



## It's in the post



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Despite the rise and rise of social media, email and a vast array of over the top internet based communications services, post still remains an important means of communications, although the number of letters sent in the UK is in rapid decline. At the same time as letters are rapidly declining, parcel growth is increasing, as consumers increasingly move to online shopping. Developments in both the UK and Europe set the scene for potential postal changes, particularly with regards to parcels and prove an interesting comparison with regulation in telecoms on similar issues.

### Draft European regulation on cross-border delivery

The more interesting of the developments is the European Commission's draft regulation on cross-border delivery which forms part of the Commission's package of measures aimed at increasing the effectiveness of the digital single market and cross-border e-commerce in Europe.

The Commission's research found that over two thirds of consumers who had been contemplating a cross-border online purchase had abandoned it because of high delivery prices. Parties were also unclear about options for delivery and there was a lack of transparency about tariffs. As a result of these findings, the Commission's proposed regulation sets out to increase the transparency and affordability of cross-border delivery services and prices.

It aims to do so by imposing a number of new obligations on both operators and regulators. The draft regulation requires all parcel delivery service providers (apart from those with less than 50 employees) to submit information to the regulator in the Member State in which they are established. The information to be provided to the regulator will include:

- The nature of the services provided;

- the general conditions of sale and the complaints procedure;
- the annual turnover in parcel delivery services for the previous calendar year, segmented by national, incoming and outgoing cross-border postal items;
- number of staff in the previous working year; and
- number of parcels under 31.5 kgs for the previous calendar year segmented by national, incoming and outgoing cross-border postal items.

In addition, universal service providers who offer parcel delivery services must provide their regulator with the public list of tariffs for a list of postal delivery items as well as the terminal rates for postal items originating in other Member States.

The regulator must not only provide the details to the Commission but must also undertake an assessment of the affordability of cross-border tariffs of its universal service provider. In doing so the regulator shall take the following into account:

- The domestic tariffs of comparable parcel delivery services in the originating Member State and destination Member State;
- the terminal rates; and



- any application of a uniform tariff in two or more Member States.

In addition the regulation provides that where universal service providers providing parcel delivery services have entered into multilateral agreements on terminal rates, they must meet all reasonable requests for access to all network elements and facilities as well as relevant services and information systems necessary for the provision of cross-border parcel delivery services. The USP must also publish a reference offer (which has been approved by the regulator) and must give access at the inward office of exchange in the destination Member State.

Whether the requirements of the proposed regulation which are aimed primarily at increasing transparency will be sufficient to address any alleged affordability issue of cross border delivery services remains unclear. Whilst giving regulators the power to assess affordability of their own USP provider, there remains a suspicion that, much like telecoms roaming charges, where transparency measures were first adopted before the Commission adopted more direct intervention on pricing, prices for cross-border delivery services will only come down with more direct intervention by the Commission.

The proposed regulation had its first reading in the European Parliament on 9th June. Once passed by the European Parliament and the Council, it will take effect twenty days after its publication in the EU Official Journal.

## Ofcom consultation on Review of Regulation of Royal Mail

In comparison with the Commission's review of regulation with its ambition of increasing cross-border e-commerce services, Ofcom's Review of the Regulation of Royal Mail, does not appear directed to the outcome of any particular ambition or vision.

Rather there appears to be a very different approach by Ofcom to postal regulation when compared with telecoms regulation. Ofcom's telecoms work is based upon a strong vision (albeit with many critics) of where the UK electronic communications sector should be going) (e.g. on non-discrimination and broadband deployment), but there is no sense in this Royal Mail consultation document that there is a clear vision for the UK postal sector. This lack of vision seems to permeate the rest of the consultation document and the decisions Ofcom makes within it.

Despite Ofcom describing the review as "a fundamental review to examine whether the existing regulation of Royal Mail remains appropriate and sufficient to secure the universal postal service", the review does

not appear to examine where postal services might be going in the future, and appears to satisfy itself with a cursory examination of the current state of the sector. Despite the fact that Ofcom must have been aware of the Commission's ongoing work on cross border delivery services there is little acknowledgement of the Commission's ongoing work, and any implications this might have, not only for Royal Mail, but for the future of the UK postal sector as a whole.

The consultation document concludes that the current Universal Service obligation imposed on Royal Mail is currently financially sustainable and is likely to be so for the immediate future. It also concludes that while Royal Mail is making efficiency improvements there is more that it could do based on not only benchmarking with its international competitors but also benchmarking its most efficient operations against other operations.

The consultation also examines the access framework and considers the complaints of a number of stakeholders who have complained about access pricing, the scope of access regulation and non price issues including non-equivalence and the ability of Royal Mail to make unilateral changes to its contract.

In respect to the claims of non-equivalence, Ofcom says "concerns over different operational access facilities and processes to test compliance with product specifications, both of these issues concern detailed operational matters and reflect what may be to some degree unavoidable operational friction. We have however seen no evidence to suggest that Royal Mail is presently acting in an unduly discriminatory manner or in a way so as to cause access operators harm as a result."

Ofcom's reluctance to engage with and examine operational issues in-depth in the postal context is a far cry from its willingness to get involved in the minutiae of BT's ordering and operational processes either in its own right or via third party mechanisms such as the OTA. Whilst there may not be unduly discriminatory behaviour or harm occurring in the Royal Mail operational processes, what is clear from telecoms is that a competitor is not generally equipped to provide Ofcom with the best evidence. Competitors usually have a sense that there is something wrong but generally lack the evidence to detail this and it is often only investigation by the regulator that can confirm whether there is indeed discriminatory behaviour. The review does not suggest that Ofcom has engaged in any investigation of the detail behind the concerns but has merely assessed them on the basis of the information that competitors have been able to produce. The difference in approach to the telecoms regime is illustrative. In telecoms, the key part of Ofcom's regime is not so much pricing controls but controls on quality of service and the requirement for equivalence as



well as increasing focus on key performance indicators to allow additional transparency on particular service issues.

The outcome of the consultation document is the overall continuation of the existing regulatory regime with a few minor tweaks. This may be the correct decision but by failing to robustly examine where the UK postal sector is going and what it is likely to look like in five or ten years and by failing to appear to deal with the concerns of competitors, confidence in Ofcom's overall conclusions is undermined.

It may be that Ofcom's overall focus on service in telecoms reflects the fact that, like energy, telecoms is an area where a lot of political heat is focussed. Both energy and telecoms have in recent years become somewhat of a political football with MPs not only calling for the breakup of BT but also the break up of National Grid as well as greater controls over the big six energy companies. In contrast there is generally little political heat generated over postal services and it may be that as a matter of regulatory priorities therefore, Ofcom has chosen to focus more resource on telecoms.

### Ofcom's enforcement action in post

Of course, Ofcom may suggest that it is addressing any alleged non-discrimination or other abuses in post through the current competition case lodged by Whistl UK against Royal Mail. That case which was opened in February 2014 is one where Whistl complained against the prices, terms and conditions offered by Royal Mail for access to certain letter delivery services (D+2 access).

In July 2015, Ofcom announced that it had issued a Statement of Objections to Royal Mail on the basis that Royal Mail had unlawfully discriminated against competitors in that its wholesale prices for bulk mail contained differential pricing so that access customers who were competing against Royal Mail in delivery paid higher prices than access customers who were not competing in delivery. Ofcom alleged that this differential in pricing acted as a disincentive to operators entering into

the delivery market and therefore heightened barriers to entry. The distortion of competition for delivery was not in the best interests of consumers.

With over 12 months having elapsed since Ofcom first announced its statement of objections and with no further update as to progress on the case, it seems unlikely that there will be a rapid resolution to this case, again reinforcing the idea that Ofcom has chosen to prioritise telecoms over post.

Ofcom has also recently finalised its own initiative investigation into Royal Mail's compliance with its Universal Service obligation D+1. Despite finding that Royal Mail had failed to comply with its universal service condition, Ofcom decided not to impose a financial penalty.

This decision was based on the fact that although the condition required 93% of relevant mail to be conveyed within one working day, only 92.5% of mail had met the target. In Ofcom's view the relatively minor nature of the failing combined with the steps that Royal Mail had taken to address the underlying issues meant that a fine was not appropriate.

There is arguably a markedly different approach to Ofcom's decision in late October to fine Vodafone £925,000 for Vodafone's failure to comply with Ofcom's rules in relation to handling customer complaints. These failures including failing to ensure that complaints were resolved fairly and in a timely manner and by failing to ensure that a written notification was sent to customers if a Complaint (as defined in Ofcom's Code on Complaint Handling processes) remained unresolved after 8 weeks and no applicable exceptions applied between the period of 1 January 2014 and 5 November 2015.

If you have any questions about how Ofcom regulates in post and or telecoms do not hesitate to contact us.



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