

**TNT Post UK Limited: Response to Consultation**  
**End-to-end competition in the postal sector: Draft guidance on Ofcom's approach**

**Legal status of proposals:** TNT Post UK Limited (“TNT Post” or “we”) takes the position that a number of the proposals referred to in the Consultation would, if implemented, be contrary to the objectives and provisions of Postal Directive 97/67 as amended<sup>1</sup> (the “EU Postal Directive”) notwithstanding that they are contemplated by the Postal Services Act 2011. This response is made without prejudice to our rights to challenge any measures on the grounds of their being contrary to the provisions of the EU Postal Directive or otherwise.

**Summary of legal position:** Article 7 of the EU Postal Directive (Financing of universal services), has required the progressive – and since 1 January 2013, total - liberalisation of postal services throughout the EU.

Article 7.1 deals with the means of financing the universal service and states that:

*“Member States shall not grant or maintain in force exclusive or special rights for the establishment and provision of postal services. Member States may finance the provision of universal services in accordance with one or more of the means provided for in paragraphs 2, 3 and 4<sup>2</sup>, or in accordance with any other means compatible with the Treaty”.*

Now, finally, at the end of the 14 year liberalisation process (an extended period of transition aimed to allow steps to be taken to prepare for the advent of competition), **restricting competition is no longer a legal option as a means of safeguarding the USO.**

Article 9 of the EU Postal Directive (Conditions governing the provision of postal services and access to the network) serves a very different purpose from Article 7, namely to set out the permitted means of regulation. Article 9 cannot properly be interpreted as permitting any restrictions (aside from a requirement to make contributions to a compensation fund) to be imposed which are designed to assist the universal service provider in financing the discharge of the USO. The specific, mutual cross-referencing between Article 7.4 and Article 9.2, third indent illustrates the different functions of these two Articles.

Accordingly, to the extent that other measures might be introduced which restrict competition in postal services, we hold the firm view that they would be illegal and unenforceable. While OFCOM acknowledges that: *“Given that the general approach of the Directive (which constitutes the final step in the gradual opening up of the postal services market) is one of market liberalisation, any regulatory intervention must be considered in light of this purpose”*, this implies that regulation may, potentially, restrict competition. This, in our view, mis-states the near total prohibition on restricting the activity of competitors now contained in the Directive. As stated above, there is only one exception to this principle, namely the right to establish a compensation fund where provision of the USO entails a net cost and represents an unfair financial burden on the Universal Service Provider<sup>3</sup>. It is a long-established principle of European Law that domestic legislation must be interpreted, wherever possible, in a manner

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<sup>1</sup> Amended by Directive 2002/39/EC and Directive 2008/6/EC

<sup>2</sup> Paragraph 2: putting the universal service out to tender; Paragraph 3: state aid or net cost sharing mechanism when it is an unfair financial burden; and Paragraph 4: compensation fund to share net cost.

<sup>3</sup> Articles 7.3(b) and 7.4 of the EU Postal Directive.

which is consistent with the provisions of a Directive<sup>4</sup>. Where this is not possible, the domestic legislation will be unlawful and must be changed<sup>5</sup>. Accordingly, the powers in the Postal Services Act 2011 may only be exercised in a way which recognises this fundamental principle in the EU Postal Directive that no restrictions (bar a properly constituted universal service compensation fund) may be imposed on the provision of competing postal services.

**Specific proposals:** rather than repeat the above objections, both in principle and in law, to any measures which have the effect of restricting competition, the following comments are made in addition – and without prejudice - to that underlying position.

**Clarity:** at paragraph 4.21 of the current consultation and in its 25 July 2012 update<sup>6</sup>, OFCOM said that it would carry out the current consultation in order to provide regulatory clarity. We welcomed this approach as it would have offered the regulatory certainty needed to inform investment decisions. We are, therefore, disappointed that the guidance makes it impossible to assess, with any degree of commercial certainty, what if any regulation might be imposed upon us and what the financial impact might be. It is, for example, not clear how and under what conditions Royal Mail itself would be required to contribute to any compensation fund.

**Efficiency:** we fully agree that “it is critically important that Royal Mail improves its efficiency”<sup>7</sup> and note OFCOM’s statutory duty to have regard to the need for the provision of the universal service to be efficient before the end of a reasonable time. It is our view that these proposed guidelines have the potential to undermine efficiency in two ways.

First, the uncertainty about the extent and legality of possible regulation adds, yet another, incalculable risk to an investment decision. We set these out in our response to the 20 October 2011 consultation (see extract in Annex) as follows:

“There are already a great number of variables and risks for any would-be entrant to consider such as:

- available volumes
- uncertainty about zonal structures (including the number of zones) and pricing
- customer inertia in light of limited geographical coverage
- the impact of VAT
- Royal Mail’s competitive reaction
- availability of labour
- productivity levels
- capital investment costs”

By reducing the likelihood of investment by competitors, OFCOM is relieving pressure on Royal Mail to become more efficient.

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<sup>4</sup> *Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, Case 14/83, [1984] ECR 1891, para.26.

“[T]he Member States’ obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article [4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law in particular the provisions of a national law specifically introduced in order to implement [a Directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article [288].”

<sup>5</sup> *Commission v UK* (Case 61/81) [1982] ICR 578

<sup>6</sup> At paragraph 1.2, 1.21 and 1.22

<sup>7</sup> Paragraph 4.9 of the consultation

Second, by proposing to impose measures which could have the impact of restricting, if not entirely eliminating, delivery competition, OFCOM is creating a perverse incentive for Royal Mail to remain inefficient. That is because Royal Mail could benefit from its competitors' being required to contribute to a compensation fund or provide additional services as a direct result of its being inefficient. If this were not an option, Royal Mail would have no choice but to improve its efficiency and change its business model in such a way that it can compete too in a normal and open market.

**State aid:** The guidance also fails to take into account the fact that although state aid (either direct or via a state measure setting up a compensation fund) is, under the EU Postal Directive, ordinarily a financing option<sup>8</sup>, this may not be possible in the case of Royal Mail. State aid to Royal Mail (a tremendous distortion of competition in its own right, given the vast multi-billion pound aid it received) has now been approved by the EU Commission as "one time, last time" aid under the "Rescue and Restructuring Guidelines"<sup>9</sup> and it is our position that no further direct state funding as given so far is permitted. During the aid approval process, the UK Government raised - and the EU Commission specifically took account of - arguments about the need for aid in the context of the ongoing provision of the universal service<sup>10</sup>. The UK Government stated that "*the measures were specifically designed to spend only the strict minimum necessary to secure the future of the universal service and restore RMG to viability to that end.*"<sup>11</sup> The guidelines are extremely clear on this point: "*rescue aid should be granted only once (one time, last time condition). In accordance with the same principle, in order to prevent firms from being unfairly assisted when they can only survive thanks to repeated State support, restructuring aid should be granted once only.*"<sup>12</sup> This means that the application of the Postal Directive can only be based on either article 7.3(a) (compensation from public funds) or 7.3(b) (sharing the net costs), not both at the same time, and which must be notified by the EU Commission as state aid<sup>13</sup>. **This would, in our view, not preclude the establishment of a compensation fund in the future. This is, clearly, a very important point and the legal position, therefore, needs to be fully set out in any final guidance in order to provide clarity and regulatory certainty.**

**Triggers for a review**<sup>14</sup>: it is not clear if a "material increase" in end-to-end competition means generally (i.e. assuming the starting point is as now) or comparatively (i.e. taking into account the business plan details competitors have already shared with OFCOM) nor is it clear what amounts to "material". It is also impossible to assess the risk of regulatory restraint when, even if there is no change in those plans, "a material change in Ofcom's assessment" could trigger a review without stating on what objective, transparent basis that material change of its assessment might take place. Clarification on these two points (and the definition of "material") is very important to give regulatory certainty. If significant investment decisions about expansion are to be made, which involve a lead time of several months, taking into account the need for a number of steps such as procurement of mail-sequencing machinery, route-planning, identification of suitable premises, and recruitment and training of staff, it is crucial that

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<sup>8</sup> Article 7.3(a) EU Postal Directive 2008/6/EC

<sup>9</sup> Section 3.3 Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty: Official Journal 244 , 01/10/2004 P. 0002 - 0017

<sup>10</sup> COMMISSION DECISION of 21 March 2012 ON THE MEASURE SA.31479 (2011/C - ex 2011/N) which the United Kingdom plans to implement for Royal Mail Group at paragraphs 60, 112, 116, 122, 128, 132, 240, 241 ,260.

<sup>11</sup> At paragraph 128 op. cit.

<sup>12</sup> Paragraph 72, Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty: Official Journal 244 , 01/10/2004

<sup>13</sup> Recital 26 EU Postal Directive 2008/6/EC

<sup>14</sup> Section 4.26 of the consultation

any contemplated trigger for a review be notified long in advance and that it be based on objective and measurable criteria. This would then allow would-be investors to make an informed decision as to the increased risk of regulatory restrictions at an early stage. It is also extremely important that, if there is any possible impact on our existing staff and operations as a result of any such review, we have as much notice as possible. Clarification in the guidelines as to timing would, therefore, be very useful.

#### **Assessing the financial impact of E2E competition on the USO (section 5):**

Counterfactual (step 1): Using the Royal Mail annual business plan will only be a sensible starting point if it already contemplates a realistic degree of competition (and OFCOM is best placed to assess this given the information we and other operators have supplied) and sets out the measures Royal Mail intends to take to respond to this, including the planned commercial strategy, cost reductions and efficiency gains. For subsequent years, a review of the previous year's plan should reflect the actual level of competition and effectiveness of the Royal Mail reaction against the plan. To the extent that Royal Mail's plan had overstated (or understated) the level or effect of actual competition, the subsequent year's business plan should be adjusted to record a surplus (or deficit). Royal Mail needs to plan for a realistic level of competition by becoming more efficient. If competition comes later than expected, Royal Mail should already have benefited from that delay and should not be permitted to re-set the competitive baseline at a lower level and thus increase the effect of end-to-end competition in the following year and the risk of regulation.

Direct impact of end-to-end competition (step 2): we note that OFCOM will carry out its own assessment of competitors' business plans but the implication, in paragraph 5.11, that competitors may understate their likely success in an effort to forestall regulatory intervention is not realistic. In the first instance, the quarterly notifications will quickly reveal any disparity from past and future business plans. More importantly, end-to-end competition requires very material investment in machinery which would be depreciated over a number of years and also involves the recruitment of employees. It is not realistic that we would understate our plans to hoodwink the regulator and run the risk that subsequently, in as little as a year, we may be forced to make staff redundant or materially write-down our asset values. Even if the reason for this would be a regulatory decision, we would struggle to justify such a "head in the sand" approach to our shareholders.

Assessing Royal Mail's potential response (step 3): it is important to assume that Royal Mail would take the appropriate action of an efficient operator in a competitive market. Royal Mail must not be rewarded for continued inefficiency in the face of competition, even if that competition can enter relatively quickly. Royal Mail has been exposed to the threat of potential competition since 2006 but has not achieved adequate levels of efficiency. Experience shows that the reality of growing competition is likely to exert a far greater pressure than the mere threat of potential competition, which may never materialise. Therefore, we do not accept that the speed of Royal Mail's response should be a relevant consideration for OFCOM. It will take a number of years for any operator to build up significant geographical coverage, even if investment is made very quickly and assuming an immediate removal of the VAT distortion (which now looks unlikely before 2015). Royal Mail has the scale, scope and financial power to withstand transitory inefficiency but needs the pressure to ensure it does address it. To do otherwise, would be to give Royal Mail inappropriate protection from a critical, external pressure. It also needs to be totally clear that the only relevant consideration is on Royal Mail's ability to provide the universal service and not on its financial position generally or to provide the universal service at a minimum level of profitability, as this will hinge on Royal Mail's success in reducing inefficiency. As part of this consideration, it is also appropriate that OFCOM consider the effect on Royal Mail's ability to

finance the universal service of the continued provision of loss-making services, year after year (such as international bulk mail services and Relay). The effect of these (and any other loss-making) commercial activities cannot be left out of consideration. In short, Royal Mail must not be allowed to take its foot of the gas.

Testing if the universal service is likely to be put at risk (step 4): the EU Commission, in approving state aid, has taken into account Royal Mail's business plan and is, implicitly, satisfied at its ability to provide a universal service. It should never be the case that competition from physical delivery of mail, likely to drive the greatest efficiency pressure, should be restrained for a failure by Royal Mail to reach those expected levels of efficiency and cost flexibility. It is also crucial that all the statutory requirements of necessity, objective justification, proportionality, transparency and non-discrimination are met. It is not clear how OFCOM can assess the impact of End-to-End competition on the universal service without having conducted a full net cost analysis of providing the USO. Finally, in assessing the effect of delivery competition on the provision of the USO, potential changes to the USO must also be taken into account. If the extent of the USO is set at a level which is wider than it needs to be, from a consumer or EU legislation perspective, there can be no defensible argument that competition should be restrained in order to justify such additional and non-essential obligations. These obligations would exist, ultimately, because of a political decision and not the assessment of the independent regulator. The guidance should make clear how any permitted reduction in the USO will be taken into account. It should not be limited to changes which are proposed (as stated in paragraph 6.63) as these may countenance a service which goes beyond the minimum needs of users and, thus, place an undue burden on Royal Mail and, thereby, its competitors.

#### **Assessing if the financial sustainability of the USO is threatened (section 6):**

The definition of OFCOM's duties in relation to the USO in the UK legislation has gone beyond the requirements of the EU Directive by requiring that the regulator ensure that Royal Mail make a reasonable commercial rate of return. The relevant test in the EU Postal Directive to justify a compensation fund is if (a) the provision of it entails a net cost in fulfilling that part of the universal service that would not be fulfilled if there were no obligation to do so<sup>15</sup> and (b) the obligations represent an unfair financial burden on the universal service provider.<sup>16</sup> What amounts to a reasonable profit<sup>17</sup> from universal services, for the purposes of the EU Postal Directive, is not necessarily the same as a reasonable commercial rate of return on expenditure incurred, as set out in s29(4) Postal Services Act 2011. In order to minimise the distortion of competition, the relevant level of profitability should be set at the lowest acceptable rate, taking into account permissible reductions in the scope of the USO. What constitutes a "short term dip" in profitability needs to be clarified. It is also implied that a structural decline – which exists – may justify restraints being imposed on delivery competition. We are firmly of the view that delivery competition may not be held responsible for a structural change in the use of

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<sup>15</sup> Annex 1, Part B EU Postal Directive 2008/6/EC: "the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without universal service obligations"

<sup>16</sup> Article 7(3) EU Postal Directive as amended by Directive 2008/6/EC

<sup>17</sup> Recital 29 EU Postal Directive 2008/6/EC "The calculation [of the net cost] should take into account all other relevant elements, including any market benefits which accrue to a postal service provider designated to provide universal service, the entitlement to a reasonable profit and incentives for cost efficiency."

postal services. If Royal Mail has been overly optimistic in its volume and revenue predictions, it must then address its own business plan. The presence of delivery competition is likely to make that more – rather than less – feasible. We fully agree that delivery competition may drive the right incentives on Royal Mail but how this will be assessed is not specified. Clarification on this point is important.

As to matters which are to be considered to be within Royal Mail's control (paragraph 6.28), it should be expressly stated that wages and other employment conditions are within Royal Mail's control. It gives cause for concern that OFCOM will undertake work to identify a reasonable rate of efficiency improvement. If set too low, this can result in competitors not investing (due to risk of regulatory restraints) and may become a self-fulfilling prophecy.

In principle we do not accept the presumption that Royal Mail's costs are relatively fixed. The majority of cost is labour and so is, inherently, a variable cost. Royal Mail needs to be exposed to competition both operationally and on employment terms in order to produce the most efficient and flexible cost structure. The current business model would represent an inappropriate baseline if it does not look forward and assume implementation of other employment models, more akin to those of its competitors. A changed Royal Mail business model could lead to another number staff and could lead to leaner (i.e. cheaper) labour costs and conditions.

Where Royal Mail adopts a commercial strategy of discounting, this is also a matter within its control. To take a recent example, Royal Mail has proposed to offer a 5-15% discount to access customers who commit to certain volume and profile of mail. Aside from the anti-competitive effect of these measures, this could constitute an overly generous discount which is offered to deter the use of competing delivery operators. Our view is that this is completely unnecessary and, were Royal Mail to adopt such a strategy in an attempt to compete, it should not be allowed to rely on the resulting, reduced revenues as a justification for its competitors' activities to be restrained. Marco-economic cycles and structural change are well known phenomena. Royal Mail should be expected to adopt strategies which give sufficient flexibility to cope with unexpected changes and include relevant sensitivity analysis in anticipation. Similarly, product mix is likely to be shaped largely by Royal Mail's own pricing and so should, primarily, be seen as a matter within Royal Mail's control and arising from its commercial strategy.

### **Options for regulatory intervention (section 7)**

That OFCOM has the power to intervene at any time makes the need to advance warning of possible intervention crucial, given the lead time for investment and, in a worst case scenario, possible impact on existing operations.

General Universal Service Conditions: As stated at the outset, General Universal Service Conditions may not be implemented in a way which restricts competition in a manner which is incompatible with the EU Postal Directive. Belgium and Finland have both been the subject of infringement proceedings or widespread censure precisely because they sought to restrict competition through the introduction of similar conditions. The lack of competition in both countries is testament to the effect those measures have had on competition there. It is far from clear how the imposition of a General Universal Service

Condition could help in the provision of a universal service if the effect of it was not to restrain competition but, rather, to divert greater volumes to Royal Mail's competitors' networks. If, on the other hand, the conditions render an, otherwise viable, competing business model loss-making, OFCOM will have simply demonstrated that the purpose of the measure was to restrain competition. That is not permissible and would not operate in a way designed to ensure the minimum distortion of competition<sup>18</sup>. Justifying any such measure as "necessary" will be an extremely difficult, and probably impossible, task. While a measure could be put in place within 6-9 months, it would be essential that longer notice be given so that informed investment decisions can be taken by competitors.

Compensation fund: Our comments on a universal service compensation fund are set out above. The UK has a unique constraint in that Royal Mail has been the recipient of "one time, last time" rescue and restructuring aid and so, prima facie, further aid may not be legally possible (footnote 12). It should be clarified if and how article 7.3 of the Postal Directive could be implemented (footnote 16) and in what way Royal Mail itself must also contribute to any fund. That this is the case is not clear from the proposed guidance and, indeed, paragraph 7.51 would tend to imply that Royal Mail would not contribute, which we believe to be incorrect.

Universal service put out to tender: the UK legislation, wrongly in our view, precludes this measure for just under 9 years<sup>19</sup>, despite it being one of the key measures for ensuring efficient provision of the universal service<sup>20</sup>. A review of the legislation which would require public tendering or, if no such amendment is made, Royal Mail asking for the burdensome services (which need not be the entire service) to be put out to tender should be a pre-condition to imposing any obligations on competing operators, in order to minimise the risk of competition being unnecessarily restrained when the universal service is not being provided in the most efficient manner possible. If Royal Mail, who has the right to propose this<sup>21</sup> chooses to continue providing the service and not put it out to tender, this would be a clear indication that it does not consider the activity to be an unfair burden. The provision of a frequent, nationwide service is a unique selling point which offers Royal Mail a commercial advantage. In Germany, a comparable system is operated and Deutsche Post has not once sought to relinquish its voluntary commitment to provide a nationwide universal service. In some areas, Deutsche Post sub-contracts the activities to third parties.

Modification of access requirements: as Royal Mail is largely free to agree terms for the provision of access services, a modification of this requirement to grant access is potentially counter-productive as it may encourage an increase in delivery competition. We do not see how this could be seen as a

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<sup>18</sup> Recital 23 EU Postal Directive 2008/6/EC: "(23) Directive 97/67/EC established a preference for the provision of the universal service through the designation of universal service providers. Member States may require that the universal service be provided throughout the whole of the national territory. Greater competition and choice means that Member States should be given further flexibility to determine the most efficient and appropriate mechanism to guarantee the availability of the universal service, while respecting the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market."

<sup>19</sup> s.45(14) Postal Services Act 2011

<sup>20</sup> Recitals 23 and 26 and Article 7(2) EU Postal Directive 2008/6/EC

<sup>21</sup> s.45(14) Postal Services Act 2011

necessary measure. We also note that any such measure would apply to all customers, not just those who provide (or purchase) competing delivery services. It would also harm users because, without access, there would be next to no competition.

Mandating access to competing operators' networks: it is unlikely that this would materially increase the volumes entering the Royal Mail network. Accordingly, this is more likely to be counter-productive. If, however, competitors had secured such a proportion of volumes that Royal Mail would want to use this service, then this may be a possible way forward. In these circumstances, this is more akin to tendering out part of the universal service provision.

## **CONCLUSION**

The proposed guidance does not provide certainty. In some cases, quite the opposite is true which creates uncertainty for would-be investors in competing delivery services. There are complex legal issues which are raised by the proposals but which are not yet adequately considered or addressed. This proposal sends an unfortunate message to the rest of the EU that the level of competition in a liberalised EU Market can, somehow, be controlled by the State. For all these reasons, we urge OFCOM to consider these proposals very carefully indeed and to discuss them with the relevant elements of the EU Commission to ensure that whatever may be proposed in the future is, indeed, lawful and compatible with the EU Postal Directive and EU Competition Law. By doing so, OFCOM will create the necessary market certainty for investors in, both, Royal Mail and in competing End-to-End delivery operations which customers have demonstrated they want.

TNT Post UK Limited  
8 January 2013

## ANNEX

### TNT Post response to 20 October 2011 proposals

7.1.11. We are of the firm view that seeking to impose regulatory obligations on operators who are willing to take the commercial risk of investing in the UK market is undesirable for a number of reasons:

- Royal Mail needs to modernise and become more efficient but regulatory price caps which were previously aimed at encouraging this behaviour are to be removed so there is an excessive reliance being placed on Royal Mail's self-restraint with customers being most at risk;
- Modernisation at an appropriate pace, without the presence of competition, is less certain even though it is essential. The creation of regulations on end-to-end competitors would be counter-productive if they relieve the very pressure which needs to be applied to Royal Mail to modernise;
- Evidence in other countries has shown that employment conditions are the cornerstone to the financial success of labour-intensive postal services and competition provides the best possible benchmark for the applicable labour conditions;
- Customers increasingly want choice, especially following material price increases in May 2011 and in the expectation of further significant increases in 2012 and perhaps thereafter. There is growing concern among business mailers that transactional mailers are perceived as a "cash cow" by Royal Mail's most senior management;
- Royal Mail has failed to innovate or offer the wide range of wholesale services over the last seven years which would have permitted greater innovation by access operators. End-to-end competition is therefore the best way to introduce greater and more rapid innovation to the market;
- There are already a great number of variables and risks for any would-be entrant to consider such as:
  - available volumes
  - uncertainty about zonal structures (including the number of zones) and pricing
  - customer inertia in light of limited geographical coverage
  - the impact of VAT
  - Royal Mail's competitive reaction
  - availability of labour
  - productivity levels
  - capital investment costs
- Competitors are unlikely to gain access to all mail flows so Royal Mail will remain a monopoly on C to X, first class and certain geographical areas;
- Even where competition has emerged in other jurisdictions, such as in Sweden, where Bring CityMail serves over 50% of Swedish households, the USP has fared well;

- Royal Mail's headcount will reduce but, if there is no end-to-end competition, this will result in a higher level of net job losses than if other operators are able to recruit new staff;
- Case by case regulation which may interfere with the liberalisation of the market is potentially subject to legal challenge for infraction of the EU Postal Directive which envisages: competitive procurement of the services in order to provide the USO (Article 7.2), use of public funds (Article 7.3(a)) or the establishment of a compensation fund (Article 7.3(b)) but not any other methods for financing the burden (if any) of providing the USO. Under PSA 2011 s.44, OFCOM may not conduct a review of the financial burden (if any) of meeting the USO for five years (unless otherwise directed by the Secretary of State). Therefore, due to the combination of EU and UK law, there is no scope (absent a direction from the Secretary of State) for a compensation fund before 2017 and no scope for other measures contemplated by s42 PSA 2011 at any time which are not contemplated by Article 7 of the EU Directive.
- A regulatory measure which is based upon the exclusive status of the designation as USP but which prevents free competition is potentially incompatible with Article 106 TFEU which provides as follows:-

*Article 106*  
(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

- Although there is a primary duty on OFCOM to secure the provision of a universal service, imposing regulation in a way which would hinder competition is subject to a number of statutory constraints which we believe would make any such regulation either inappropriate or unlawful if there were no evidence that the universal service would necessarily be undermined. Relevant provisions provide:
  - regulation not permitted unless the measure is one "OFCOM consider necessary" - s.42 PSA 2011;
  - the duty to further the interests of consumers in relevant markets where appropriate by promoting competition - s.3(1)(b) Communications Act 2003 ("CA 2003");
  - the duty, when furthering the interests of consumers, to "have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money" – s.3(5) CA 2003;

- the duty to have regard to “the desirability of promoting competition in relevant markets”- s.3(4)(b) CA 2003;
- the duty to have regard to “the desirability of encouraging investment and innovation in relevant markets” – s.3(4)(d) CA 2003;
- the duty to ensure that the regulation is “transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed” – s.3(3)(a) CA 2003.