

Annex 4

USP access condition – detailed drafting issues

Introduction

- A4.1 Section 10 sets out in detail the decisions that we have taken following our October consultation on the new regulatory framework for access and our December consultation in which we set out how the proposals from October 2011 would be reflected in a USP access condition.
- A4.2 We received a number of responses to the December consultation that commented on the detailed drafting of the USP access condition. The purpose of this Annex is to address some of those more detailed drafting points and, where appropriate, to indicate what modifications we have made to the provisions of the USP access condition.

USPA 1: Application, definitions and interpretation

Definition of “D+2 and later than D+2 Letters and Large Letters services”

- A4.3 TNT suggested that we should not describe D+2 Letters and Large Letters services as retail services as that would be potentially confusing as only Royal Mail had a split of wholesale and retail services.
- A4.4 We do not propose to modify the description of D+2 and later than D+2 Letters and Large Letters services as being retail services since we are referring here to an end-to-end service that access operators and Royal Mail both offer their customers (even though access operators contract with Royal Mail for the provision of the downstream element of this service).

Definition of “Inward Mail Centre” or “IMC”

- A4.5 TNT suggested defining “Inward Mail Centre” as the activities in a mail centre related to the inward sorting of mail for delivery “in that mail centre’s catchment area”. The purpose of the change was to make the definition less circular.
- A4.6 We have modified the definition in line with TNT’s suggestion. In addition, we have made further changes to clarify what is meant by the inward sortation of mail and to bring the definition into line with the definition that is set out in the USP Accounting Condition.

Definition of “Relevant Retail Services”

- A4.7 Royal Mail proposed that the definition of “Relevant Retail Services” should specify that any current, new or retail services offered by Royal mail should only be regarded as substantially similar services to Relevant Retail Services where they were substantially similar “in terms of service characteristics”.

- A4.8 We reject Royal Mail's proposed clarification. Service characteristics is one of a number of factors that Ofcom might take into account in determining whether a service is substantially similar to a Relevant Retail Service.

Definition of "Working day"

- A4.9 Royal Mail suggested that the term "public holiday" that is referred to in the definition of "working day" should itself be defined and that the definition should be consistent with that used in other conditions.
- A4.10 We have now included a definition of "public holiday" in USPA 1.3 which is consistent with the definition in the DUSP Conditions and in the universal service postal order.

USPA 2: Requirement to provide D+2 Access on reasonable request

- A4.11 TNT argued that we should delete "reasonably" from USPA 2.1 as Royal Mail should not be able to refuse to accept a request for D+2 Access on the basis that a request is unreasonable.
- A4.12 We do not consider that it is appropriate to delete "reasonably" from USPA 2.1. There may be circumstances in which it is appropriate for Royal Mail to refuse a request, for example, where the applicant has failed to provide the requisite information. Furthermore, the provision as drafted is consistent with access conditions under the Communications Act 2003. We do not consider that there is any reason to impose a stricter requirement to offer access on Royal Mail than we have done in the telecommunications sector.

USPA 5: Requirement not to unduly discriminate and restriction on use of information obtained in connection with giving access

- A4.13 TNT proposed modifying USPA 5.2 (which was USPA 4.2 in the proposed USP access condition that was published in the December consultation) so that the Universal Service Provider would be deemed to have shown undue discrimination "in the absence of contrary evidence" if it "favours an activity carried on by it or it favours any other person or a particular description of persons so as to place at a competitive disadvantage any person competing with the Universal Service Provider or such other person".
- A4.14 TNT proposed this change because it regarded the right to deem there to be undue discrimination set out in the draft USPA 5.2 to be welcome but too conditional. TNT was also concerned that Royal Mail might not just favour its own business, but also the business of third parties or particular customers, e.g. those who might be less inclined to compete downstream/used downstream services.
- A4.15 We have not made any of TNT's proposed changes. First, we do not consider that it is appropriate to deem the Universal Service Provider to have discriminated unduly merely in the absence of contrary evidence.
- A4.16 Secondly, while we agree with TNT that undue discrimination might arise if the Universal Service Provider favoured another person in order to place at a competitive disadvantage any person competing with the Universal Service

Provider, we do not consider that it is necessary to make this change since such conduct would clearly be caught by USPA 5.1.

- A4.17 Thirdly, USPA 5.1 and 5.2 (which were USPA 4.1 and USPA 4.2 in the proposed USP access condition that was published in the December consultation) are consistent with the non-discrimination provisions in access conditions under the Communications Act 2003. We do not consider that there is any reason to impose a different non-discrimination obligation on Royal Mail from the ones that we have imposed in the telecommunications sector.
- A4.18 TNT further has argued that USPA 5.3 (which was USPA 4.4 in the proposed USP access condition that was published in the December consultation) should be amended to replace the “all reasonable endeavours” requirement with a requirement to “act in a manner best calculated to” secure that no information that the Universal Service Provider has as a result of giving access is disclosed to certain persons or for certain purposes. It argues that Royal Mail should be subject to a stronger duty on confidentiality than merely using “all reasonable endeavours” given the risk of leakage.
- A4.19 We do not consider that it is appropriate to amend the “all reasonable endeavours” requirement in USPA 5.3 for a number of reasons. First, we have deleted the “act in a manner best calculated to” wording which was set out in USPA 4.3 in the proposed USP access condition that was published in the December consultation as that provision has now been deleted. It is therefore not appropriate to introduce such a requirement into USPA 5.3. Secondly, the wording of USPA 5.3 reflects the wording of Condition 10(3) of Royal Mail’s licence and we have no reason to believe that that provision was ineffective to address the risk of inappropriate flows of information.
- A4.20 TNT has suggested modifying the list of persons to whom disclosure of information that the Universal Service Provider has as a result of giving access may be permitted. It has proposed specifying that disclosure may be made to a person acting as an agent of the Universal Service Provider for the provision of postal services provided that that agent is providing postal services “to the person to whom access is provided and only for that purpose”.
- A4.21 We agree with TNT that it is appropriate to limit disclosure to agents to circumstances in which those agents are providing access services to the relevant person. In the event that Royal Mail wished to make disclosure to an agent not acting in that capacity, it would always be free to seek Ofcom’s consent in writing to such a disclosure.