timetable for dispute resolution (2.3.2, 2.13)	Where Ofcom decides that it is appropriate for it handle a postal dispute, Ofcom is required to make a determination for resolving the dispute as soon as is reasonably practicable <sup>8</sup> . Although there is no further statutory deadline, Ofcom will endeavour to resolve postal disputes within four months. An indication of how this timeline might work is set out at paragraph 2.18 of the Guidelines.
Ofcom's powers (2.12)	In resolving disputes, Ofcom will consider exercising any of its regulatory powers listed in clause 16 of schedule 3 to the 2011 Act.
Information gathering (2.16 – 2.17)	Ofcom's information gathering powers are set out in clause 19 of schedule 3 to the 2011 Act. Part 2 of schedule 8 to the 2011 Act applies in relation to failure by any party to comply with its obligation to provide information to Ofcom.

## Section 3

### Making a dispute referral to Ofcom

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Grounds for referral (3.2)	The statutory grounds for postal disputes are different to those under the 2003 Act. Where a party refers a postal dispute to Ofcom, Ofcom will consider whether it relates to a dispute between postal operators or between a postal operator and a user of postal services about the terms and conditions on which access is provided or will be provided and whether that access is required by virtue of an access condition.
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## Section 4

### The enquiry phase

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Ofcom's discretion (4.10)	As noted in section 2 above, Ofcom has a discretion as to whether it is appropriate for it handle a postal dispute. Ofcom is therefore not limited to the circumstances set out in paragraph 4.10 of the Guidelines for refusing to handle postal disputes. However, the
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<sup>5</sup> Clause 13(2) of part 2 of schedule 3 to the 2011 Act.

<sup>6</sup> Section 65 of the 2011 Act. A USP access condition is a condition imposed under section 38 of the 2011 Act and a general access condition is a condition imposed under section 50 of the 2011 Act.

<sup>7</sup> Clause 14 of part 2 of schedule 3 to the 2011 Act.

<sup>8</sup> Clause 15 of part 2 of schedule 3 to the 2011 Act.

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Ofcom's duties (4.19)	<p>remainder of section 4 will apply to postal disputes. Thus, Ofcom intends to take into account whether there are alternative means which are likely to lead to a prompt and satisfactory resolution of the dispute, as well as Ofcom's priorities and available resources, in deciding how to exercise its discretion.</p> <p>The factors listed at paragraph 4.19 of the Guidelines will be relevant to the question of how Ofcom should exercise its discretion. However, Ofcom must also carry out its functions in relation to postal services in a way that it considers will satisfy our primary duty to secure the provision of a universal postal service<sup>9</sup> and our assessment will accord this duty due weight. We will also take into account our general duties under the 2003 Act<sup>10</sup>.</p>
<b>Section 5</b>	<b>Resolving a dispute</b>
Cross-border disputes (5.22 – 5.25)	The provisions of section 189 of the 2003 Act in relation to cross-border disputes will not apply to postal disputes.
Statutory time limit (5.45 – 5.47)	The section in the Guidelines relating to the statutory time limit does not apply to postal disputes. However, as noted above, we will endeavour to resolve postal disputes within four months.
<b>Annex 2</b>	<b>Ofcom's statutory duties and regulatory principles</b>
Conflict of duties (A2.1)	Section 3(6A) of the 2003 Act provides that the duty in section 29(1) of the Act (which requires Ofcom to carry out its functions in relation to postal services in a way that it considers will secure the provision of a universal postal service) takes priority over our general duties in the 2003 Act in the case of conflict between the two where we are carrying out our functions in relation to postal services.
Community requirements (A2.4)	Section 4 of the 2003 Act does not apply to Ofcom's functions in relation to postal services.

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<sup>9</sup> Section 29 of the 2011 Act.

<sup>10</sup> Sections 3 and 6 of the 2003 Act.

# Schedule 3 Paragraph 13 (3) Postal Services Act 2011 (the 2011 Act) format for submitting a dispute referral to Ofcom

1.1 Submissions should be made to:

Investigations Programme Manager, Competition Group  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
e-mail: [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk)  
Telephone: 020 7783 4100

1.2 If you need any further guidance on how to make a submission to Ofcom, please contact the Competition Group's Investigations Programme Manager.

1.3 On receipt, Ofcom will send a non confidential version of the dispute submission to the Parties named in the dispute submission. If the dispute submission contains confidential information, you must provide a separate non-confidential version which can be copied to the other Parties, as well as explaining why you believe the information to be confidential.

1.4 In the event that Ofcom accepts the dispute submission, Ofcom will normally publish details of the dispute, including the business names of the Parties in Ofcom's Competition and Consumer Enforcement Bulletin on its website. Where publishing a final determination, Ofcom may also publish the non-confidential version of the dispute submission.

1.5 Parties referring a dispute must ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay the opening of the Enquiry Phase. In certain exceptional cases however, in particular with respect to smaller companies or individuals, Ofcom may, taking into account all the circumstances, consider relaxing some of these conditions.

## Contents of a submission

1.6 Parties are reminded that if they do not refer disputes in the manner set out in these guidelines (Schedule 3, Paragraph 13(3) of the 2011 Act), Ofcom is not obliged to accept the dispute (Schedule 3, Paragraph 14(1) of the 2011 Act).

1.7 Supporting evidence may be provided in suitable electronic formats (advice on this can be provided by the Investigations Programme Manager). However, we will require a hard copy of the main body of the submission, with a signed declaration by an officer of the company.

1.8 A submission should contain the following information:

## **Section A: Preliminary information**

1.9 Please provide:

- business name, address, telephone number, and email address and, if relevant, the contact details of an individual who can discuss the detail of the dispute;
- a brief explanation of the nature of the Party's business (e.g. postal operator, user of postal services) and its scale (local, national, international - approximate turnover is helpful);
- details of the other Party(s) in dispute (nature of the Party's business; contact details);
- details of the relationship between the Parties to the dispute;
- a summary of the dispute including the legal basis according to which the dispute is being referred (e.g. Schedule 3, Paragraphs 13(1) and (2) of the 2011 Act plus identification of the relevant access condition which you consider applies) and an explanation (with evidence) of how the relevant conditions are fulfilled;
- a concise explanation of the commercial context to the dispute;
- a proposed remedy or remedies for resolution of the dispute, in light of Ofcom's powers under Schedule 3, Paragraph 16(2) of the 2011 Act.

## **Section B: The issues in dispute**

1.10 Please provide a clear and precise delineation of the scope of the dispute, including:

- full details of the relevant products or services;
- a list of all the issues which are in dispute; and
- a clear and comprehensive explanation of the commercial context to the dispute, including all relevant background and evidence.

1.11 Full details of any justification given (including relevant evidence) for the conduct or action leading to the dispute. For example:

- If the dispute relates to a request for a new access product or service: business plans of relevant product or service including forecasts, demonstrating how and when it is intended to make use of the products or services requested.
- If the dispute concerns a variation or amendment to existing agreed terms between the Parties: a copy of the relevant version of the contract or terms, clearly identifying the clauses that are subject to the dispute.

## **Section C: History of commercial negotiations**

- 1.12 Please provide a description of any negotiations which have taken place between the Parties or, in the event that a Party has refused to enter into negotiations, evidence of the submitting Party having taken reasonable endeavours to enter into good faith negotiations.
- 1.13 Ofcom would expect to see:
- details of the steps taken (or the reasonable endeavours to enter into good faith negotiations) to resolve all of the issues which are in dispute;
  - an explanation of why commercial agreement could not be reached;
  - relevant documentary evidence of commercial negotiations covering the whole period of negotiation, including correspondence, notes of meetings and telephone calls, and a chronological summary of the events; and
  - details of any options or proposed solutions put forward by any Party during negotiations, including what, if anything, was accepted, what was rejected and why.
- 1.14 We are aware that in negotiations, Parties may make without prejudice offers in an attempt to settle disputes. We do not wish to dissuade Parties from actively seeking to resolve disputes in this way, and whilst we will wish to see details of such offers where that may be relevant to determining whether meaningful negotiations have taken place, the existence or content of such offers will not be treated as relevant information or determine our resolution of a dispute.

## **Section D: Ofcom's Statutory and Community Duties**

- 1.15 For all submissions, Ofcom expects the following information:
- identification and applicability of any of Ofcom's regulatory principles and statutory duties (as set out in particular in sections 3 and 4 of the Communications Act 2003 and section 29 of the 2011 Act), which the referring party considers is relevant in this case; and
  - where relevant, a clear explanation of how the subject matter of the dispute may relate to broader regulatory issues or policies.

## **Section E: Proposed Remedy**

- 1.16 Please include details, with reasons, of the appropriate remedy for the dispute, for example:
- full details, including an accurate technical description, of a requested product or service; and/or
  - the specific level at which any relevant charge should be set.
- 1.17 For each suggested remedy or outcome, Parties must also give a full justification and explain how that remedy:
- a) falls within Schedule 3, Paragraph 16 of the 2011 Act, and

- b) would be consistent with Ofcom's statutory duties, as set out in sections 3 and 4 of the Communications Act 2003 and section 29 of the 2011 Act, as well as Ofcom's regulatory principles.

## **Section F: Supporting information and evidence**

- 1.18 Where relevant and available, Ofcom expects the Parties to provide the following specific information and evidence:
- copies of the relevant contract or terms which are the subject of the dispute (see Section B);
  - business plans relating to the relevant product or service (see Section B);
  - all relevant documentary evidence of commercial negotiations between the Parties relating to the disputed matter or matters (see Section C);
  - relevant details about the provision of the product or service in question;
  - a full chronology of all the relevant facts;
  - detailed and specific cost/price information for the provision of the relevant product or service, as well as cost/price trends (where available). In all cases, costs/price information and data must be presented in a usable format, including, where relevant, a fully executable model;
  - full and complete benchmarking data. This could be on an international, industry or other basis. In the alternative, explain why no such data is available or relevant; and
  - all relevant previous decisions, determinations, rulings by courts/tribunals, guidance, opinions/recommendations and policy statements at the UK or EC level.
- 1.19 Where you consider that information which falls into one of the above categories is either not relevant, or that information is not available, please explain why this is the case.
- 1.20 In all cases, Ofcom expects the Parties to provide information and evidence that is focused and appropriately tailored to the relevant issues in dispute.
- 1.21 In all cases, Ofcom expects the Parties to provide non-confidential versions of such information and evidence.

### **Declaration by an officer of the company:**

- 1.22 Before making this submission to Ofcom, to the best of my knowledge and belief, [company name] has sought to resolve this dispute through commercial negotiation. All information and evidence provided in referring this dispute to Ofcom is, to the best of my knowledge and belief, true and accurate.
- 1.23 Signed:
- 1.24 Position in the company:

1.25 Date:

### **Acknowledgement of submissions**

1.26 We will acknowledge receipt of a submission within one working day.

1.27 This does not necessarily mean that we think the submission meets the requirements set out above. As set out in section 3, if a submission does not meet the requirements set out above, we will advise you on what else may be needed before we will consider the submission to be complete.