

Ofcom's Procedural Officer Decision

In the matter of an application from Royal Mail dated 30 June 2015

Procedural Officer Case Ref: PO/2015/1	Date of Ofcom's decision 22 June 2015
Applicant Royal Mail Group Limited ("Royal Mail")	Date application received 30 June 2015
Applicant's lawyers (where applicable) Ashurst LLP	Date of Procedural Officer's decision 9 July 2015

Summary

1. Ofcom has an ongoing investigation¹ under the Competition Act 1998 into a complaint from TNT Post UK Limited (subsequently renamed Whistl, and referred to in this decision as "Whistl") in relation to the prices, terms and conditions on which Royal Mail is offering to provide access to certain letter delivery services ("the Investigation").
2. Royal Mail complained to me about Ofcom's refusal to offer a second state of play meeting in relation to the Investigation. Royal Mail considers that this decision amounts to a material procedural error that seriously prejudices Royal Mail, on the basis that:
 - a. Ofcom has denied Royal Mail the ability to understand the issues in relation to which it is being investigated; and
 - b. Ofcom has departed from its own guidelines, and has not provided any reason or justification for doing so.
3. Royal Mail sought a decision that:
 - a. Prior to taking a provisional decision, Ofcom should offer Royal Mail a second state of play meeting at which Ofcom explains to Royal Mail its provisional thinking on the case including a description of any key potential competition concerns that have been identified. Ofcom should also explain the legal basis on which Ofcom considers that Royal Mail may have infringed competition law by announcing pricing proposals that were never implemented;
 - b. Following the state of play meeting, Ofcom should allow Royal Mail a reasonable period, and at least one month, in which to make such representations or submissions as it considers appropriate in light of the information provided by Ofcom during the state of play meeting; and
 - c. Ofcom's case team should have regard to any such submissions made by Royal Mail prior to Ofcom taking its provisional decision in this case.

¹ Ofcom case reference: CW/01122/01/14 Further details available at: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01122/

Scope

4. I am satisfied that Royal Mail's application amounts to a complaint about the procedures followed during the course of an investigation under the Competition Act 1998, which has not been determined or settled by the relevant person overseeing the investigation to the satisfaction of the complainant, and which therefore falls within the scope of Rule 8 of the Competition and Markets Authority's Competition Act 1998 Rules².

Process

5. Royal Mail's application was received on 30 June 2015. The Ofcom case team met with me on 1 July 2015 to discuss the application. Separately, Royal Mail and Ashurst also met with me on 1 July 2015 to discuss the application. Following my invitation, Ashurst submitted written representations on 6 July 2015 about the relevance of the Court of First Instance's judgment in *AC-Treuhand AG v Commission*³ to Royal Mail's application.

Background to the application

6. I do not recount here a comprehensive chronology of the Investigation to date. However, I note the following key dates by way of relevant background:
 - a. On 21 February 2014, Ofcom opened its investigation into certain changes to price and non-price terms of Royal Mail's access contracts for letters.
 - b. On 15 December 2014, Royal Mail attended a state of play meeting with Ofcom ("the December state of play meeting").
 - c. On 29 April 2015, Royal Mail wrote to Ofcom⁴ seeking (among other things) some further detail about the process for the Investigation. In particular, Royal Mail asked for confirmation that Ofcom would invite Royal Mail to a state of play meeting before deciding to issue a statement of objections, and also asked for an opportunity to meet with Ofcom [X].
 - d. On 15 June 2015, Ofcom responded to Royal Mail⁵ explaining that it did not intend to hold a further state of play meeting before taking a provisional decision.
 - e. On 16 June 2015, Royal Mail wrote again to Ofcom⁶ asking Ofcom to reconsider its decision not to offer a state of play meeting.
 - f. On 22 June 2015, Ofcom confirmed its decision not to offer a second state of play meeting.⁷

² See schedule to the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014

³ <http://curia.europa.eu/juris/celex.jsf?celex=62004TJ0099&lang1=en&type=TEXT&ancre=>

⁴ Letter from Neil Harnby (General Counsel, Royal Mail) to Neil Buckley (Director of Investigations, Ofcom)

⁵ Letter from Paul Dean to Neil Harnby

⁶ Letter from Neil Harnby to Paul Dean (Principal, Investigations, Ofcom)

⁷ Letter from Neil Buckley to Neil Harnby

7. The Ofcom case team's reasons for not holding a second state of play meeting are largely as set out in the letters of 15 June 2015 and 22 June 2015. It appears to me that the case team's main reasons for not agreeing to Royal Mail's request for a state of play meeting can be summarised as follows:
- a. The case team considered that it had already taken Royal Mail through the key competition concerns identified at the December state of play meeting, and Royal Mail had [X]
 - b. The case team had given careful consideration to [X] and considered that it already had the material it needed from Royal Mail to enable it to reach a provisional decision, and that a second state of play meeting was therefore not necessary.
 - c. In view of the market sensitivity of the provisional decision, the case team would not have been in a position to disclose the nature of the provisional decision at a state of play meeting and considered that it would be difficult to have any substantive engagement with Royal Mail without risking such a disclosure.
 - d. Ofcom's Enforcement Guidelines refer to there generally being two state of play meetings prior to a provisional decision being reached in Competition Act investigations, but these are not intended to be prescriptive and are not binding.
 - e. If the provisional decision were to be to issue a statement of objections, that document would set out Ofcom's case in full, and Royal Mail would have an opportunity to make written and oral submissions in response, alongside other procedural protections such as the access to file process.
8. When I met with the case team, it also informed me that:
- a. It had consulted with the CMA and considered that its approach to market sensitivity (as set out at paragraph 7c above) is consistent with Ofcom's responsibility to disclose price sensitive information in a controlled and orderly way; and
 - b. It considered that it had in substance met the objectives of Ofcom's Enforcement Guidelines in correspondence with Royal Mail and by holding the December state of play meeting.

9. The reasons for Royal Mail's complaint are largely as set out in its letter of 16 June 2015 and in its application to me dated 30 June 2015, and I consider that these can be summarised as follows:
- a. Royal Mail considers that it has been denied the ability to understand the issues in relation to which it is being investigated, and that [X] in the event that Ofcom decides to issue a statement of objections; and
 - b. Ofcom has departed from its Enforcement Guidelines without providing any reason for doing so (or to the extent that it has provided reasons, those reasons are inadequate).
10. These two strands of Royal Mail's complaint are clearly closely related and to some extent interdependent, but for clarity, I have addressed them below in turn.

Royal Mail has been denied the ability to understand the issues being investigated

11. Royal Mail considers that, in the absence of a second state of play meeting, it has been denied an opportunity to understand the issues for which it is being investigated, and that [X] in the event that Ofcom decides to issue a statement of objections.
12. I have first considered what is the purpose of state of play meetings in this context, and it appears to me that the main purposes of state of play meetings are:
- a. First, to improve the quality of decision-making on the part of the regulatory authority;
 - b. Second, to provide a degree of transparency about the process to the parties to the investigation.
13. In this regard, I note the European Commission's Notice⁸ on best practices for the conduct of proceedings in competition law cases, which says that:
- "State of Play meetings can contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between the DG for Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure."*⁹
14. I also note that this is largely consistent with Royal Mail's own application, which states that:
- "...from a policy perspective, the Government, OFT (now CMA) and Ofcom have recognised that State of Play meetings are a very important procedural step for*

⁸ European Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C308/06)

⁹ Notice, paragraph 61

*competition authorities, that lead to improved transparency and which foster better decision-making.*¹⁰

15. I note Royal Mail's comment that "*State of Play meetings are a key procedural mechanism by which **to improve engagement with the parties that are the subject of an investigation so as to preserve their rights of defence and to help ensure better and more robust decision-making***".¹¹(emphasis added)
16. In this regard, Royal Mail appears to be suggesting that engagement through a second state of play meeting is necessary so as to preserve its rights of defence. In my view, it is clearly important that the investigating authority does not do anything in the pre-provisional decision stage which may irremediably compromise the target's rights of defence at a later stage. However, it seems to me that the target's rights of defence ought properly to be considered in the context of the totality of an investigation from end-to-end. While discussions at state of play meetings may be relevant to that assessment, it seems unlikely to me that the absence of a state of play meeting at one particular point in the investigation would, of itself, prevent a target from being able to exercise its rights of defence, taking into account the well-established procedural safeguards built into the process for Competition Act investigations after a provisional decision (particularly a statement of objections) is issued.¹²
17. Turning now to whether Royal Mail has been denied the opportunity to understand the issues for which it is being investigated, it appears to me that Royal Mail has had some substantive engagement with the case team. In particular:
 - a. Royal Mail received a non-confidential version of the original complaint from Whistl on 31 January 2014. I have reviewed the redacted version of the complaint and I do not accept Royal Mail's assertion that this was so heavily redacted as to be "*very difficult for Royal Mail properly to understand the allegations being made*".
 - b. Royal Mail has had one state of play meeting in December 2014, at which it was shown excerpts from documents that the case team considers to be important to the Investigation, and at which was discussed the nature of the competition concerns potentially raised by those documents. The case team and Royal Mail provided me with copies of their own attendance notes of this meeting which are largely similar. I can see from these documents that the case team explained to Royal Mail that [X]

¹⁰ Royal Mail complaint, paragraph 5.3

¹¹ Royal Mail complaint, paragraph 5.2

¹² In this regard I note the CFI's judgment in AC-Treuhand AG v Commission, T-99/04, in particular paragraphs 44-60

- c. Royal Mail has been sufficiently informed about the nature of the Investigation to [X] Far from being kept “*in the dark*” as Royal Mail claim in its application to me, it appears to me [X] that the case team had indicated its concerns about Royal Mail’s pricing proposals in sufficient detail for Royal Mail [X]
18. I also note that the Investigation appears to centre around Royal Mail’s own conduct and its own documents which it has supplied to Ofcom.
19. Given that Royal Mail is a large and sophisticated publicly listed company, advised by skilled and specialist competition lawyers, I consider that the level of engagement in the Investigation to date is likely to have been sufficient for Royal Mail to have a broad understanding of the issues in relation to which it is being investigated.
20. I accept that there may be aspects of the case in relation to which Royal Mail does not currently understand Ofcom’s full analysis, but even if this is the case, I consider that it is the proper function of the provisional decision to make the detail of Ofcom’s analysis clear. When Ofcom does issue its provisional decision that will (presumably) set out Ofcom’s reasoning in full, accompanied by access to all relevant supporting documents. If such provisional decision were to be a statement of objections, Royal Mail would have the opportunity to make both written and oral representations on the provisional decision and the reasoning.
21. For all these reasons, I am satisfied that Royal Mail has been sufficiently informed about the issues for which it is being investigated and that the case team’s refusal to offer a second state of play meeting at this stage in the Investigation has not compromised Royal Mail’s rights of defence in this Investigation. In its application, Royal Mail asserts that it [X] although it appears to me that Royal Mail is sufficiently well informed about the issues for which it is being investigated in order to [X]

Ofcom has departed from its Enforcement Guidelines without providing reasons

22. Royal Mail argues that Ofcom has not complied with an obligation to follow its own Enforcement Guidelines.

23. Ofcom’s Enforcement Guidelines say:

“Ofcom will generally hold at least two ‘state of play’ meetings with the parties on the progress of the investigation. These meetings will cover substantive issues as well as procedural issues. At these meetings the case team will update parties on progress in an investigation and, where appropriate, share emerging thinking. Parties will also have the opportunity to raise concerns or arguments they have. These meetings will take place early on in the investigation and close to Ofcom’s decision on whether or not to issue a statement of objections. Where we issue a statement of objections, we will generally hold a further ‘state of play’ meeting after

*the parties have submitted their written representations and the oral hearing has been held.*¹³

24. Royal Mail also refers to paragraph 1.25 of the Enforcement Guidelines, which says:
- “These guidelines set out Ofcom’s general approach to enforcement in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in these guidelines, we will be prepared to explain why.”*
25. In short, Royal Mail considers that Ofcom has departed from its guidelines without giving reasons for this. To the extent that Ofcom has given reasons for its decision, Royal Mail considers that these are inadequate.
26. I note that the procedure outlined in the Enforcement Guidelines is not absolute – it is caveated by the word “generally”. In my view, this clearly leaves scope for the exercise of the case team’s discretion to hold fewer than two state of play meetings in any particular investigation, without this being a departure from the Enforcement Guidelines. Ofcom’s concurrent Competition Act 1998 powers cover a wide range of possible infringing behaviour by a wide range of stakeholders, and it seems perfectly appropriate that the Enforcement Guidelines should leave the case team with a wide discretion to take different approaches based on the specific nature of any given investigation, and their view on how to conduct the investigation effectively while providing an appropriate level of transparency.
27. I also note the additional caveat in the Enforcement Guidelines about the content of the state of play meeting – the case team will share emerging thinking “where appropriate”.
28. In any event, I do not agree with Royal Mail that the case team has failed to give reasons for its decision. I consider that the reasons are set out in the letters of 15 and 22 June 2015, and I have summarised these at paragraph 7 above. They are:
- a. The case team considered that it had already taken Royal Mail through the key competition concerns identified at the December state of play meeting, and Royal Mail [X]
 - b. The case team had given careful consideration to [X] and considered that it already had the material it needed from Royal Mail to enable it to reach a provisional decision, and that a second state of play meeting was therefore not necessary.
 - c. In view of the market sensitivity of the provisional decision, the case team would not have been in a position to disclose the nature of the provisional decision at a state of play meeting and considered that it would be difficult to have any substantive engagement with Royal Mail without risking such a disclosure.

¹³ Ofcom Enforcement Guidelines, paragraph 7.18.

- d. Ofcom's Enforcement Guidelines refer to there generally being two state of play meetings prior to a provisional decision being reached in Competition Act investigations, but these are not intended to be prescriptive and are not binding.
 - e. If the provisional decision were to be to issue a statement of objections, that document would set out Ofcom's case in full, and Royal Mail would have an opportunity to make written and oral submissions in response, alongside other procedural protections such as the access to file process.
29. I therefore consider that, even on Royal Mail's narrower reading of Ofcom's Enforcement Guidelines that Ofcom has departed from its own guidelines, the case team has given reasons for its decision to do so in this case. I consider that the substantive reasons set out at paragraph 28 a-c in particular amount to a reasonable basis for the exercise of the case team's discretion to decide whether, and when, it is necessary and appropriate to hold a state of play meeting.

Conclusion

30. For all the reasons set out above, I uphold the decision of Neil Buckley (as the relevant person overseeing the Investigation for Ofcom) not to offer Royal Mail a second state of play meeting prior to Ofcom taking a provisional decision on the Investigation.

Nuala Cosgrove
PROCEDURAL OFFICER
9 July 2015