



**Condition 10 of Royal Mail's Licence:
Prohibition against Obtaining Unfair Commercial
Advantage**

A Complaint about Royal Mail's Offer of Zonal Downstream Access

**Final Report and Decision of the
Postal Services Commission**

September 2006

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SUMMARY

- S.1 This report sets out the decision of the Postal Services Commission (“Postcomm”) to impose a financial penalty on Royal Mail of £1 million, following an investigation which established that Royal Mail had contravened Condition 10(2) of its Licence. Condition 10(2) obliges Royal Mail to conduct its business in the manner best calculated to secure that it does not obtain any unfair commercial advantage in connection with the provision of access to operators and customers¹ to its postal facilities.
- S.2 The investigation also found that Royal Mail had been in contravention of the requirement in Condition 13 of its Licence to take all reasonable precautions against the risk of failure to comply with Part 4 of its Licence which includes Condition 10.
- S.3 The grounds for Postcomm’s decision are as follows:
- in February 2004, Royal Mail and UK Mail announced that they had agreed commercial terms for UK Mail to obtain downstream access to Royal Mail's network;
 - in June 2004, Royal Mail's Letters Management Board agreed to begin offering Royal Mail’s downstream access service direct to Royal Mail's own customers;

¹ By "operator", Postcomm means a licensed postal operator competing with Royal Mail in the postal services market by obtaining access to Royal Mail's delivery network. By "customer", Postcomm means people or entities who generate mail to send and who probably already use Royal Mail services.

- from June 2004 onwards, Royal Mail undertook a series of presentations and visits to various retail² customers;
- before beginning this exercise, Royal Mail should have analysed the risks and looked at the alternative ways of carrying on its business to minimise the risk that it might obtain an unfair commercial advantage and should have reviewed such analysis as often as necessary; and
- by not conducting such analysis at that time and not reviewing its policy in such a way, Royal Mail did not act in a manner best calculated to ensure that it did not obtain any unfair commercial advantage;

S.4 Postcomm's judgement is that at that time there were shortcomings with Royal Mail's Condition 10 policy, specifically that:

- Royal Mail's Wholesale team (which was responsible for selling downstream access) was based within Royal Mail's Regulatory Affairs team and, as a result, some staff had conflicting duties in that they were responsible for both dealing with regulatory complaints from competitors and devising commercial strategies to retain business at the expense of such competitors;
- Royal Mail had no policy to regulate the transfer of staff between and within its Wholesale and Retail teams, with the result that at least one member of the Wholesale team worked alongside members of the Retail team on the provision of downstream access to customers. Furthermore, this lack of a policy allowed for the immediate transfer of staff between the

² By "retail customer", Postcomm means a customer who was using an existing Royal Mail bulk mail service, such as Mailsort.

Wholesale and Retail teams, therefore making any structural separation between the two teams unfit for purpose;

- Royal Mail had no single written policy on Condition 10 compliance and what policies were in place were ineffectively communicated to Royal Mail staff and external stakeholders.

S.5 There was also no reference to and no effective involvement by Royal Mail's Compliance Officer.

S.6 Postcomm is therefore satisfied that Royal Mail was in contravention of both Conditions 10(2) and 13(1) of its Licence and that a financial penalty of £1 million should be imposed.

S.7 Postcomm's judgement is that the contraventions occurred in the period from June 2004 to November 2005. Since November 2005, Royal Mail has agreed to take and is taking some steps to become compliant with Condition 10. Postcomm is therefore satisfied that it does not now have grounds to issue an enforcement order on Royal Mail.

S.8 This report represents Postcomm's final decision. Postcomm published two earlier reports, in February and July 2006³, in which it invited representations on its proposed remedies. Representations were received from Royal Mail, TNT UK Limited, Postwatch and the Communications Workers Union. Postcomm has taken into account all representations received in this final report.

³ Postcomm's first report was published on 17 February 2006; the second report was published on 12 July 2006.

- S.9 A chronology of events, covering Royal Mail's activities on Condition 10 compliance and key milestones in Postcomm's investigation, is set out in Annex A.
- S.10 A Notice confirming Postcomm's decision to impose a financial penalty of £1 million on Royal Mail is at Annex B.
- S.11 A Notice confirming Postcomm's decision not to make an enforcement order against Royal Mail is at Annex C.

CHAPTER 1

BACKGROUND

A. THE PARTIES

- 1.1 Royal Mail Group plc (“Royal Mail”) is a wholly owned subsidiary of the government-owned public limited company Royal Mail Holdings plc. Royal Mail was granted its Licence to provide postal services (the “Licence”) on 23 March 2001. The Licence was modified on 1 April 2003, 2 November 2005 and 25 May 2006. Royal Mail is required, by the conditions of its Licence, to provide a universal postal service in the United Kingdom.
- 1.2 Express Limited (“Express”) was granted a licence on 23 April 2003. Express has now withdrawn from the mail market and its licence was revoked, at its request, with effect from 25 December 2005.
- 1.3 TNT Post UK Limited (“TNT”, formerly TPG Post UK Limited) is part of TNT N.V., which is the holding company of the two brands TNT and Royal TPG Post. TNT was granted a licence on 1 January 2003.
- 1.4 UK Mail plc (“UK Mail”) is a subsidiary of Business Post Group plc. UK Mail was granted a licence on 12 June 2003.
- 1.5 Throughout this report, Express, TNT and UK Mail are referred to as “the Complainants”.

B. THE SERVICE

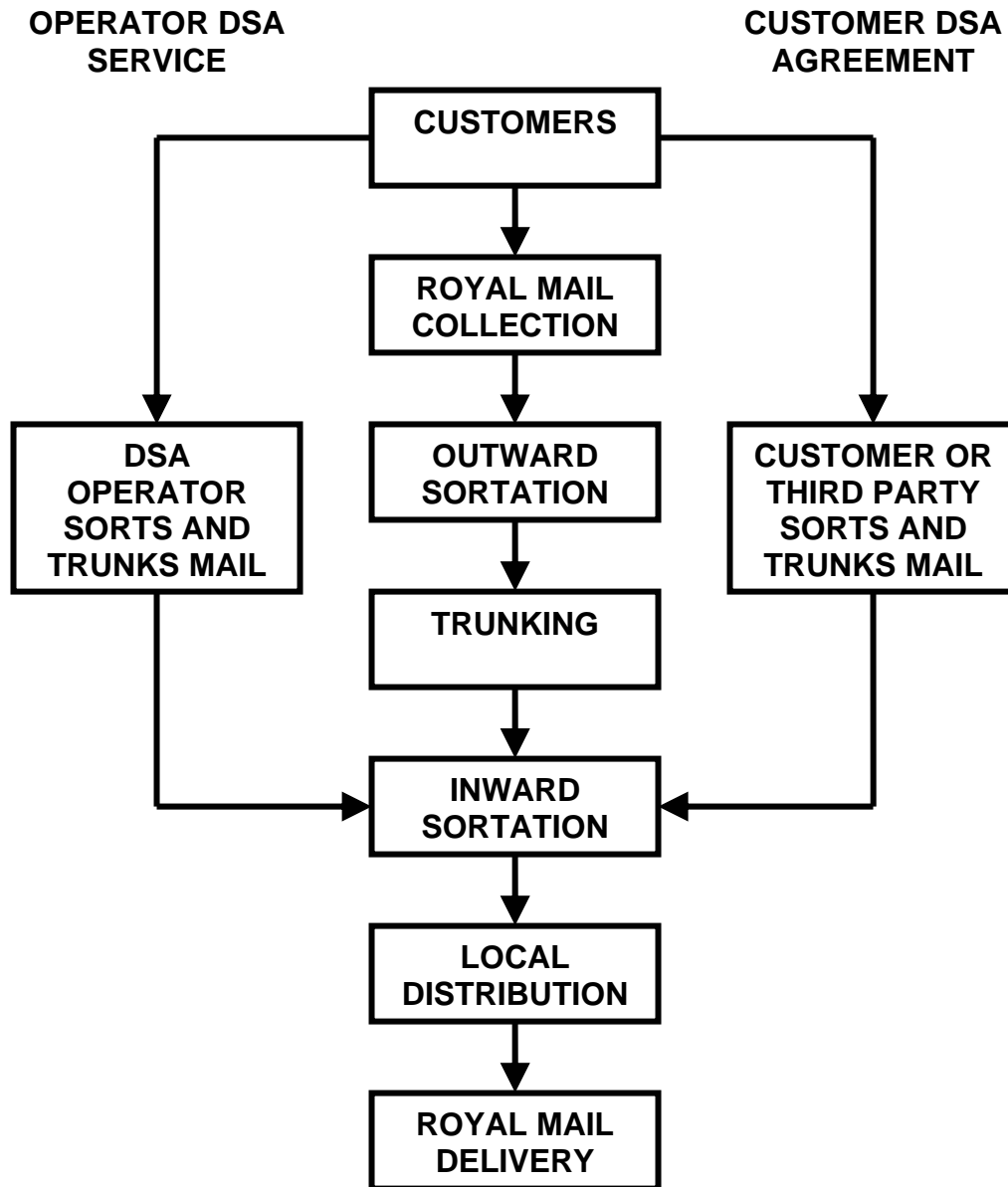
1.6 This is the final report in the investigation into a complaint about Royal Mail's offer of downstream access – and in particular a variation of that service which was offered to customers with a geographically de-averaged price, or “zonal” price⁴.

1.7 Downstream access (“DSA”) is a service that Royal Mail supplies under Condition 9 of its Licence⁵, whenever another party requests access to Royal Mail's postal facilities. Royal Mail first agreed a DSA service with UK Mail on 10 February 2004. Following this original agreement, there was interest in DSA from other parties. Under Condition 9 of its Licence, Royal Mail is obliged to provide access to its own customers as well as to operators who will then offer mail services to customers. Therefore, it is not necessary to be a licensed provider of mail services to enter into a DSA agreement with Royal Mail. If a single customer thought it could benefit from its own DSA agreement, it could ask Royal Mail for such an agreement. The development of zonal DSA made the service more attractive to customers who posted to particular regional areas. A number of operators and customers have now concluded DSA agreements with Royal Mail. Accordingly, Royal Mail and the operators are in competition to attract customers for the service and operators are reliant on Royal Mail for access to its delivery network to offer their services (see Diagram 1).

⁴ Royal Mail originally developed and offered DSA on the basis of “one price goes anywhere”, similar to its retail first and second class tariffs. In contrast, zonal pricing charges the customer on the basis of where an item is being delivered. Royal Mail divided clusters of delivery points around the country into five bands, known as delivery zones. According to Royal Mail, zone 1 has the cheapest delivery costs and hence the lowest price. Prices increase from zones 2-5, Royal Mail says, to reflect the cost differences of delivery in each zone. The first zonal DSA service was agreed by Royal Mail in October 2004 with a customer who is not a complainant.

⁵ Condition 9(2) requires Royal Mail to negotiate in good faith with any person who applies for access to Royal Mail's facilities, with a view to agreeing terms for such access.

Diagram 1: The Postal Pipeline and DSA Options for Customers



C. THE COMPLAINT

1.8 In November 2004, Postcomm received complaints about Royal Mail's offer of zonal DSA. The complainants alleged that Royal Mail's actions and strategies in offering zonal DSA appeared to be intended to exclude DSA operators from providing competing services and to exclude other licensed operators from

developing their own networks for delivering mail in the UK. Essentially, the complainants alleged that Royal Mail was engaging in the following anti-competitive behaviour.

Alleged Discrimination

- 1.9 It was alleged that Royal Mail was supplying, or offering to supply, zonal DSA on terms which were unduly discriminatory against the complainants and against customers who used other bulk mail products.

Alleged Unfair Commercial Advantage

- 1.10 It was alleged that Royal Mail had obtained an unfair commercial advantage in the provision of DSA to customers.

Alleged Failure to Notify and Publish

- 1.11 It was alleged that Royal Mail had failed to notify properly and publish details of its offers of zonal DSA.
- 1.12 In line with Postcomm's published procedures available at the time⁶, the complaint was first subject to a preliminary assessment. Postcomm concluded from its preliminary assessment that it had sufficient reason to suspect a breach of one or more of Royal Mail's Licence conditions. It therefore decided to open a full investigation.

⁶ See procedures published in "Competitive Market Review", Postcomm's proposals for consultation, September 2004. These procedures have most recently been updated in "Competitive Market Review", Postcomm's proposals for tackling barriers to entry in postal services, November 2005.

D. THE INVESTIGATION

- 1.13 Postcomm considered there was the risk that Royal Mail could obtain an unfair commercial advantage, contrary to Condition 10 of its Licence, by using information it had obtained as a result of negotiations with its competitors (who had signed up for national DSA) to enable it to target customers of its competitors who may have otherwise switched to one of those competitor operators. To minimise the impact of any commercial advantage that Royal Mail might have gained as a result of a breach of Condition 10 (and the corresponding obligations under Condition 13), Postcomm decided to prioritise its investigation in relation to the allegations relating to Condition 10 (and the corresponding obligations under Condition 13).
- 1.14 With regard to the other aspects of the complaints, because of the passage of time since they were first made, Postcomm has concluded that further investigations should not be conducted, unless a renewed complaint indicates that investigation would be likely to be a worthwhile use of resources.
- 1.15 As part of its investigation Postcomm secured information and material from Royal Mail and also interviewed a number of third parties. See Annex A for further detail.

E. THE ALLEGATIONS UNDER CONDITION 10

- 1.16 The specific allegations made by the complainants under Condition 10 were as follows.
- Royal Mail may have obtained an unfair commercial advantage by using information it had obtained through negotiations with operators to target customers likely to switch to those operators;

- Members of Royal Mail’s senior management and Wholesale teams – including Royal Mail’s “Head of Commercial” – were involved in the sale of DSA to some of the UK’s largest mail customers. These included customers with whom the complainants were also in negotiations to provide a mail service;
- A customer received an oral quotation from Royal Mail for zonal DSA prices and third party upstream services very soon after one of the complainants had informed Royal Mail DSA personnel of its plans to offer upstream services to this customer and to ask Royal Mail if it would provide the downstream delivery element;
- Royal Mail failed to use “all reasonable endeavours” to avoid the disclosure of information in its possession which it obtained as a result of DSA negotiations with operators. It moved from a clear structure, imposing a “Chinese Wall” within the Royal Mail organisation, to one where there was an inevitable cross-over of information;
- The complainants’ request that a Royal Mail employee – who was involved in the access negotiations with customers – attend a meeting to discuss their own DSA solution, was declined. This placed Royal Mail’s direct customers (who had met with the same employee) at a distinct advantage.

1.17 Chapter 2 of this report explains the legal background under which this investigation has been carried out. Chapter 3 sets out the information provided by Royal Mail relevant to Postcomm’s findings, and Chapter 4 assesses that information and identifies shortcomings. Finally, Chapter 5 provides Postcomm’s conclusions and the remedies it thinks are appropriate in light of those conclusions.

CHAPTER 2

LEGAL BACKGROUND

A. CONDITION 10 OF ROYAL MAIL'S LICENCE

- 2.1 Condition 10, together with the other Conditions in Part 4 of Royal Mail's Licence, is intended to promote effective competition between postal operators.
- 2.2 The term "postal operator" is defined by the Act⁷ as "a person who provides the service of conveying postal packets from one place to another by post, or any of the incidental services of receiving, collecting, sorting and delivering such packets.
- 2.3 For this purpose, paragraph 2 of Condition 10 requires Royal Mail to conduct its business in the manner best calculated to secure that neither it nor other parties obtain an unfair commercial advantage when it (Royal Mail) is providing access to its postal facilities to other persons.
- 2.4 It is important to recognise that Condition 10(2) may be contravened even where no actual unfair commercial advantage has been obtained by Royal Mail in connection with the provision by it of access to its postal facilities. It is enough if Royal Mail conducts its business in a manner that is not "best calculated to secure" that no unfair commercial advantage is obtained. In the early stages of market development, Postcomm considers it imperative that Royal Mail does not act in a way that could undermine, frustrate or distort the furtherance of customer interests through effective competition.

⁷ Section 125 Postal Services Act 2000

B. CONDITION 13 OF ROYAL MAIL'S LICENCE

- 2.5 Condition 13 of Royal Mail's Licence requires it to take all reasonable precautions against the risk of failure to comply with the other Conditions in Part 4 and Conditions 16 and 17⁸ of its Licence.
- 2.6 For this purpose, paragraph 3 of Condition 13 requires Royal Mail to employ a compliance officer for the purpose of facilitating compliance by Royal Mail with the conditions contained in Part 4 and Conditions 16 and 17 of its Licence.

C. THE POSTAL SERVICES ACT 2000

- 2.7 The Act is, amongst other things, the statute under which Postcomm grants licences to postal operators and can issue enforcement orders and financial penalties against licensed operators for contraventions or likely contravention of their licences.
- 2.8 Section 22 of the Act requires Postcomm, if it is satisfied that a licence holder is contravening any condition of its licence, or is likely to contravene any such condition, to make a "final order". A final order is an order making such provision as is needed for the purpose of securing compliance with the condition in question. In order to make a final order, Postcomm is required to give notice in accordance with section 26 of the Act and to consider any representations that are made in accordance with the notice and not withdrawn.
- 2.9 Under section 23 of the Act, if Postcomm is not satisfied that a licence holder is contravening any condition of its licence or is likely to contravene any such

⁸ These conditions were renumbered 17 and 18 respectively on 25 May 2006.

condition, but it appears that such contravention is likely, then Postcomm must issue a “provisional order”. A provisional order was not issued in this investigation. Postcomm believed that the requirements of section 23 were not met during the early stages of the investigation.

2.10 Under section 25 of the Act, Postcomm is required not to make a final order if it is satisfied that the duties imposed on it by sections 3 and 5⁹ of the Act preclude it from doing so, if the licence holder has agreed to take and is taking all the steps that Postcomm considers appropriate to secure or facilitate compliance with the condition concerned, or if the contraventions or apprehended contraventions are trivial.

2.11 Section 30 allows Postcomm to impose a financial penalty if it is satisfied that a licence holder (a) has contravened any condition of its licence, or (b) is contravening any such condition. The amount of any penalty must be reasonable¹⁰. Section 31 provides that Postcomm must prepare and publish a statement of policy in relation to the imposition of penalties and must have regard to this when imposing such a penalty.

2.12 Section 34 sets the time-limits on the imposition of financial penalties. The relevant provisions of section 34 are as follows:

(1) No penalty shall be imposed under section 30 in respect of a contravention of a licence condition:

(a) where a provisional order has been made but not confirmed in respect of the contravention and no final order has been made in

⁹ Section 3 of the Act sets out the primary duty of Postcomm, which is to exercise its functions in a manner best calculated to ensure the provision of a universal postal service. Subject to that duty, section 5 places a duty on Postcomm to exercise its functions in a manner which will further the interests of users of postal services, wherever appropriate by promoting competition.

¹⁰ Section 30 (1) of the Act.

respect of it, unless a copy of the notice under section 32(1) has been served on the licence holder no later than six months starting with the date on which the provisional order was made,

(b) where a provisional order has been confirmed or a final order [has been] made in respect of the contravention, unless a copy of the notice under section 32(1) has been served on the licence holder no later than three months starting with the date on which the order was confirmed or (as the case may be) made.

(2) No penalty shall be imposed under section 30 in respect of a contravention of a licence condition for which no ... final order has been made unless a copy of the notice under section 32(1) has been served on the licence holder within twelve months from the time of the contravention.

2.13 To summarise, where Postcomm is satisfied that a licence condition contravention is still occurring or is likely to occur, it must take enforcement action by imposing a final order. If Postcomm wishes to impose a financial penalty, it may do so within 3 months from the date of such final order. Where no associated enforcement order is imposed (because, for example Postcomm considers that the relevant contravention is historic and not continuing) a financial penalty must be proposed within 12 months *from the time of the contravention*. Where the contravention was ongoing and not a one-off action, if Postcomm wishes to propose a financial penalty it must do so within 12 months from the end of the time period during which the licensee was contravening a condition of its licence¹¹.

¹¹ Section 125(1) provides that "Contravention", in relation to any requirement, condition, direction, order or regulations, includes any failure to comply with it and cognate expressions shall be construed accordingly.

CHAPTER 3

INFORMATION PROVIDED BY ROYAL MAIL

A. INTRODUCTION

- 3.1 During the course of the investigation Royal Mail provided Postcomm with a series of relevant documents including Board Papers, internal and external communications (including emails), presentations to customers and internal briefing documents. Royal Mail also provided explanations on how it was operating a policy of compliance with Condition 10 and what changes it has made to that policy; and information on the structure of its Wholesale and Retail teams. Not all of the information that Royal Mail has provided is relevant to this part of Postcomm's investigation and so not all of it is reproduced or referred to here.
- 3.2 Royal Mail also provided information in response to Postcomm's provisional findings. This information was provided in writing on 26 September 2005 and orally on 28 September 2005 at a meeting between Royal Mail and Postcomm. Royal Mail also provided further information at the oral hearing held on 15 November 2005. As with the information requirements, not all of the information that Royal Mail has provided is relevant to this part of Postcomm's investigation and so not all of it is reproduced or referred to here.

B. THE STRUCTURE OF THE WHOLESALE AND RETAIL TEAMS IN ROYAL MAIL, TO NOVEMBER 2005

- 3.3 Royal Mail has both Wholesale and Retail teams within its organisation. The functions and structure of these teams, to November 2005, are described below.

Wholesale

- 3.4 During the majority of the time that Postcomm was conducting its investigation, Royal Mail's Wholesale team was located within the Regulatory Affairs and Wholesale Department, which was headed by the Director of Regulatory Affairs and Wholesale. The Wholesale team was responsible for dealing with both operator and customer requests for DSA and was headed by the Head of Wholesale. On 13 December 2005, after Postcomm had notified Royal Mail of its provisional findings, Royal Mail announced that it had set up a separate Wholesale Directorate outside the Regulatory Affairs Department. Postcomm's investigation however is focused on the previous structure.

Retail

- 3.5 For the purposes of this report, when referring to Royal Mail's Retail teams Postcomm is referring to both Royal Mail's Marketing team and its Sales team. Royal Mail's Marketing team is headed by the Marketing Director and its Sales team is headed by the Director, Sales and Customer Service. The Retail teams are responsible for overseeing Royal Mail's brand development and pricing strategy for its retail (i.e., non-DSA) services.

C. ROYAL MAIL'S PRE INVESTIGATION POLICY

- 3.6 During the course of the investigation based on material and information provided by Royal Mail, Postcomm ascertained that Royal Mail's Condition 10 policy during 2004/5 was as set out below:

Royal Mail's Condition 10 Policy before the 15 December 2004 Meeting of the Royal Mail Letters Management Board

3.7 Royal Mail's then current policy for compliance with Condition 10 appeared to include the following:

- the Wholesale team had sole responsibility for DSA negotiations, signing DSA agreements, setting up related accounts and implementing such agreements. This applied whether agreements were with operators or customers;
- only Wholesale and appropriate operational support personnel were to be involved in DSA negotiations;
- Wholesale was to control implementation of DSA arrangements;
- Wholesale would not support the activities of the Retail team, nor would it disclose the details of arrangements being discussed or negotiated with existing Retail customers; and
- Wholesale and Retail were to have separate reporting lines into the Chief Executive of Royal Mail Group.

3.8 In addition, Royal Mail had in place a series of management procedures and policies with a view to achieving compliance with Condition 10. The policies and procedures were described by Royal Mail to be as follows.

Individual Non-Disclosure Agreements

- 3.9 Those whose principal function related to DSA and whose work put them in contact with commercially confidential information from, or about, DSA customers and operators, were required to sign a non-disclosure agreement.

Frontline Briefings

- 3.10 Because inward mail centres and delivery offices handle both Royal Mail mail and DSA mail (whether from operators or others) on the same shift, frontline operational staff were given briefings on the importance of not discussing or disclosing information – for example, the identity of those using operators for their postal services gleaned from processing access traffic.

Retail/Wholesale Interface

- 3.11 Four “DSA Champions” were employed in the Retail team and were trained as the internal sales experts on DSA and as intermediaries between Retail and Wholesale to sell Royal Mail DSA products to customers.

Management Information Systems

- 3.12 Only those employees authorised to access information on a postal operator or a retail customer's DSA account were allowed by the policy to search¹² and release information from Royal Mail management systems (including accounting systems, sales systems and customer interface systems).

¹² Royal Mail did not have systems in place to prevent misuse – only a policy with penalties if employees did access information that they were not authorised to access.

Retail's Involvement in DSA

- 3.13 The only role that Retail had in relation to DSA was the introduction, on a reactive basis, of customers to existing (i.e. published) DSA terms. Customers who required a variation to the standard DSA terms were referred to the Wholesale team. The Wholesale team took sole responsibility for all DSA negotiations and agreements with customers and operators. Where a customer had both a DSA agreement and also used normal retail products and services, the separate accounts were managed separately by the Wholesale and Retail teams.

How was the Pre-15 December 2004 Policy Communicated?

- 3.14 Communications were circulated within Royal Mail explaining aspects of Condition 10 and the steps Royal Mail was putting in place to secure compliance. Examples of such communications that Postcomm has seen in the material submitted by Royal Mail were as follows:
- a DSA managers' briefing following the signing of the first DSA agreement with UK Mail was circulated by Royal Mail's DSA Account Manager, on 1 April 2004;
 - editions of an internal newsletter, "Ops Daily" (which is circulated to managers in all Mail Centres), circulated on 14 April 2004, 5 May 2004 and 14 July 2004 reminded staff that any information gained about any competitor or customer must not be used by Royal Mail to obtain any unfair commercial advantage; and

- a question and answer document was issued in June 2004 to the four DSA Champions explaining the procedures relating to DSA (with a particular emphasis on what to do if customers request DSA).

Royal Mail's Condition 10 Policy Post-15 December 2004 Meeting of the Royal Mail Letters Management Board

- 3.15 On 15 December 2004, Royal Mail's Letters Management Board discussed the Condition 10 policy in place within Royal Mail to ensure that it was fully cognisant of, and formally endorsed the policy. Royal Mail was also aware that there was an external perception (which Royal Mail said was completely unjustified on the facts) that members of its Wholesale team explaining DSA to customers, often in the presence of members of the Retail team, was in some unarticulated way non-compliant with its Licence.
- 3.16 This latter point referred to an individual who worked in the Wholesale team with the job title of "Head of Commercial", whose role it was, amongst other things, to be the first formal point of contact beyond the initial DSA enquiry for both operators and customers. The Head of Commercial was moved from Wholesale to Retail in late November 2004, following an informal conversation between the Director of Regulatory Affairs and Wholesale and the Director of Marketing. Royal Mail said that given (a) that the focus of the Head of Commercial's work was increasingly involving operating as a first point of contact in giving presentations to customers; (b) there was an identified need to increase the level of expertise in relation to these subjects within the Retail teams; and (c) the increasing number of requests from customers it was consistent with Royal Mail's business needs for the role to transfer to Retail.

3.17 Royal Mail said that its Condition 10 policy did not fundamentally change following its Letters Management Board meeting on 15 December 2004. Rather, existing practices were consolidated and updates made in the light of experience that had been gained to that date. In particular, experience suggested that an initial suggestion – that retail teams would account manage customers wanting the existing DSA terms – needed some revision in order to take account of the need to ensure consistent treatment and compliance with Condition 10.

3.18 Following the 15 December 2004 meeting of the Royal Mail Letters Management Board, Royal Mail's Wholesale and Retail teams confirmed at a meeting on 23 March 2005 that nothing further needed be done to put in place the policy and that:

- all negotiations between prospective DSA customers and Royal Mail, where the customer had declared its intent to sign a DSA agreement directly with Royal Mail, would be managed by the Wholesale team; and
- all “business as usual” activity relating to the management of DSA customers would be managed by the Wholesale team. The Retail account team would have no involvement in ongoing communication with their customer regarding the performance of its DSA agreement.

3.19 Royal Mail said that there was no relevant written record of this meeting. However, it said that the policy was explained to all DSA customers. These DSA customers were also asked to sign a formal letter of agreement that set out Royal Mail's obligations in relation to Condition 10 and explained that customers must discuss their DSA agreement with the Wholesale team only.

3.20 Royal Mail said that it had not found it necessary to develop a general policy on staff transfers between the two teams. It said that any issues associated with the protection of sensitive information or potential conflicts of interest would be addressed on a case by case basis. It also said that where a member of staff had signed a non-disclosure agreement the obligations in that agreement would continue to be in force following a transfer to another role.

CHAPTER 4

POSTCOMM'S ASSESSMENT

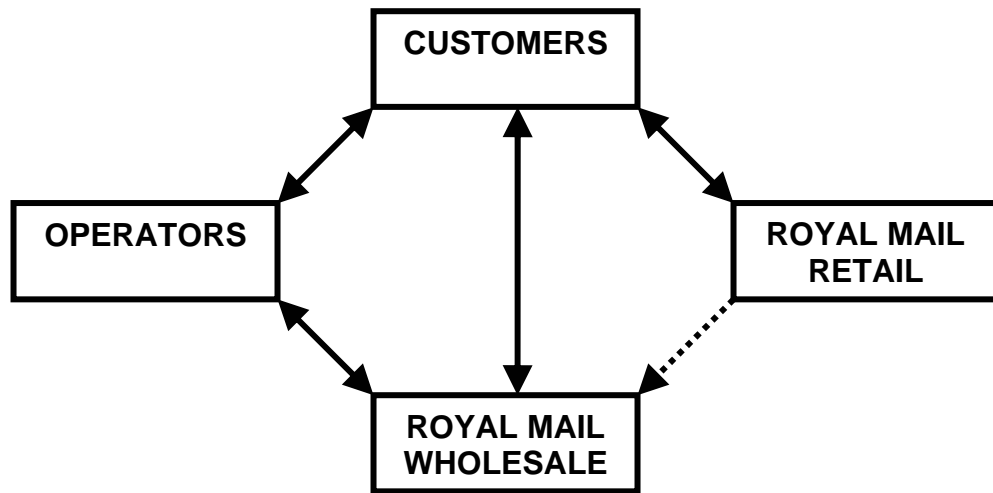
A. INTRODUCTION

- 4.1 Postcomm's approach to assessing the complaints made under Condition 10 was to consider whether or not Royal Mail had in place at the time the complaints were made a policy to meet its obligations under Condition 10. Those obligations required Royal Mail to conduct its business in the manner best calculated to secure that it did not obtain any unfair commercial advantage in connection with the provision by it of access to its postal facilities. Postcomm assessed Royal Mail against this obligation.
- 4.2 Postcomm also considered Royal Mail's compliance with Condition 13. When assessing Royal Mail's compliance with Condition 13 of its Licence, Postcomm considered whether Royal Mail took all reasonable precautions against the risk of failure to comply with its obligations under Part 4 of its Licence. Royal Mail's obligations under Part 4 of its Licence relate to the promotion of effective competition between postal operators. In particular, Royal Mail was required to ensure that it at all times employed and consulted a Compliance Officer, who was provided with such staff as he may reasonably require, to perform the tasks assigned to him under the Licence.

B. BACKGROUND

- 4.3 Diagram 2 sets out Royal Mail's Wholesale and Retail teams and their relationships with DSA operators and DSA customers, at the time when Postcomm began its investigation.

Diagram 2: Royal Mail Wholesale and Retail Structure



- 4.4 Customers who mail in bulk had a choice of using either a Royal Mail product (e.g. Mailsort) sold by the Royal Mail Retail Teams; a product supplied by one of the DSA operators competing with Royal Mail, or using DSA themselves through a direct relationship with Royal Mail Wholesale. (In theory, customers also have the choice of using another end to end operator, but this is not shown in the above diagram.) Royal Mail Wholesale had a direct relationship with operators and customers, where it was supplying them DSA. However, there was no direct relationship between Royal Mail's Wholesale and Retail teams, though Retail was responsible for introducing to Wholesale those customers who showed an interest in DSA (shown by the broken line in the diagram). Wholesale was not involved in the development and sale of retail products to customers.

C. POSTCOMM'S ASSESSMENT

- 4.5 Postcomm identified a number of areas where Royal Mail failed to act in a manner best calculated to ensure that it did not obtain an unfair commercial advantage. Postcomm considers that there were a number of shortcomings

with Royal Mail's approach to compliance with its obligations under Conditions 10 and 13 of its Licence. The following sections set out Postcomm's initial view and assessment of these areas. It then summarises Royal Mail's representations in February and July 2006 and concludes with Postcomm's final assessment of each area.

Postcomm's Main Criticisms and Royal Mail's Response

4.6 Postcomm has identified four areas which, in its judgement, demonstrate that Royal Mail did not act in a manner best calculated to ensure that it did not obtain an unfair commercial advantage and that it was therefore in contravention of Condition 10. These four areas are as follows:

- wholesale team based within Royal Mail's Regulatory Department;
- lack of a staff transfer policy;
- failure to identify the risks;
- lack of a single coherent policy.

4.7 Royal Mail made representations in February and July 2006 on each of these four areas. It also made representations covering wider issues to do with Postcomm's assessments, which are set out below.

4.8 In the following paragraphs, Postcomm explains what it believes Royal Mail should have done in order to have been compliant with Condition 10(2) and Condition 13(1) of its Licence. In summary, Postcomm's initial assessment was that Royal Mail should have:

- established a separate Wholesale team, independent of any other Royal Mail department;
- developed and implemented a staff transfer policy covering all staff who had dealings with DSA, at the same time as conducting the risk assessment described below;
- conducted a comprehensive risk assessment prior to marketing DSA to customers in June 2004, with the support of an independent third party – identifying any areas where the way it intended to sell DSA may lead to a possible contravention of Condition 10;
- developed and implemented a single, coherent, contemporaneous and definitive written policy on its Condition 10 obligations prior to marketing DSA to customers in June 2004.

4.9 Specifically, in June 2004, Royal Mail failed to address various shortcomings in its then Condition 10 policy which meant that Royal Mail had not acted in the manner best calculated to avoid obtaining an unfair commercial advantage. The following paragraphs set out Postcomm’s assessment and Royal Mail’s representations on these issues.

Wholesale Team based within Royal Mail’s Regulation Department

Postcomm’s Assessment

4.10 Until 13 December 2005, Royal Mail’s Head of Wholesale reported to the Director of Regulatory Affairs and Wholesale (“the Director”). In Postcomm’s opinion, it was inconsistent for Royal Mail to situate its Wholesale team (which is a commercial arm) within its Regulatory Affairs department.

Regulation is a very specific type of activity which involves making sure that Royal Mail's commercial activities (and all other relevant activities) are compliant with the Licence and relevant legislation. Through his dual responsibilities for Wholesale and Regulation, the Director had to both ensure compliance and run commercial activities. Therefore, the Director had responsibility for both dealing with complaints about DSA and for the marketing of DSA. The Director actually became involved in negotiations with a DSA customer during late 2004 and early 2005. This negotiation took place at a time when the Director was being asked by Postcomm to comment on the issues raised by the complainants. Postcomm was also concerned about how the Director could discharge his function of providing the Royal Mail board with objective and impartial advice on regulatory issues in relation to DSA when he had commercial and management responsibility for DSA.

- 4.11 In addition, Postcomm was concerned about the lack of separation within the Wholesale team, in that the same people dealt with both operators and customers. This lack of separation within the Wholesale team could potentially allow Royal Mail to deal with operators more or less favourably than its own customers, since there is an inherent commercial incentive on Royal Mail to keep as much of the customers' business as possible to enhance its relationships with customers. Royal Mail also had inadequate security systems in place at June 2004. For example, at that time, there was no ring-fencing of reports containing DSA transactional and billing information. By August 2005, Royal Mail had still not fully implemented all security systems.

Royal Mail's Representations

- 4.12 Royal Mail said that Postcomm had ignored the fact that it was kept fully informed of the steps that Royal Mail was taking and was fully aware of the evolution of its internal structure. Royal Mail also said that it was required to

provide DSA on a non-discriminatory basis to customers and operators and so separation within the Wholesale team would make this almost impossible to manage.

Postcomm's Conclusions

- 4.13 Royal Mail said that Postcomm was aware of its Wholesale and Regulatory structure, through both formal and informal channels, but had not raised the objections which it raised during the investigation. Postcomm's response is that the obligations in Royal Mail's Licence are obligations on Royal Mail and Postcomm had no reason to comment on Royal Mail's Wholesale and Retail structure prior to this investigation. Additionally, Postcomm does not believe that it should micro-manage Royal Mail: Postcomm expected Royal Mail to address its responsibilities under the Licence on its own initiative but it is evident from Postcomm's current assessment that Royal Mail failed to do so.
- 4.14 Royal Mail should have established a separate "stand alone" Wholesale team before it began supplying DSA to customers and operators. The members of this team should not have had any dual functions. For example, they should not be responsible for both commercial issues (such as selling DSA) and regulatory issues (such as handling complaints about the supply of DSA). Royal Mail should also have considered whether further separation within its Wholesale team was necessary to ensure that Royal Mail did not show any *undue* discrimination in the provision of DSA. Postcomm does not accept Royal Mail's argument that it would be impossible to manage two wholesale teams: one dealing with operators using DSA and the other dealing with customers using DSA. Nor does Postcomm accept that this would make it impossible to ensure that there was no undue discrimination. That would only be the case if one group, (i.e., customers) was being supplied the same DSA service on a more favourable basis than another group (i.e., operators). It

would be straightforward to ensure that the terms and prices were offered on a consistent basis without sharing other customer information.

Royal Mail had no Staff Transfer Policy

Postcomm's Assessment

- 4.15 The lack of any staff transfer policy reduced the effectiveness of having separate Wholesale and Retail teams. For example, it was entirely possible under Royal Mail's then policy for a member of staff in Wholesale to switch to Retail for a short period and then switch back to Wholesale (and vice versa). Both teams would have knowledge of current market developments involving both operators and customers, which could be advantageous in marketing to and/or negotiating deals with either group.
- 4.16 Although Royal Mail thought it unlikely that the Wholesale and Retail teams would have information that was commercially useful to each other, staff were nevertheless required to sign non-disclosure agreements. In addition, DSA customers were asked to sign agreements that they would only speak to the Wholesale team on DSA matters. These measures suggest to Postcomm that Royal Mail did think that staff could possess commercially useful information which should not be leaked between departments. There was also the situation of Royal Mail's Head of Commercial, who was based in the Wholesale team. This individual gave many presentations to potential DSA customers throughout autumn 2004, while he also had intimate knowledge about DSA operators through his role in Wholesale. The presence of a member of Royal Mail's Wholesale team at customer presentations seems also to be a breach of the policy Royal Mail had at the time for handling these enquiries, as the Wholesale team was not to support the activities of the Retail team. One of the complainants also alleged that this individual (the Head of Commercial) targeted a customer with a DSA offer, after learning that

the customer had been in negotiations with a competitor. Royal Mail said that the individual learnt of the customer's intentions through Retail and did not deny that he visited the customer.

- 4.17 Postcomm considers that Royal Mail did not act in the manner best calculated to secure that it did not obtain an unfair commercial advantage (the test required under Condition 10) in this instance. Postcomm's judgement here is reinforced by the fact that, on 19 November 2004, Royal Mail moved the Head of Commercial from Wholesale to Retail, to take up a new role as "Head of Retail Access". Because Royal Mail had no staff transfer policy at the time, the Head of Commercial was able to transfer from Wholesale to Retail within days, with the clear risk of "information leakage" which could be advantageous for Royal Mail when promoting its services to customers. Moreover, Royal Mail's Compliance Officer had no involvement in this transfer. Given that the transfer was made, in part at least, because of compliance concerns voiced by a competitor, Postcomm would have expected Royal Mail to have made at least some reference of the transfer to its Compliance Officer before taking any action. The failure to consult the Compliance Officer on the transfer was a breach of Condition 13.

Royal Mail's Representations

- 4.18 Prior to November 2005, Royal Mail's view was that a formal staff transfer policy was not essential. However, since then, Royal Mail has put in place a formal staff transfer policy.

Postcomm's Conclusions

- 4.19 Royal Mail should have developed and implemented a staff transfer policy covering all staff that had dealings with DSA. This exercise should have been

carried out prior to June 2004, when Royal Mail decided to begin providing DSA to customers. Postcomm would have expected one of the key features of a staff transfer policy to include a specified period of time (e.g. at least 3 months), between someone leaving one team and joining another (e.g. Wholesale to Retail), so that commercial knowledge became out of date. This would be an additional safeguard, which was not a feature of the non-disclosure agreements that Royal Mail did have in place.

Failure to Identify the Risks

Postcomm's Assessment

- 4.20 Royal Mail carried out a high level risk assessment of the possibility that it might breach Condition 10 in about April 2004, but it did not review that assessment until nearly 18 months later after its meeting with Postcomm on 28 September 2005. Postcomm's opinion is that the risk assessment conducted in April 2004 was inadequate, as it did not address or identify the risks inherent from having a Wholesale team based within the Regulatory Affairs team, or the need to have an effective staff transfer policy. To the extent that Royal Mail conducted a "risk assessment" in April 2004, Postcomm would have expected this to have been regularly reviewed without prompting by Postcomm. It was particularly important that a review should have taken place when the Royal Mail Letters Management Board agreed to market DSA to customers in June 2004. Royal Mail claimed that it never had a policy of actively marketing DSA to customers and that the June 2004 Board meeting only noted that Royal Mail would need to respond to customer interest in DSA. Postcomm does not accept this for the following reasons. First, the recommendations put forward in the June 2004 Board paper included the following:

“The Holdings Board is asked to endorse the recommendation of seeking to offer innovative solutions primarily to statement producers in the form of a facilitated access service.”

4.21 Elsewhere in the June 2004 Board paper, facilitated access is described as:

“A competitively priced services option, which includes mails management, onsite mails verification and other value added services plus logistics provided by a third party on top of the standard DSA contract.”

4.22 Secondly, Postcomm also received evidence from several DSA customers and potential DSA customers that Royal Mail was actively marketing DSA, rather than just responding to customer interest. This evidence is set out below.

4.23 On 6 May 2005, T-Mobile made the following statement:

“On 5 July 2004, T-Mobile issued a Request for Quotation (“RFQ”) to Royal Mail, UK Mail, TNT Mail and Deutsche Post requesting that they quote for the delivery (both upstream and downstream) of T-Mobile’s customer invoices.

“A tender response document was received from, inter alia, Royal Mail. However, Royal Mail was only prepared to offer us their standard rates. When questioned, [...] Royal Mail informed us that they could not reduce their standard rates for delivery and we informed [Royal Mail] that on that basis it would be likely that Royal Mail would lose the tender. [Royal Mail] suggested that Royal Mail quote for downstream delivery only which would allow us to arrange upstream access at a cheaper rate than they could offer. Our combined costs for upstream and downstream delivery would therefore be

lower than Royal Mail's standard rates. We agreed to this and considered this proposal alongside the other postal operators' responses to the RFQ."

4.24 On 21 April 2005, MBNA made the following statement:

"On 29 October 2004 [MBNA's Royal Mail Partnership Director] introduced me to [Royal Mail's Head of Commercial] of Royal Mail's "downstream access" development team. ... Details of an offer on zonal or regional downstream access were given."

4.25 On 13 May 2005, NTL made the following statement:

"... at the end of 2004 NTL again approached Royal Mail regarding improving our existing package in respect of downstream mail. During the later discussions with Royal Mail they suggested that NTL could save money if it were to hold its own Condition 9 licence."

4.26 On 27 April 2005, Centrica made the following statement:

"It was during one of our routine meetings [with Royal Mail] around what a generic access product would mean to the operation of our print and mail centres, that the subject of zonal pricing for downstream access was raised. The issue was first raised by [Royal Mail's Head of Commercial], who is a regular attendee at our meetings."

4.27 In view of the above evidence, Postcomm considers that Royal Mail was actively marketing DSA to some customers after June 2004. This was shortly after Royal Mail had agreed DSA agreements with three operators, who were in competition with Royal Mail for customer business. At that time, Royal Mail also made the decision to begin marketing those same inputs – DSA – to end

customers. This should have been the time when Royal Mail reviewed its risk assessment under Condition 10 and made sure that its processes met its obligations.

Royal Mail's Representations

- 4.28 Royal Mail said that Postcomm needed to demonstrate that the presence or absence of a specific step or measure had led to a specific and present risk and that this was not sufficiently mitigated by some other step. It also questioned Postcomm's claims that the approach taken by Royal Mail was insufficient, on the grounds that Postcomm had failed to identify any alternative model that would have improved the situation.
- 4.29 Royal Mail also objected to Postcomm's opinion that Royal Mail had been actively seeking to promote DSA to its customers, saying that this was an erroneous assumption. Royal Mail said that it had no policy or strategic objective of proactively marketing DSA to customers. However, it nonetheless faced increased customer interest in these options, and said that, in discharge of its obligations under Condition 9 Royal Mail provided information on request, gave presentations to customers and would negotiate and enter into such agreements with customers. Royal Mail claimed that it would be in breach of its obligations under Condition 9 were it not to do so, but this did not equate to any kind of active marketing.
- 4.30 Royal Mail also argued that it did not decide to market DSA in June 2004 and said that it was wholly unacceptable that Postcomm should misrepresent Royal Mail's position. Royal Mail said that even if it had actively marketed DSA to customers, this was not something which is proscribed by the terms of its Licence.

Postcomm's Conclusions

- 4.31 At the time that Royal Mail began marketing DSA to customers, it should have reviewed its own risk assessment on the possibility of a breach of Condition 10. This should have been conducted with the support of an independent third party with experience in such matters. As it was, Royal Mail failed to identify important risks which Postcomm believes should have been very clear. These include the risks inherent from Royal Mail's position as a vertically integrated business, which is dominant in the postal services market and which also supplies services to its competitors in some of the very same markets; the risks from having a Wholesale team within the Regulation team and the conflicts of interest which might arise from this; the risks of having one Wholesale team deal with both operators and customers and the risks of allowing staff free movement across the Wholesale and Retail teams. Some of these risks have now been addressed by Royal Mail to some extent (though Postcomm remains concerned about a single Wholesale team dealing with both customers and operators). A comprehensive risk assessment of the type described would have alerted Royal Mail to improvements it could make without the need for Postcomm to identify them as an issue during the course of this investigation.
- 4.32 In addition, Royal Mail did not use the internal expertise that it had available. During the meeting with Postcomm on 28 September 2005, Royal Mail confirmed that there had been no Compliance Officer involvement when it had considered its obligations under Condition 10. By failing to involve the Compliance Officer in its consideration of its Condition 10 obligations, Royal Mail has failed to do something that would have constituted behaviour best calculated to reduce the risk of unfair commercial advantage.
- 4.33 Royal Mail denies that it was actively marketing DSA from June 2004 and disputes the evidence Postcomm relies upon. Postcomm considers that the

evidence it has presented in this chapter supports its view that Royal Mail did decide to begin actively marketing DSA in June 2004 and that this was when it should have reviewed its obligations under Condition 10.

Lack of a single coherent policy

Postcomm's Assessment

4.34 Royal Mail had no clear, single, contemporaneous, written policy on Condition 10 compliance before the Royal Mail Letters Management Board discussed Condition 10 policy on 15 December 2004. Instead there was a combination of non-disclosure agreements, briefings and some ring-fencing of accounts. Following the 15 December 2004 meeting of the Royal Mail Letters Management Board there was little action by Royal Mail to implement any agreed policy. The only action Postcomm was made aware of was a meeting on 23 March 2005 between Wholesale and Retail to confirm the policy, three months after the policy was agreed. The lack of any written record of this meeting is of concern and shows a lack of appreciation of the importance of the issue.

4.35 Postcomm considers that a single and comprehensive written policy would represent best practice. It would also allow any newcomer to Royal Mail, or outsider (such as Postcomm) to understand the policy at a glance.

Royal Mail's Representations

4.36 Royal Mail says that a single written Condition 10 policy would not represent a substantive improvement, in terms of an approach best calculated to secure compliance, over a series of tailored policy statements and other measures. Royal Mail also said that Condition 10 was a “dynamic” obligation, in that it

must also apply to future competitive activity. Therefore, it could not be assessed on a “once and for all” basis.

Postcomm’s Conclusions

- 4.37 Royal Mail should have developed and implemented a comprehensive, single coherent, contemporaneous and definitive written policy on its Condition 10 obligations before it began its series of presentations to potential DSA customers. In Postcomm’s judgement, the right time for Royal Mail to have developed this policy would have been at or soon after the June 2004 Letters Management Board meeting.
- 4.38 This does not preclude regular review and update to the policy to ensure that it remains fit for purpose in the dynamic context in which Royal Mail is operating.
- 4.39 Royal Mail should also have instigated a programme designed to implement and communicate that policy across all relevant departments and teams, and kept a clear record of this programme and who had completed it. This is not to say that tailored policy statements and other measures cannot be used, but they lack context if they are not presented as part of an overall policy with one of its objectives to secure compliance with Condition 10. Additionally, the various policies and measures in place failed in enabling Royal Mail to achieve compliance with Condition 10.

D. SUMMARY

- 4.40 In summary, Postcomm considers that there were a number of steps which Royal Mail could reasonably have taken, but which it did not take, to ensure that it acted in the manner best calculated to avoid obtaining any unfair

commercial advantage in connection with the provision by it of access to its postal facilities, including:

- creating an independent Wholesale team outside the Regulatory Affairs team;
- an effective staff transfer policy which would have prevented staff transferring at short notice between the Retail and Wholesale teams;
- a clear and thorough analysis of the risks to be addressed, which was regularly reviewed;
- the involvement of Royal Mail's Compliance Officer in considering the obligations under Condition 10;
- the production of a comprehensive, clear, single, contemporaneous, written Condition 10 policy. This should have been in place before the commencement of any further sales or marketing of DSA and regularly reviewed; and
- the effective communication of that policy both within Royal Mail and to external stakeholders.

4.41 The representations received in response to the notices issued by Postcomm in February and July 2006 do not, on detailed review, alter these findings, nor do they show that Postcomm's process has any defect which prevents Postcomm from relying on those findings.

CHAPTER 5

CONCLUSIONS AND REMEDIES

A. CONCLUSIONS

5.1 Postcomm's investigation has established that Royal Mail failed to act in a manner best calculated to secure that it did not obtain an unfair commercial advantage in connection with the provision of access to its postal facilities to both operators and customers.

5.2 Postcomm has therefore concluded that Royal Mail has contravened Condition 10(2) of its Licence in that it failed to:

- establish an independent Wholesale team within Royal Mail, outside the Regulatory Affairs team;
- put in place an effective staff transfer policy which would have prevented staff transferring at short notice between the Retail and Wholesale teams;
- carry out a clear and thorough analysis of the risks to be addressed, regularly reviewed; and
- put in place a clear, single, contemporaneous, written Condition 10 policy, before the commencement of any further sales or marketing of DSA and regularly reviewed.

5.3 Postcomm's investigation has also established that Royal Mail failed to take all reasonable precautions against the risk of failure to comply with Condition 10 of its Licence. Postcomm has therefore concluded that Royal Mail has

contravened Condition 13(1) of its Licence in that it failed to involve Royal Mail's Compliance Officer in considering its obligations under Condition 10.

- 5.4 Postcomm's judgement is that, based on its findings, Royal Mail was in contravention of Condition 10(2) and Condition 13(1) from June 2004 to November 2005. Since November 2005, Royal Mail began or agreed to make changes to its approach in those areas. Accordingly Postcomm has accepted that it cannot now make any final order against Royal Mail¹³.

B. REMEDIES

- 5.5 In this section, Postcomm discusses the remedies it believes are appropriate in light of the Licence breaches identified earlier in this report. Because of the nature of the findings from Postcomm's investigation, the remedies that Postcomm has considered have a bearing on the structural organisation of Royal Mail, in particular the organisation of Royal Mail's Wholesale team and its relationship with the rest of Royal Mail. Postcomm is currently reviewing whether it is appropriate to promote changes to the organisational structure of Royal Mail to contribute to a more effective competitive market¹⁴. The remedies proposed as a result of this investigation are without prejudice to the conduct and outcome of that review. The remedies discussed here are those which Postcomm believes are relevant to the matters it investigated concerning the provision of DSA.

- 5.6 In its February 2006 report, Postcomm proposed an enforcement order and a financial penalty. In its representations to the February report, Royal Mail said that it had taken, or had agreed to take, steps since November 2005 to achieve compliance and argued that an enforcement order was no longer

¹³ See section 25(b)

¹⁴ "Postcomm's Strategy Review: The postal market - 2010 and beyond: Key Questions for Stakeholders", 9 August 2006

necessary. Royal Mail also argued that there was no justification for the proposed financial penalty. The following section sets out why Postcomm has decided not to make an enforcement order but still considers it reasonable to impose a financial penalty of £1 million.

Undertakings

- 5.7 Where it identifies contraventions of Royal Mail's Licence, Postcomm is required by section 22 of the Act to make an enforcement order against Royal Mail. Postcomm's duty to make an enforcement order is subject to section 25 of the Act, which imposes on Postcomm a duty not to make an order if the licence holder has agreed to take and is taking all the steps that the Commission considers appropriate to secure or facilitate compliance with the condition concerned (see Chapter 2).
- 5.8 Postcomm is satisfied that Royal Mail has agreed to take or is taking steps that Postcomm considers appropriate to secure or facilitate compliance with its obligations under Condition 10(2) and 13(1). In its representations, Royal Mail said that it had taken the following measures since November 2005:
- established a discrete Wholesale team with dedicated premises at Royal Mail's offices;
 - developed a staff transfer policy in its Wholesale team;
 - conducted a forward looking assessment of the risks that Royal Mail faces under Condition 10(2), using external advice in the process;
 - taken steps in relation to systems separation.

5.9 Postcomm recognises Royal Mail's efforts in taking these steps and accepts that these measures go a long way towards securing and facilitating Royal Mail's compliance with Condition 10. Therefore, Postcomm is not asserting that Royal Mail has been in contravention of Condition 10(2) and Condition 13(1) after November 2005.

5.10 In its representations of 25 July 2006, Royal Mail said that it had decided to take the further actions set out in Postcomm's second report, which Postcomm considers will minimise the likelihood of Royal Mail contravening Condition 10(2) and Condition 13(1) in future. These further actions are as follows:

- to promulgate a single written policy to enable compliance with Condition 10(2) based on a comprehensive assessment (with the benefit of external professional advice to provide the non-Royal Mail perspective that has been lacking of the risks Royal Mail is facing of continuing contravention of Condition 10(2);
- to provide a copy of that policy to Postcomm by 31 January 2007;
- not less than once in each period of two years commencing 14 September 2006 to review the risk assessment and the policy promulgated for fitness for purpose and provide a copy to Postcomm of any revisions to that policy which may be made; and
- for a period of three years from the date hereof, to ensure that the Compliance Officer conducts regular audits of continuing compliance with the provisions of these assurances and provides a copy of his audit report to the Commission.

5.11 Given these actions Postcomm feels unable to assert that there is a likelihood of licence contravention at this stage, although it remains concerned at the possibility of inadequate separation within Royal Mail's Wholesale team between the selling of DSA to customers and to competing operators.

A Financial Penalty

5.12 Postcomm's power under section 30 (1) of the Act to impose a financial penalty is discretionary. Postcomm may impose on a licence holder a penalty of such amount as is reasonable, where it is satisfied that the licence holder has contravened or is contravening any condition of its licence. In exercising this power, Postcomm must have regard to its policy on financial penalties published under section 31(1) of the Act ("the penalties policy")¹⁵. In accordance with section 31(2) of the Act, Postcomm has had regard to its penalties policy.

5.13 Postcomm is satisfied that Royal Mail has contravened Condition 10(2) and Condition 13(1) of its Licence. Postcomm has concluded that it is appropriate to impose a financial penalty for a number of reasons which are in accordance with paragraph 13 of its penalties policy:

The contravention was serious

5.14 Royal Mail has said that Postcomm has identified no specific unfair commercial advantage that Royal Mail has obtained in relation to any particular competing operator. Under the terms of Condition 10, it is not necessary to identify an unfair advantage for a contravention of Condition 10 to occur or for that contravention to be serious.

¹⁵ Financial Penalties: A decision document and Statement of Policy February 2002

5.15 Postcomm regards observance by Royal Mail of Condition 10 as of the utmost importance. The development of services based on DSA provided by operators in competition with Royal Mail has been the most significant way in which competition has developed in the United Kingdom and is therefore especially important. For competing operators to make the investment needed to enter the postal market in competition with Royal Mail there must be confidence on their part that Royal Mail will not obtain unfair commercial advantage from its position as supplier to them of vital final distribution services. This is why Royal Mail's Licence sets the high standard of requiring Royal Mail to act in the manner best calculated to avoid obtaining unfair commercial advantage. It is also the reason why that obligation is within the remit of Royal Mail's Compliance Officer under Condition 13 of Royal Mail's Licence. The potential for damage to the development of competition through non-compliance with Conditions 10(2) and 13(1), in Postcomm's view, is a very serious consequence of non-compliance.

The imposition of a penalty will further Postcomm's statutory duties

5.16 Postcomm considers that the imposition of a penalty will further the interests of postal users by demonstrating (i) its intolerance of anti-competitive behaviour on the part of Royal Mail, and (ii) its commitment to effective competition between postal operators. In addition, Postcomm expects the financial penalty to have a deterrent effect on any future failure by Royal Mail towards compliance with these Licence conditions.

Royal Mail has been negligent in its approach towards compliance with Condition 10(2) and Condition 13(1)

5.17 From the evidence available, Postcomm considers that Royal Mail did not pay sufficient and sufficiently serious attention to the requirements of Condition 10(2) and Condition 13(1) during the period in question. Royal Mail cannot

claim that it was previously unaware of its obligations under Condition 10(2), as it put in place some measures which it argued were sufficient for Condition 10 compliance (but which Postcomm considers failed to meet the standard required). Royal Mail also cannot claim that the risks it was facing were novel or that it had no obvious precedents to follow in order to minimise those risks. In the UK, there are a number of examples of dominant firms separating parts of their businesses in order to avoid the risk of showing preference to another part of its business, most notably in the telecommunications and energy sectors. By not considering measures to achieve a similar effect, while at the same time being aware of its obligations and putting in place insufficient measures, Postcomm considers that Royal Mail has been negligent in its approach towards compliance with Condition 10(2) and Condition 13(1). Even if Royal Mail considered that these industries differed in some ways from the postal sector it would still have been appropriate for it to consider whether some or all of the measures in those industries provided a useful starting point for its consideration. Royal Mail has not provided any such analysis.

It does not appear to Postcomm that the nature of the contravention or the circumstances of its occurrence are such that it is not appropriate to impose a penalty

- 5.18 The test in relation to this aspect of the penalties policy includes a consideration of whether the contravention arose from circumstances entirely beyond the control of Royal Mail. Postcomm has found no evidence to suggest that the contraventions or the circumstances of their occurrence were outside the control of Royal Mail.

Assessment of the Penalty

- 5.19 Under section 30 (1) of the Act, Postcomm may impose on Royal Mail a penalty of such amount as is reasonable. In deciding the amount of the

penalty, Postcomm has had particular regard to paragraphs 14 to 18 of the penalties policy. The penalties policy states that Postcomm establish a starting point, consider whether there are any aggravating or mitigating circumstances and the need to deter future acts and lastly conduct an overall assessment, including consideration of proportionality.

Paragraph 14 of the Penalties Policy

5.20 In establishing the starting point for determining the amount of a penalty, Postcomm is to consider the financial benefit obtained by the licence holder and the burden imposed on others as a result of the contravention of the licence condition. A consideration of these estimates is Postcomm's starting point for deciding the amount of any penalty with a view to ensuring that:

- the infringement of the licence condition confers no benefit on Royal Mail in terms either of profits made by it or of costs imposed on competitors; and
- the incentive to continuing compliance provided by the possibility of a financial penalty is realistic, reasonable and proportional in relation to the gains that may arise, directly or indirectly, from non-compliance.

5.21 In this case, there are difficulties in identifying readily quantifiable financial benefits or losses, arising from Royal Mail not acting in a "manner best calculated" to secure that it obtains no unfair commercial advantage. Nonetheless, Postcomm's judgment is that a penalty should be imposed and Postcomm has considered various ways that it could calculate the penalty, in accordance with the penalties policy, taking into account these difficulties.

- 5.22 Originally, in its provisional findings sent to Royal Mail in November 2005 prior to the oral hearing, Postcomm proposed calculating the penalty by applying its penalties policy with reference to the approach taken by the Office of Fair Trading (“OFT”), when it calculates financial penalties for infringements of the Competition Act 1998. Postcomm calculated a starting point for the penalty based on a percentage of DSA turnover, because the OFT calculates its penalties based on a percentage of turnover in the relevant market. Postcomm’s approach was driven in part by the difficulties in putting a value to the benefit to Royal Mail and the burden on competitors caused by Royal Mail’s behaviour. Following the November hearing, having taken account of Royal Mail’s representations, Postcomm concluded that this was not a suitable approach for calculating the starting point. The OFT approach is based on the “seriousness” of the behaviour, within a band of 1 – 10 % of turnover in the relevant market. Under the penalties policy, the issue of seriousness should be considered at the stage where Postcomm considers the appropriateness of a financial penalty (see paragraphs 5.14 – 5.15 above). In Postcomm’s judgement it would not have been appropriate to consider the seriousness of the Licence contravention twice.
- 5.23 Postcomm therefore moved, in its February 2006 report, to calculate the starting point for the penalty by reference to a proxy for the benefit obtained by Royal Mail. It was Postcomm’s judgement that the ability of operators and potential new entrants to gain market share was likely to have been hampered. Fewer bulk mailers would have switched from a Mailsort product (typically Mailsort 2) to an operator using access, or become a DSA customer (and therefore probably needing to have mail carried by an operator or new entrant to the relevant inward mail centres). As a result, it was Postcomm’s view that operators were likely to have carried lower volumes of mail than they would have if the contravention had not occurred and Royal Mail was likely to have retained more customers on a Mailsort tariff, rather than on an access tariff.

5.24 However, Postcomm now accepts, in light of Royal Mail's representations, that the method used by Postcomm in February 2006 to put a value on the benefit obtained by Royal Mail and to use that value as the starting point for a financial penalty is insufficiently consistent with the observed facts and insufficiently robust to be relied upon. Royal Mail's representations added weight to the argument that even rough values of the benefit and burden resulting from Royal Mail's contraventions are difficult to quantify and attempts to calculate their values are problematic. Paragraph 14 of the penalties policy is so difficult to apply in a rational and consistent manner in this case that, having had very serious regard to it, Postcomm thinks that it should not be applied. However, Postcomm does not accept that, having concluded that it is appropriate to impose a financial penalty, it must abandon this decision because of the difficulties in applying paragraph 14 of its policy.

5.25 In Postcomm's judgement, a better approach in this case is to return to the fundamental purposes of the Act and to seek to give effect to them, and to depart from paragraph 14 of the penalties policy because to follow it would frustrate those aims. The key purpose of the Act that is relevant to this matter appears to Postcomm to be the purpose of "furthering the interests of users wherever appropriate by the promotion of effective competition"¹⁶. Postcomm believes that to achieve that purpose (and other purposes), there must be the administration of a system of regulation which involves penalties, where necessary, to publicly and critically mark the occurrence of a serious contravention of a regulation intended to further such purpose and to penalise, and thereby deter, behaviour which is a contrary to the purpose. The question Postcomm has to address is what level of penalty is necessary and proportionate to publicly and critically mark the occurrence of the contraventions that have occurred and to penalise Royal Mail for these contraventions and thereby deter other contraventions.

¹⁶ Section 5 of the Act

5.26 This question is a matter of judgment and Postcomm's judgment is that a penalty of £1 million is necessary and is a reasonable amount for the starting point of the penalty, in the context of a company the size of Royal Mail. Postcomm's judgement is that a penalty of £1 million will make the critical mark that is required in relation to the serious contraventions that have occurred in this case, to provide the necessary degree of penalty and to provide a deterrent sanction that is sufficient in this case. Although this figure is significantly less than that originally proposed, Postcomm considers that it will send a clear signal that Postcomm will not tolerate anti-competitive behaviour and will use its full powers wherever it uncovers such behaviour.

Paragraphs 15 and 16 of the Penalties Policy

5.27 Postcomm does not consider that it is necessary to adjust the penalty for aggravating or mitigating circumstances.

Paragraph 17 of the Penalties Policy

5.28 Royal Mail is currently the monopoly supplier of DSA services and so there are no other licensed postal operators who have Condition 10 or similar obligations in their licence. Therefore, in this case, Postcomm is not concerned with deterring similar breaches of licence by other operators.

Paragraph 18 of the Penalties Policy

5.29 Whatever penalty calculation methodology that it adopts, Postcomm must ultimately assess the penalty figure for its reasonableness and proportionality as set out in this provision of its policy.

- 5.30 In Postcomm's judgement, the figure of £1 million is reasonable and proportional in the circumstances of the case. The figure is also conservative when viewed against Royal Mail's overall turnover of £4642 million in the 2004/05 financial year. Postcomm believes that the penalty should be paid in one instalment because it is small in relation to Royal Mail's turnover. Payment should be made by bankers draft payable to Postcomm.
- 5.31 Following an overall reconsideration of its decision, in relation to the imposition of a financial penalty, its amount and the manner of its payment, Postcomm has concluded that the imposition of a financial penalty of £1 million to be paid in one instalment will further its statutory duties. Postcomm also considers that, because the contraventions of Condition 10(2) and Condition 13(1) resulted from a closely related series of failures on the part of Royal Mail, it is appropriate to impose a single penalty in respect of the contraventions of both conditions and to deal with the matter in a single notice under section 30 of the Act¹⁷.
- 5.32 Postcomm considers that the imposition of a penalty of £1 million will further the interests of postal users (i) by demonstrating its intolerance of anti-competitive behaviour on the part of Royal Mail, (ii) by showing its commitment to effective competition between postal operators and (iii) by deterring Royal Mail from future failure to comply with these Licence conditions.

¹⁷ Postcomm is of the view that this is within its powers under section 30 of the Act because, applying the Interpretation Act 1978, "any condition" in section 30(1)(a) includes any one or more conditions.

ANNEX A

CHRONOLOGY OF EVENTS

The key dates and events relevant to Postcomm's investigation are as follows:

23 March 2001

Licence granted to Royal Mail under section 11 of the Act.

10 February 2004

Royal Mail and UK Mail announce that they have agreed commercial terms for UK Mail to obtain downstream access to Royal Mail's network.

April 2004

Royal Mail carries out a risk assessment on the likelihood of it contravening Condition 10.

8 June 2004

Meeting of Royal Mail's Letters Management Board, where a decision was made to begin providing DSA to customers.

July 2004

Royal Mail begins a series of presentations to retail customers on using its downstream access service, on both a national price and zonal price.

15 October 2004

Royal Mail agrees the first zonally priced downstream access service with a customer who is not one of the complainants.

5 and 18 November 2004

Postcomm receives letters of complaint on Royal Mail's offer of zonal downstream access.

15 December 2004

Meeting of Royal Mail's Letters Management Board, to endorse Royal Mail's Condition 10 policy.

7 January 2005

Postcomm begins a full investigation into the complaint and publishes a note of the Scope of the Investigation on its website.

24 January 2005

A Requirement to Furnish Information to Postcomm, issued under Condition 16 of Royal Mail's Licence ("an information requirement") is sent to Royal Mail.

9 February 2005

Postcomm receives part 1 of Royal Mail's response to the information requirement.

23 February 2005

Postcomm receives part 2 of Royal Mail's response to the information requirement.

April/May 2005

Postcomm interviews a selection of stakeholders who have an interest in Royal Mail's DSA service. These interviews are conducted under Section 47 of the Postal Services Act 2000.

24 June 2005

Postcomm sends Notices under Section 47 of the Act to a selection of stakeholders and to the complainants, requiring the production of information.

14 July 2005

Postcomm sends a second information requirement to Royal Mail, specifically covering the Condition 10 aspects of the complaints where Postcomm felt it needed further evidence or clarification.

1 August 2005

Postcomm receives Royal Mail's response to the second information requirement.

8 September 2005

Postcomm sends Royal Mail a copy of its “Provisional Findings” following its investigation under Condition 10.

26 September 2005

Royal Mail submits its written response to Postcomm’s provisional findings.

28 September 2005

Postcomm meets Royal Mail to discuss Postcomm’s provisional findings.

5 October 2005

Postcomm meets Royal Mail again to consider Royal Mail's revised risk assessment and draft recommendations to ensure compliance, compiled in light of Postcomm’s provisional findings.

15 November 2005

Postcomm holds an oral hearing with Royal Mail, to allow Royal Mail the opportunity to respond formally to Postcomm’s provisional findings and proposed remedies.

17 February 2006

Postcomm publishes its first report following its investigation and invites representations on its proposed remedies.

12 July 2006

Postcomm publishes its second report in response to Royal Mail's representations. It varies the proposed remedies and invites representations on such variations.

14 September 2006

Postcomm publishes its final report in response to Royal Mail's representations on the variations to the proposed remedies.

ANNEX B

NOTICE OF IMPOSITION OF FINANCIAL PENALTY

POSTCOMM

(THE POSTAL SERVICES COMMISSION)

POSTAL SERVICES ACT 2000

SECTIONS 30, 31, 32 AND 33

NOTICE OF IMPOSITION OF FINANCIAL PENALTY

ON

ROYAL MAIL GROUP PLC

Whereas –

- (1) Royal Mail Group plc, company number 4138203, having its registered office at 148 Old Street London EC 1V 9HQ (“Royal Mail”) is the holder of a licence (“the Licence”) granted by the Postal Services Commission (“Postcomm”) under section 11 of the Postal Services Act 2000 (“the Act”) on 23 March 2001 and was amended on 1 April 2003, 2 November 2005 and 25 May 2006.
- (2) It is a requirement of paragraph 2 of Condition 10 in Schedule 2 to the Licence (“Condition 10.2”) that Royal Mail shall conduct its business as a postal operator in the manner best calculated to secure that neither Royal Mail nor any related person of Royal Mail, nor any other person, obtains any unfair commercial

- advantage in connection with the provision by Royal Mail of access to its postal facilities pursuant to a condition of the Licence.
- (3) Pursuant to Condition 9 in Schedule 2 to the Licence Royal Mail has entered into a number of contracts under which it provides access to its postal facilities to certain users and to certain licensed postal operators.
 - (4) It is a requirement of paragraph 1 of Condition 13 in Schedule 2 to the Licence (“Condition 13.1”) that Royal Mail shall take all reasonable precautions against the risk of failure to comply with certain conditions of the Licence, including Condition 10.2.
 - (5) It is a requirement of paragraph 3 of Condition 13 in Schedule 2 to the Licence that Royal Mail shall ensure that at all times it employs a competent person (“the Compliance Officer”) for the purpose of facilitating compliance by Royal Mail with certain conditions of the Licence, including Condition 10.2.
 - (6) Postcomm has received complaints suggesting that Royal Mail might be contravening certain conditions of its Licence, including Conditions 10.2 and 13.1 in connection with the provision of access to its postal facilities and Postcomm has conducted an investigation into a number of aspects of the complaints.
 - (7) On the basis of information obtained in the course of Postcomm’s investigation Postcomm concluded in February 2006 that Royal Mail has contravened and is contravening Conditions 10.2 and 13.1.

- (8) In a report published on 17 February 2006 (“the February Report”) Postcomm set out the facts it relied upon in reaching its decision as to the contraventions of the Licence and formally gave notices of its proposals to make an enforcement order against Royal Mail and to impose a financial penalty on Royal Mail.
- (9) Postcomm received representations in response to its notices proposing to make an enforcement order and to impose a financial penalty on Royal Mail.
- (10) Royal Mail in its representations to the formal notices advised Postcomm that since November 2005 it had agreed to take and is taking the steps that Postcomm considered appropriate to secure compliance with Condition 10.2.
- (11) Having considered those representations in July 2006 Postcomm concluded that Royal Mail had contravened Conditions 10.2 and 13.1 in the period from June 2004 to November 2005 and decided that the proposed penalty should be varied to the sum of £1million.
- (12) Postcomm further concluded that in view of the fact that Royal Mail is taking steps which Postcomm considers appropriate to secure compliance with Condition 10 it does not now have grounds to make an enforcement order against Royal Mail.
- (13) In a report published on 12 July 2006 (“the July Report”) Postcomm set out its analysis of the representations it had received to the February Report and Notices and gave reasons for its decision to vary the proposed penalty.

- (14) In September 2006 Postcomm considered the representations it received to the July Report and accompanying Notice of Variation of proposed penalty and confirmed that the penalty should be varied and imposed in the sum of £1million.
- (15) On the basis of information obtained in the course of Postcomm's investigation and the representations received to the Notice of variation referred to in paragraph 14 above Postcomm is still satisfied that Royal Mail did contravene Conditions 10.2 and 13.1 in the period from June 2004 to November 2005 and for the reasons stated in the Notice of Variation that the proposed financial penalty should now be imposed in the varied sum in accordance with section 30 of the Act.

Now therefore pursuant to sections 30, 32 and 33 of the Act and having had regard to its statement of policy under section 31 of the Act Postcomm hereby gives notice as follows –

1. Postcomm has imposed a financial penalty on Royal Mail.
2. The amount of the penalty is £1million.
3. The conditions which Postcomm is satisfied have been contravened are Conditions 10.2 and 13.1.
4. The acts or omissions which Postcomm considers constitute contraventions of each of these conditions are that Royal Mail failed to –
 - a) establish an independent Wholesale team outside the Regulatory Affairs team;

- b) put in place an effective staff transfer policy which would have prevented staff transferring at short notice between the Retail and Wholesale teams;
 - c) carry out and regularly review a clear and thorough analysis of the risks to be addressed; and
 - d) put in place and regularly review for fitness for purpose, a clear, single, contemporaneous, written Condition 10 policy, before the commencement of any further sales or marketing of DSA.
5. Other facts which Postcomm considers justify the making of the order are –
- (a) the facts set out in the Report which accompanies this Notice and Postcomm relies on the totality of that Report insofar as facts contained in it are not referred to in this Notice, and
 - (b) in particular, the fact that Royal Mail's present Compliance Officer joined Royal Mail relatively recently so that the positive and comprehensive approach to compliance that he should be instilling in Royal Mail has not yet become embedded throughout Royal Mail.
6. The penalty is required to be paid in one instalment by bankers draft payable to Postcomm at Hercules House, 6 Hercules Road, London SE1 7DB.

7. The date by which the penalty is required to be paid is by 12.00 noon on 25 October 2006.
8. This Notice shall be construed in the same manner as the Licence.

The Seal of the
Commission
hereunto affixed is
authenticated by –

Authorised for that purpose

Dated 14 September 2006

ANNEX C

NOTICE OF DECISION NOT TO MAKE A FINAL ORDER

POSTCOMM

(THE POSTAL SERVICES COMMISSION)

POSTAL SERVICES ACT 2000

SECTIONS 22, 25, 26 AND 27

NOTICE OF DECISION NOT TO MAKE A FINAL ORDER

AGAINST

ROYAL MAIL GROUP PLC

Whereas –

- (1) Royal Mail Group plc, company number 4138203, having its registered office at 148 Old Street London EC 1V 9HQ (“Royal Mail”) is the holder of a licence (“the Licence”) granted by the Postal Services Commission (“Postcomm”) under section 11 of the Postal Services Act 2000 (“the Act”) on 23 March 2001 and was amended on 1 April 2003, 2 November 2005 and 25 May 2006.
- (2) It is a requirement of paragraph 2 of Condition 10 in Schedule 2 to the Licence (“Condition 10.2”) that Royal Mail shall conduct its business as a postal operator in the manner best calculated to secure that neither Royal Mail nor any related person of Royal

- Mail, nor any other person, obtains any unfair commercial advantage in connection with the provision by Royal Mail of access to its postal facilities pursuant to a condition of the Licence.
- (3) Pursuant to Condition 9 in Schedule 2 to the Licence Royal Mail has entered into a number of contracts under which it provides access to its postal facilities to certain users and to certain licensed postal operators.
 - (4) It is a requirement of paragraph 1 of Condition 13 in Schedule 2 to the Licence (“Condition 13.1”) that Royal Mail shall take all reasonable precautions against the risk of failure to comply with certain conditions of the Licence, including Condition 10.2.
 - (5) It is a requirement of paragraph 3 of Condition 13 in Schedule 2 to the Licence that Royal Mail shall ensure that at all times it employs a competent person (“the Compliance Officer”) for the purpose of facilitating compliance by Royal Mail with certain conditions of the Licence, including Condition 10.2.
 - (6) Postcomm has received complaints suggesting that Royal Mail might be contravening certain conditions of its Licence, including Conditions 10.2 and 13.1 in connection with the provision of access to its postal facilities and Postcomm has conducted an investigation into a number of aspects of the complaints.
 - (7) On the basis of information obtained in the course of Postcomm’s investigation Postcomm concluded in February 2006 that Royal Mail has contravened and is contravening Conditions 10.2 and 13.1.

- (8) In a report published on 17 February 2006 (“the February Report”) Postcomm set out the facts it relied upon in reaching its decision as to the contraventions of the Licence and formally gave notices of its proposals to make an enforcement order against Royal Mail and to impose a financial penalty on Royal Mail.
- (9) Postcomm received representations in response to its notices proposing to make an enforcement order and to impose a financial penalty on Royal Mail.
- (10) Royal Mail in its representations to the notices advised Postcomm that since November 2005 it had agreed to take and is taking the steps that Postcomm considered appropriate to secure compliance with Condition 10.2.
- (11) Having considered those representations in July 2006 Postcomm concluded that Royal Mail had contravened Conditions 10.2 and 13.1 in the period from June 2004 to November 2005 and decided that the proposed penalty should be varied to the sum of £1million.
- (12) Postcomm further concluded that in view of the fact that Royal Mail is taking steps which Postcomm considers appropriate to secure compliance with Condition 10 and the requirements of section 25 of the Act it does not now have grounds to make an enforcement order against Royal Mail.
- (13) In a report published on 12 July 2006 (“the July Report”) Postcomm set out its analysis of the representations it had received to the February Report and Notices and gave reasons for

its decision not to impose an enforcement order against Royal Mail and to vary the proposed penalty.

- (14) In September 2006 Postcomm considered the representations it received to the July Report and accompanying Notice of Variation of proposed penalty and confirmed its decision not to make an enforcement order against Royal Mail and that the penalty should be varied and imposed in the sum of £1million.
- (15) On the basis of information obtained in the course of Postcomm's investigation and the representations received to the Notice of variation referred to in paragraph 14 above Postcomm is still satisfied that Royal Mail did contravene Conditions 10.2 and 13.1 in the period from June 2004 to November 2005.

**Now therefore pursuant to sections 22, 25 and 27 of the Act
Postcomm hereby gives notice as follows –**

9. Postcomm has decided not to make a final order against Royal Mail.
10. Postcomm is satisfied that from November 2005 Royal Mail has agreed to take and is taking the steps that Postcomm considers appropriate to secure compliance with Conditions 10.2 and 13.1 of its Licence.
11. Other facts which Postcomm considers justify its decision not to make the order are –
 - (c) the facts set out in the Report which accompanies this Notice and Postcomm relies on the totality of that Report

insofar as facts contained in it are not referred to in this
Notice, and

12. This Notice shall be construed in the same manner as the Licence.

The Seal of the
Commission
hereunto affixed is
authenticated by –

Authorised for that purpose

Dated 14 September 2006