



**ASSOCIATION OF INTERNATIONAL COURIER & EXPRESS SERVICES**

**578 SANDRINGHAM RD, HEATHROW AIRPORT,**

**MIDDLESEX TW6 3SL**

**TEL: 44 (0) 865 400904 OR 44 (0) 7971 969650**

**EMAIL: [INFO@AICES.ORG](mailto:INFO@AICES.ORG) [WWW.AICES.ORG](http://WWW.AICES.ORG)**

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By e mail to: [holly.tingle@ofcom.org.uk](mailto:holly.tingle@ofcom.org.uk)

Dear Ms Tingle,

The Association of International Courier and Express Services (AICES) welcomes this opportunity to respond to Ofcom's consultation on its general policy on information gathering.

AICES is the UK trade organisation for companies handling international express documents and package shipments. Our members provide door-to-door transport and deliveries of tracked next-day or time-definite shipments, including documents, parcels and merchandise goods. AICES members directly employ around 38,000 people and indirectly support a total of almost 82,000 UK jobs and are responsible for over 95% of the international courier and express shipments moved through the UK every day.

As you are probably already aware, AICES members do not accept that they are "postal operators" under the Postal Services Act 2011 (the 2011 Act). However, we note that information requests can be issued on parties other than postal operators under Schedule 8 to the 2011 Act and in those circumstances wish to comment upon the Draft Statement.

AICES Members acknowledge certain statements made by Ofcom in the draft General Policy on Information Gathering (the Draft Statement) are of some reassurance and would urge Ofcom to focus strongly on these points in any statement under paragraph 14 of Schedule 8 of the 2011 Act and when subsequently considering whether to make any request for information. In particular, these include:

- (i) The fact that, without qualification, Ofcom acknowledges "*statutory demands for information must be proportionate ....*". AICES members endorse this emphasis upon an unfettered proportionality test. Any attempt to limit the parameters by which Ofcom applies any assessment of proportionality, for example by solely considering proportionality against Ofcom's intended use (rather than looking at the wider merits of

requesting information from specific entities, including the effects upon, or appropriateness of asking, those entities), would distort and subvert Ofcom's regulatory approach.

- (ii) The recognition (albeit in a limited context) that Ofcom must seek "*to minimise the burden placed on those from whom information is requested*". In particular, Ofcom should not seek information from those who have operated competitively for many years in sectors far detached from the universal post service sector (such as the international express courier sector) without extreme justification.

However, the AICES Members have very serious concerns over Ofcom's general approach to in the draft statement of information gathering. In particular:

- The Draft Statement seeks to impose a single general statement across separate and distinct regulatory fields, namely Communications Act 2003 (the 2003 Act), the Wireless Telegraphy Act 2006 and the 2011 Act. The postal services sector, regulated under an entirely different regulatory and statutory scheme, should be treated entirely separately from the other sectors.
- The statement under paragraph 14 of Schedule 8 was clearly intended to be specific to the 2011 Act. If Parliament had intended a general statement relating to all Ofcom's various information request powers, then it would have simply amended the 2003 Act, not imposed a specific statutory requirement under the very terms of the 2011 Act.
- The requirement to publish a statement of general policy separately in respect of postal services is indeed clear from s. 55 of the 2011 Act. That expressly states that Schedule 8 and information gathering is "*for the purpose of carrying out their functions in relation to postal services or related purposes*". Paragraph 14 is plainly focussed upon that.
- The 2011 Act contains statutory provisions that are unique to postal services and cannot be exercised or applied for uses in an identical manner to, for example, the information gathering powers under s. 135 et seq. of the 2003 Act.
- For example, s. 135 and 136 of the 2003 Act give Ofcom wide powers to require the provision of information for the purpose of carrying out its functions under Chapter 1 of Part 2 of that Act. This includes carrying out market reviews prescribed under the EU telecoms regulatory framework and to investigate potential breaches of conditions specific to the conditions imposed under s. 45 of the 2003 Act. The s. 45 conditions include such features as "*protecting the interests of the end-users of public electronic communications services*" and "*the allocation of telephone numbers*" and proper "*spectrum management functions*".
- None of these matters have any bearing on the use of Ofcom's Information gathering powers under Schedule 8 of the 2011 Act. The regulatory requirements on Ofcom in respect of the postal sector are completely different. For example, under section 29 of the 2011 Act, Ofcom's primary duty is to "*secure the provisions of a universal postal service*", which places

an entirely different regulatory duty on Ofcom to that in the Electronic Communications sector.

- Ofcom’s attempt therefore to set out a generalised statement applying across a number of wholly different scenarios in entirely different sectors, governed by entirely different statutes is completely inappropriate. As only one further brief illustration, Ofcom refers in paragraph 6 of Section 3 of the Consultation document to the statement applying “*when we are exercising .... dispute resolution functions*”. However it is clear from paragraph 14 of Schedule 8 to the 2011 Act that the required statement does not apply to dispute resolution (which is dealt with in an entirely separate Schedule to the 2011 Act).
- Further, it is quite clear from paragraph 14 of Schedule 8 to the 2011 Act that Parliament intended Ofcom to publish a specific statement of general policy in respect of both (i) the exercise of Ofcom’s powers under paragraphs 1 and 3 of Schedule 14 and (ii) the uses to which Ofcom proposed to put the information so obtained.
- Parliament plainly did not anticipate a mere re-statement of what the Act already indicates under paragraphs 1 and 3 of Schedule 8, otherwise there would have been no need to include a specific requirement for Ofcom to publish a statement under paragraph 14.
- In respect of “*the uses to which Ofcom proposed to put the information so obtained*”, simply listing out the statutory provisions of the 2011 Act in Annex 7 and then adding in paragraph 13 of Section 3 of the Consultation “*The uses to which Ofcom will put information obtained under the relevant provisions of the 2003, 2006 and 2011 Acts follow from the purpose or purposes for which that information was obtained*”, cannot reflect the type of statement Parliament intended Ofcom to provide in respect of information requested under the 2011 Act.
- Likewise, although Ofcom has given some detail about the “*procedure*” by which it may request information (though without any specific distinction between the respective Acts with their different statutory frameworks), there is no attempt to set out the parameters by which Ofcom will exercise the powers and so cannot reflect a “*general policy with respect to .... the exercise of Ofcom’s powers under paragraph 1 or 3*”. For example:
  - In light of s. 29 of the 2011 Act, it must be more proportionate to request information which directly relates to the services that a universal service provides, rather than other sectors which are already competitive and do not need intrusive regulation. However, the Draft Statement makes no attempt to set out Ofcom’s framework relating to this important distinction;
  - Under paragraph 1(2)(c) of Schedule 8 to the 2011 Act information may be requested from non-regulated parties. However, the Draft Statement fails to draw any distinction between information requests made of regulated entities and such non-regulated parties.

AICES members operate non-universal services in a highly competitive marketplace and are subject to competition law. Our Members therefore strongly object to additional regulatory burdens being imposed on the express services sector through unnecessary and disproportionate requirements for the provision of information. In view of the comments above, AICES Members would urge Ofcom to consult on a new Draft Statement specific to carrying out its functions in relation to postal services and recognising the limitations of the information gathering powers as defined under the 2011 Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anne de Courcy', with a large, stylized flourish at the end.

Anne de Courcy  
Secretary General