

We note that this is a preliminary consultation and believe that there are some fundamental principles which need to be established, before seeking to extend liability for Ofcom's and Citizens' Advice charges beyond Royal Mail.

Q1. What are your views of the basis on which turnover from letter services is currently calculated for the purposes of administrative charges? In particular, would it be appropriate to include turnover from access services within the calculation? Please provide reasons for your views.

1.1 Point of principle.

- a) Ofcom seem (section 3.6) to see inclusion of access services as justified by the fact that regulation of access services gives rise to significant regulatory work (and hence cost) and say "access services are subject to and benefit from regulation to a significant degree".
- b) It is, though, Royal Mail's provision of access that is regulated, not the activities of access customers *per se*, and the need for such regulation is driven by Royal Mail's market power in downstream access services.
- c) In particular, the cause of Ofcom's upcoming work on access arises from Royal Mail's alleged abuse of its market power in access, not anything done by access customers. It would be highly unfair to make access customers pay additionally towards Ofcom's costs merely because they are customers and subject to Royal Mail's access terms - and especially unfair if access customers are to have to pay because of Ofcom's investigation into alleged abuse. Those who complain about such abuse are already obliged to spend material sums on professional advice and to devote significant management resource.

It is Royal Mail's market power and risk of abuse of that power that drives the need for regulation and the work now being started, so RM should pay the costs of this regulation. There is no sector-specific regulation of access services. Such regulation relating to essential conditions and consumer protection is limited to those services for which the provision previously required a licence. Access services did not require a licence, given their exemption under s7(2)(h) Postal Services Act 2000.

1.2 General Comments

- a) Turnover should be based on the delivery of letters through an eligible service **within the scope of the universal service**. Ofcom must also consider to what extent revenues from parcels services which are provided within the scope of the universal service should be taken into account. We believe that this definition needs to be analysed in considerably more detail as part of the planned, second consultation. That is because, while the Ofcom statements on possible regulation/restriction of end-to-end competition (dated 27 March in each of 2012 and 2013) cross-refer to the definition in section 40, the exact meaning of the "scope of the universal service" (not to be confused with the services which are within the "definition" of the universal service) was not defined. However, it is relevant not only for potential liability to meet Ofcom's (and Citizens Advice's) administration costs but also for potential obligations or restrictions in respect of: a notification condition (section 41); imposition of general universal service conditions (section 42); contribution to a USO burden support fund (section 46); imposition of a general access condition (section 50); the ability to provide a mail forwarding business section 75 London Local Authorities Act 2007).

- b) An upstream service is not a delivery service and upstream services have always been liberalised¹ and unregulated.

1.3 Legal position

- a) Section 43 and Schedule 4 Postal Services Act 2011 (PSA 2011) provides that Ofcom's administrative charges may only be levied 'on postal operators providing services within the scope of the universal postal service'. This reflects the provision of Article 9.2 of the EU Postal Directive which permits Member States to subject those providing services within the scope of the universal service 'to make a financial contribution to the national regulatory authority's operational costs'.
- b) Section 40(1)(a) PSA 2011 says that services which 'fall within the description of a service set out in the universal postal service order' are to be treated as being within the scope of the universal service. Upstream services are not provided separately by Royal Mail as part of the universal service and upstream services do not fall within the description of those services.
- c) None of the conditions in section 40(1)(b)² would operate to bring upstream services within the description and upstream services. Furthermore, upstream services are simply not interchangeable with the services described in the universal service order, as contemplated by section 40(1)(c). It is our belief that business customers, sending bulk mail (sorted or pre-sorted) do not consider the upstream access services provided by other operators to be interchangeable with the services described in the universal service order. They are quite distinct from those customers who use universal postal services. Section 40(2), which states that 'any reference to a service includes part of a service' would not operate to bring any upstream services within the description and, thus, the scope of the universal service. That is because upstream services are provided in relation to customers sending multiple items of mail but the universal postal service order covers only single item services, even if the final delivery happens to be provided through the same Royal Mail network. The upstream service is not, therefore, part of a service which falls (or could properly be deemed to fall) within the description of universal services.
- d) Therefore, in the absence of a reliable evidence base which would demonstrate that upstream access services are seen as interchangeable, legally, we do not believe that Ofcom has the power to levy charges on upstream access services.
- e) Given the underlying legal power for levying administrative charges, Ofcom will need to assess precisely which services fall within the scope of the universal service before it can correctly and lawfully spread its costs across a range of operators.
- f) Before it may lawfully charge other operators, Ofcom will first need to establish if any or all of Royal Mail's bulk mail retail and downstream access services and competitors' upstream and delivery services are within the scope of the universal service³.

1.4 Fair, equitable, simple, transparent, verifiable and relevant

¹ Section 67(1)(h) British Telecommunications Act 1981 ("BT Act") provided that the exclusive privilege to deliver letters is not infringed by "the conveyance and delivery to the Post Office of prepaid letters for conveyance and delivery by the Post Office to the addressees, and the collection of such letters for that purpose": section 67(4) BT Act definition: "prepaid letter" includes any letter which, in pursuance of arrangements made with the Post Office, does not require to be pre-paid;". Repeated in Postal Services Act 2000 sections 7(2)(h) and 7(4).

² Where the only reason the service is not within the description is because of: a lower collection/delivery frequency; no delivery to every UK address or selling the service at a non-uniform and/or non-affordable price.

³ Even if downstream access services are outside the scope of the universal service, they may still be mandated and regulated pursuant to section 38 PSA 2011, as contemplated by Article 11a of the EU Postal Directive.

- a) We strongly believe that confining charges to eligible delivery services (if there are any other than those provided by Royal Mail) is the only way to meet the criteria set out in 2.2 of this consultation. Specifically:
- b) Access customers already contribute indirectly to Ofcom's costs via the access price paid to Royal Mail. Why should they contribute to Ofcom directly and then pay again via Royal Mail? By maintaining the principle of charging at the point of delivery it is clear which services attract any charge, and it makes the recovery of that charge through pricing transparent.
- c) However, it would be necessary to define precisely which items are covered; which services are within the scope of the universal service; and to address the situation where more than one operator is providing services in respect of the same postal items. This should apply to all companies providing letter delivery that both (a) meet the relevant revenue turnover threshold and (b) fall within the definition of services within the scope of the universal service.
- d) Attempting to move upstream as the consultation suggests will increase complexity and encourage opacity.
- e) The suggestion that it will be possible to use data that stakeholders already collect to fulfil this objective seems to over-simplify the process. Any results must be comparable and stakeholders have a wide spectrum of business models. We would contend that it will not be easy to disaggregate information from these many models to ensure meaningful, comparable and reliable statistics are gathered.
- f) Who will be subject to any charges is far from clear. Will it be any stakeholder holding an access contract with Royal Mail? All access contract customers use access services yet it is only those who undertake logistics operations who would appear to be subject to a charge. What is the justification for the exclusion of these customers?
- g) Will the proposals cover any subcontractor involved in the upstream process? For example some access contract holders subcontract all transport to logistics specialists while others use access "operator" contract holders who also run their own networks. Under these proposals it seems that an access "operator" contract holder who runs in house transport will pay while one who subcontracts may not. The position of mailing houses who have access contracts is also not clear.
- h) It is possible for a stakeholder to use Wholesale and Retail Royal Mail services, independent mail delivery, third party express delivery, third party logistics services, in-house logistics, and in-house and third party data and sortation services. How is all this to be reliably recorded, reported and verified?

Q2. Is tracking now a standard feature of letter services so that it should be removed from the current definition of premium services? Please provide reasons for your views.

- a) The question of whether a service is an express service or a premium service is only relevant if it has first been established that the service is within the scope of the universal service.
- b) Tracked services are not within the scope of the USO and so should not be subject to a charge for regulation. This is for the following reasons:
- c) The Priority and Standard services defined in the Postal Services (Universal Postal Service) Order 2012 are for single piece items and specifically do not have a tracking feature. The offerings of tracked services by competitors are for customers sending multiple items and so are not to be deemed to be within the description.

- d) The Registered and insured services described in the Order include tracking but are:
- single piece services,
 - insured,
 - for a D+1 service with target delivery before 1pm,
 - pre-paid,
 - supplied with an on-demand a proof of delivery service, and,
 - typically, are charged at a higher price.
- e) The offerings of tracked services by competitors are for customers sending multiple items, are paid for by invoice, are uninsured and so are not to be deemed to be within the description.
- f) Even if it such services were shown to be within the description, MCF members believe that "tracked end-to-end letters" is a very generic term and Ofcom have referred only to the service offered by TNT Post, whereas there are several postal services which offer tracking in various ways and to varying extents, and which are – and always have been - considered premium services. The MCF believes Ofcom needs to be more precise in explaining what it means by "tracked items", as well as justifying their inclusion as being within the scope of the universal service.

Q3. Do you think that turnover from access services, if taken into account for the purposes for administrative charging, should be calculated on the basis of gross revenue or on the basis of net revenue (after the deduction of access charges to Royal Mail)? Please provide reasons for your view.

- a) Given that we do not believe that access volumes should be included at all this is a moot question.
- b) However, if we have to express an opinion it would be that net revenues only must be used. Otherwise there is clear double counting of revenue, with the result that the true value of wholesale access will be vastly inflated resulting in demands for an unrepresentative contribution.
- c) Even then, Ofcom will need to address the liability for charges for multiple-operator chains where each company would record the revenue e.g. an operator providing services to another access operator customer.

Q4. Is the minimum turnover threshold of £10 million from the provision of letter services still appropriate? If you consider it should be raised or lowered, please specify the threshold you consider would be more appropriate and why.

- a) The threshold should be increased by inflation on a periodic basis. It should be raised immediately to £15m to account for inflation since inception. Considering that mail prices in the comparable period have risen well over RPI then an even higher figure might be appropriate.