



# Ofcom: Draft Enforcement Guidelines

Royal Mail's response

January 2012

Consultation

Publication date

31 October 2011

Closing Date for Responses

06 January 2012

Submission date

06 January 2012

## Introduction

- 1 Ofcom has issued a consultation on its draft enforcement guidelines for the handling of competition complaints and complaints concerning regulatory rules. Ofcom proposed to update its guidance because of:
  - New enforcement powers it acquired after the implementation of the European Framework on Electronic Communications in May 2011,
  - Changes to its own internal structures dividing investigation into two separate teams,
  - The development of separate guidelines on how it handles regulatory disputes in the summer of 2011, and
  - Ofcom's assumption of functions under the Postal Services Act 2011.
- 2 Royal Mail welcomes the opportunity to comment on the draft enforcement guidelines (Draft Guidelines) and considers clarity in Ofcom's enforcement procedures to be essential in ensuring a transparent and proportionate regulatory regime. The response is in two parts, the first dealing with generic points Royal Mail would like to make about the consultation, and the second providing comments on specific provisions.

## General Observations

- 3 Royal Mail believes that the guidance given to potential complainants and stakeholders about Ofcom's internal re-organisation into the Consumer Protection and Competition Group investigations teams in the Draft Guidelines is useful. Specialisation will lead to greater knowledge about the specific areas of responsibilities and may create efficiencies in terms of the time taken to resolve complaints.
- 4 Information about the types of complaint that Ofcom will deal with under the Draft Guidelines should result in

greater clarity about the matters that Ofcom can investigate on behalf of consumers, customers and stakeholders under these provisions.

- 5 Information about the matters that are not covered by the Draft Guidelines, resolving regulatory disputes and indicating where guidance on such topics can be located should reduce inadmissible complaints and wasted resources within Ofcom and the potential target of a complaint.
- 6 Royal Mail supports the proposal that all potential complainants should follow the guidance and procedures set out in sections 4 and 9 of the Draft Guidelines, which details the type of evidence that should be supplied in support of a complaint and requires that all submissions be verified by the Chief Executive Officer of the complainant or their equivalent. This should aid Ofcom's ability to avoid vexatious and unsupported complaints avoiding wasted time and resources on behalf of both Ofcom and the target of the complaint, and help focus resource on issues of real substance, should any arise.
- 7 Royal Mail notes that Ofcom will follow guidance by the OFT on different aspects of the competition law regime in the UK (Draft Guidelines, section 3.42) and welcomes the consistency that this will bring to investigations.
- 8 Royal Mail supports the use of an administrative priority framework to help Ofcom determine when it will consider a complaint and / or commence an investigation.
- 9 In the Draft Guidelines, Ofcom sometimes gives specific guidance on how long a target would have to respond to some documents e.g. draft requests for information. In other places, Ofcom merely states that it would give a reasonable period of time in which to respond or comment. Royal Mail would welcome recognition in the guidelines that Ofcom will take into account, when considering what would constitute a "reasonable" period of time to respond, factors such as:
  - 9.1 Industry specific factors (e.g. labour intensity, technology, business activity, geographic spread, etc)
  - 9.2 Request specific factors such as the degree to which the information requested is centrally held, the

- degree to which information is easily accessible, the degree to which manipulation/analysis is required to present in required format, etc).
- 9.3 Seasonality of core business activity and key annual leave periods.
- 9.4 Key non operational managers working at the front line during periods of Christmas pressure and adverse weather conditions.
- 10 For example the physical nature of our business and the scale of the USO, delivering to 28m customers each day, necessitates that Royal Mail is located in all corners of the UK employing over 100k staff. This could, in certain instances when compared to say, a telecoms company, which is a more automated business, lead to difficulties in gathering data within a short time period.
- 11 Royal Mail therefore asks that Ofcom considers industry and company specific factors when deciding on time limits for requiring a response from a target of a complaint. Royal Mail requests that Ofcom issues a statement in the final guidance that it will take such industry and company specific factors into consideration when setting time limits.

## Comments on specific provisions

- 12 Royal Mail notes that, as explained in section 5.1 of the Draft Guidelines, Ofcom may use informal means to bring a complaint or issue to the attention of a target of a complaint to resolve suitable cases, and that Ofcom will aim to do so within 15 working days. Royal Mail is of the opinion that this is a useful way of resolving issues using minimal resources to maximum effect. Should Royal Mail be the target of a complaint, it would always endeavour to assist Ofcom to resolve a complaint informally within the 15 working day period, but would ask for flexibility over time limits in which to reach resolution during periods of extreme pressure, as detailed in sections 9-10 above.
- 13 Royal Mail seeks clarification as to whether or not Ofcom would be flexible over the 15 working day time limit as set out in section 5.1 of the Consultation. Royal Mail is of the opinion that 20 working days would be

preferable as this would facilitate a greater number of cases being resolved so long as both parties understand the aim to ensure that complaints are satisfactorily resolved as quickly as possible. However, Ofcom should permit itself to be flexible if the time limit period [i.e. applies whether or not we get an extension to the 15 days] is still insufficient to resolve a complaint that would otherwise be suitable for resolution under this informal process.

14 Royal Mail would be grateful for clarification from Ofcom as to whether or not the 15 working day period referred to in section 5.1 of the Draft Guidelines is in addition to the 15 working day period referred to in section 5.9 within which it aims to complete the enquiry phase of a regulatory investigation?

15 At section 6.17, Ofcom states that once it has decided to launch an investigation it will notify the target of the identity of the likely decision maker when and if it is appropriate. Royal Mail is of the opinion that the identity of the decision maker should be communicated to all parties to a dispute as soon as possible in all cases, as this will provide clarity to the parties around the decision making process.

16 Royal Mail is grateful for clarity around the time period companies could expect to receive to comment on the scope of draft requests for information (Draft Guidelines, section 6.26). However, in Royal Mail's experience, recipients of requests are usually best placed to determine whether a request is "straightforward" or not, and it therefore believes that Ofcom should allow at least three working days notice of a draft request for information in all circumstances, save where there is genuine urgency. Royal Mail believes that cases of genuine urgency will be rare and believes that it should be possible to keep them to a minimum given adequate planning and good communications between the recipient of the request and Ofcom's case team.

17 Royal Mail would be grateful for clarification from Ofcom as to the legal basis on which it may conduct its own initiative investigations into compliance issues across an industry (see Draft Guidelines, sections 5.17-5.20). Please would Ofcom clarify whether or not such "enforcement programmes" will be applied to the postal industry and their view of the legal basis for doing so?

- 18 Royal Mail would be grateful for clarification from Ofcom as to whether or not the different criteria that apply when assessing whether information is confidential in an investigation under the Communication Act 2003 (Draft Guidelines, sections 6.31-5) and competition law will (Draft Guidelines, sections 8.20 -25) also apply to investigations into regulatory complaints made under the Postal Services Act 2011?
- 19 There is no set time period in the Draft Guidelines (section 8.25) for commenting on a proposed disclosure by Ofcom of confidential information that has been provided to it by a party, such as Royal Mail. Royal Mail does not claim that information provided by it, in response to a formal request, is confidential without a careful consideration of the basis of the claim. As such Royal Mail does not believe that it is appropriate for confidential material to be published by Ofcom, without the consent of the party who supplied it.
- 20 Should it be legally necessary for Ofcom to disclose confidential material, Royal Mail proposes that Ofcom provides that party with an absolute minimum of five working days notice of any proposed disclosure to permit that party to make enquiries, obtain legal advice and provide representations. Such representations will sometimes have to include the response of third parties who provided the original information, who may have legal rights in respect of such information, and as such may take longer to obtain and compile.
- 21 The Draft Guidelines on enforcement make reference to Ofcom's Dispute Resolution Guidelines of June 2011 which deal with disputes under the Communications Act 2003 where there is a statutory requirement that a determination must be issued within four months from the date on which Ofcom issues a decision that it is appropriate for it to open an investigation. There is no equivalent statutory time limit in the Postal Services Act 2011, Schedule 3, Part 2, section 13 (which empowers Ofcom to deal with postal access disputes). Royal Mail notes the comments made by Ofcom in the Review of Regulatory Conditions; Postal Regulation at sections 9.72-76 where Ofcom acknowledges the differences in the legislation but declares that it will endeavour to resolve postal disputes within four months as well. Royal Mail believes Ofcom should take industry and company specific factors into consideration and should not seek

to artificially truncate the time period for dealing with access disputes where to do so could prevent a comprehensive investigation and resolution based on all relevant facts and evidence. As explained above, compiling information to respond to disputes can be challenging because of the configuration of the Royal Mail's network and hence its management structure.

22 Royal Mail will comment separately on requests for information when Ofcom issues its anticipated consultation on revising its statement on information gathering.

23 Ofcom provides at section 8.30 of the Draft Guidelines that once it has issued a Statement of Objections in a competition law investigation it will permit the target to make oral representations before it proceeds to close the case. There is no equivalent right to make oral representations under section 3.33 of the Draft Guidelines, nor in Schedule 7 of the Postal Services Act 2011 following the issue of a Notification. However, Royal Mail believes that it would be beneficial to include in the Draft Guidelines a statement that Ofcom will permit the target in a regulatory investigation to make oral representations alongside or in addition to any written representations. For instance, certain aspects of the Royal Mail's operations are easier to communicate by way of oral presentation. Royal Mail appreciates that there is no such explicit procedural requirement within the relevant legislation, but believes that a facility to provide clarifications or answer questions by way of oral representations would be beneficial to all parties and could help resolve cases more quickly.

## Conclusion

Royal Mail welcomes the consultation on the Draft Guidelines and hopes that Ofcom will take its observations into account when finalising its guidance. Royal Mail would be happy to meet to discuss any aspect of this response, should that be of assistance.