

MEMORANDUM OF UNDERSTANDING BETWEEN POSTCOMM AND THE OFT

A Consultation Document

October 2002

Summary

The Office of Fair Trading (OFT) enforces the Competition Act 1998 which prohibits anti-competitive behaviour in the UK. The Postal Services Commission (Postcomm) has responsibility for enforcing Condition 11 of Consignia's licence, which requires Consignia not to act anti-competitively in various ways. There is, therefore, a potential overlap between the roles of Postcomm and the OFT in this area.

Postcomm and the OFT have proposed a Memorandum of Understanding which is intended to clarify our respective roles and responsibilities when investigating cases of anti-competitive behaviour. This consultation document invites comments on the proposed Memorandum of Understanding. Comments are requested by 17 January 2003.

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1. Introduction

What is Postcomm?

1.1 The Postal Services Act 2000 (the Act) established the Postal Services Commission (Postcomm) as the independent regulatory body for the postal services industry in the United Kingdom. As part of its function, Postcomm licenses, and enforces the licence conditions of, certain postal services providers. Postcomm's Business Plan, which can be found on its website www.psc.gov.uk, gives details of its duties, functions, objectives and work plan.

Postcomm's Statutory Duties

1.2 Postcomm's primary duty is to seek to ensure customers continue to enjoy a "universal postal service" (universal service or UPS). The UPS consists of the delivery and collection at least once every working day of mail (not exceeding 20 kilograms in weight) and the provision of a registered postal service, all at affordable prices that are uniform throughout the UK.

1.3 Subject to this, Postcomm is also charged with furthering the interests of users of postal services wherever possible by promoting effective competition between postal operators. In doing so, Postcomm must have regard to the interests of those who are disabled or chronically sick, are of pensionable age, are on low incomes or reside in rural areas.

- 1.4 Subject to both the duties above, Postcomm has a further duty to exercise its functions in a manner which it considers is best calculated to promote efficiency and economy on the part of postal operators.
- 1.5 Finally, in performing all its duties, Postcomm must have regard to the need to ensure that licence holders are able to finance the activities authorised or required by their licences.

Background

- 1.6 Postcomm has responsibility for ensuring that Consignia does not act anti-competitively, under the competition provisions in Condition 11 of Consignia's licence. This licence condition prohibits Consignia from showing any undue preference in favour of, or undue discrimination against, or from imposing any undue restrictions on, any person or class of persons. Condition 11 also prohibits Consignia from setting any prices which are excessive or predatory.
- 1.7 The OFT has various responsibilities in relation to competition policy in the UK. In particular it enforces the Competition Act 1998 (CA98) which prohibits anti-competitive agreements and abuses of a dominant market position.
- 1.8 There is, therefore, a potential overlap between the roles of Postcomm and the OFT in this area and the proposed Memorandum of Understanding (MoU) is intended to clarify the respective roles and responsibilities.

Purpose of this Consultation Document

1.9 The purpose of this consultation document is to seek comments on Postcomm's proposed MoU with the OFT.

Structure and Layout of this Document

1.10 Chapter 2 of this document sets out in more detail the need for an MoU between Postcomm and the OFT, describes the aims of the proposed MoU and sets out the proposed roles and responsibilities of the two bodies in relation to the MoU. Annexed to this document is the proposed MoU itself.

How to Respond

1.11 Responses should reach Postcomm by 17 January 2003. Postcomm will share all responses with the OFT. They can be sent by post, electronically, or by fax, to:

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1.12 If you would like clarification of any points raised by this document please contact Tasneem Azad (Postcomm) on 020 7593 2112 or Neil Stoessel (OFT) on 020 7211 8715.

Confidentiality

1.13 Postcomm intends to make public the responses it receives to this consultation document. If you do not want all or part of your response to this document to be read by anyone outside Postcomm and the OFT, please ensure your response clearly indicates which parts are confidential. If you are happy for the substance of your contribution to be made public, but do not want the name of the individual who signed it or organisation who submitted it to be revealed, please indicate this by adding "name of organisation/sender not to be published".

2. The need for a Memorandum of Understanding

Background

2.1 Subject to the requirement to ensure the provision of a universal postal service, Postcomm is charged with exercising its functions in a manner best calculated to further the interests of users of postal services, wherever possible by promoting effective competition between postal operators. In addition, as noted in Postcomm's April 2001 Decision on Consignia's licence and May 2002 Decision on the Promotion of Effective Competition, Postcomm has committed to reducing the role of regulation where possible with the intention of deregulating¹ the postal services market.

2.2 However, given Consignia's current dominant position as a provider of postal services, and whilst competition is still in its infancy, Postcomm believes that its duties would not be best discharged by moving towards a system where Consignia was regulated solely by general competition law. Postcomm, therefore, put into place Condition 11 of Consignia's licence. This condition allows Postcomm to monitor and ensure that Consignia does not unduly discriminate², show undue preference, or set prices that are predatory or excessive.

¹ unless a compelling case is made in terms of safeguarding the universal service.

² discrimination is permitted only insofar as it is needed to fulfil Consignia's legal obligations such as that of a uniform tariff.

- 2.3 As competition becomes established, Postcomm expects to progressively release Consignia from the requirements of Condition 11 and allow it to be regulated under general competition law, in particular the Competition Act 1998 (CA98). Chapter I of this Act prohibits agreements, decisions or concerted practices which have the object or effect of preventing, restricting or distorting competition within the UK. Included in the Chapter I prohibition are price fixing and market sharing agreements. Chapter II prohibits the abuse of a dominant position in a market within the UK. Such abuses may include excessive pricing, predatory pricing, discriminatory behaviour, and refusal to supply.
- 2.4 Most other regulators of UK utilities have responsibility for monitoring developments in their markets, especially during the development of competition. Unlike these regulators, however, Postcomm has not been granted concurrent powers to enforce the CA98. This means that, during the transition where Postcomm expects Condition 11 to apply to Consignia alongside the CA98, cases may result in independent assessment by two separate bodies.

The Need for an MoU

- 2.5 In this context, Postcomm's April 2001 Decision on Consignia's licence envisaged the management of overlap between the functions of Postcomm and the OFT via an effective liaison between the two organisations and the adoption of a more detailed Memorandum of Understanding (MoU).

- 2.6 In particular, it is currently the case that a complaint against Consignia could be made to either Postcomm or the OFT, or both, or that the OFT and Postcomm may find that their 'own-initiative' investigations overlap. The remedies available to either organisation are also different such that, depending on the circumstances, one may be more appropriate.
- 2.7 In order to avoid any complaints of anti-competitive behaviour by Consignia being investigated independently by the two bodies under the two separate pieces of legislation, and given that it would also be an unnecessary waste of resources for both Postcomm and the OFT to investigate a complaint simultaneously, the proposed MoU sets out agreed roles of the respective organisations in dealing with cases of anti-competitive behaviour.
- 2.8 The intention of the proposed MoU is to allow complainants to complain to either or both bodies³, but to provide for Postcomm and the OFT to liase at an early stage to ensure that the appropriate body deals with the case.
- 2.9 In this regard, it is worth noting that Condition 11 already requires Consignia to furnish to Postcomm copies of all notifications to the OFT for a decision or guidance under CA98 and of all applications to the European Commission for any form of clearance in relation to Articles 81 and 82, the competition prohibitions in the EC Treaty.

³ The Enterprise Bill, which is currently passing through Parliament provides the OFT with a formal duty to accept and review super-complaints from designated consumer bodies. This duty may later be extended to certain specified sectoral regulators but initially only the OFT will be able to handle super-complaints.

2.10 Finally, in addition to the potential overlap between the functions of Postcomm and OFT, concern has been expressed to Postcomm from organisations operating in markets related to postal services (e.g. printers involved in direct mail) that there may be anti-competitive behaviour which is not investigated either by Postcomm or the OFT in the belief that it is the responsibility of the other. This MoU seeks to address these concerns.

The Aims of the MoU

2.11 This MoU has two principal aims:

- to provide a framework within which Postcomm and the OFT can deal with complaints – such as those referred to above – and own-initiative investigations, and
- to provide reassurance to stakeholders that complaints will be dealt with appropriately by either Postcomm or the OFT.

2.12 The MoU is split into a number of sections. 'The Aims and Coverage of the MoU' is a short introduction to proposed MoU. There are then two sections describing the roles of Postcomm and OFT, in relation to the MoU. The section 'Potential Overlap Between the Functions of Postcomm and the OFT' explains in more detail the need for an MoU and explains how cases of alleged anti-competitive behaviour will be dealt with. Two further sections then detail Postcomm's and the OFT's specific procedural responsibilities in relation to the MoU. Finally, confidentiality and implementation issues are addressed.

2.13 This MoU is not legally binding but aims to provide a set of workable ground rules. It is also intended that the MoU procedures be flexible. Both Postcomm and the OFT wish to ensure that Postcomm can take action if it feels it is necessary to do so, and that the OFT can deal with a matter if that would be more appropriate.

2.14 Following consultation, the two bodies will finalise the MoU which will be published on Postcomm's website www.psc.gov.uk and the OFT's website www.offt.gov.uk.

Responsibilities of Postcomm and the OFT in relation to the MoU

2.15 In addition to the aims and coverage of the MoU and the potential overlap between the roles of Postcomm and the OFT, the proposed MoU highlights both Postcomm's and the OFT's particular responsibilities, in relation to the MoU.

2.16 In particular, Postcomm would undertake to inform the OFT of complaints received, action that Postcomm itself instigates and any decisions that Postcomm may take in relation to Condition 11 of Consignia's licence. In doing so, Postcomm would take into account views expressed by the OFT. Postcomm would also undertake to consult with the OFT should it view action via CA98 more appropriate and provide support to the OFT in assessing such cases.

2.17 Likewise, the OFT would undertake to notify Postcomm of any cases investigated under CA98, written notice issued and decisions taken. Additionally, the OFT would undertake to keep Postcomm informed of any investigations of monopoly situations under the Fair Trading Act 1973 (FTA73). The OFT would also undertake to take into account views expressed by Postcomm in considering all such cases. Finally, the OFT would undertake to consult Postcomm whenever it considered licence enforcement was more appropriate and provide corresponding support to Postcomm.

Disclosure of Confidential Information

2.18 Postcomm and the OFT accept the confidential nature of information provided by complainants, individuals, businesses and undertakings. In exchanging information of this nature, both organisations will respect the confidentiality and/or secrecy of information that has been obtained as a result of the other organisation's statutory powers or other legal obligations.

Review and Implementation

2.19 It is the intention, following consideration of the responses to this consultation, to finalise the MoU and to bring it into force as quickly as possible.

2.20 Furthermore, Postcomm and the OFT note that over time the MoU may require refinement or review. In this context, Postcomm and the OFT would hope to discuss and reach agreement on such modifications. Should any substantial changes be required, Postcomm and the OFT would expect to consult on these.

Consultation question:

Postcomm welcomes views on any issue raised in this consultation or in the proposed Memorandum of Understanding at Annex I.

Annex 1. Proposed Memorandum of Understanding between Postcomm and the Office of Fair Trading

The Aims and Coverage of the MoU

A1. In certain sectors of postal services, the Postal Services Commission (Postcomm) and the Office of Fair Trading (OFT) have overlapping powers. This is because a breach by a postal operator of one of its licence conditions may also infringe one or both of the prohibitions in the Competition Act. Postcomm has powers under the Postal Services Act 2000 (PSA2000) to grant licences to postal operators subject to appropriate conditions and to investigate and enforce the conditions in any licence. These may include conditions aimed at promoting competition between postal operators and/or at promoting efficiency and economy on the part of postal operators. The OFT has powers to investigate and take enforcement action against infringements of the two prohibitions in the Competition Act 1998 (CA98). These are a prohibition on anti-competitive agreements decisions and concerted practices (the Chapter I prohibition), and a prohibition on abuse of a dominant market position (the Chapter II prohibition). Consequently, there is a risk of the same behaviour being investigated both by Postcomm and by the OFT.

- A2. This MoU is, therefore, made between Postcomm and the OFT and aims to:
- promote co-operation and coordination between Postcomm and the OFT when dealing with cases of anti-competitive behaviour for which they have overlapping powers

- facilitate the treatment of cases of anti-competitive behaviour within postal services markets and cases that affect both postal services and related markets
- minimise duplication of activity, wherever possible
- improve transparency with respect to the respective roles of Postcomm and the OFT for relevant third parties

A3. It is not intended that this MoU be legally binding or create expectations whose non-fulfilment would give rise to rights at law.

A4. This MoU includes:

- a description of the respective roles of Postcomm and the OFT that are relevant to this MoU
- undertakings to which both Postcomm and the OFT commit, with respect to the day-to-day handling of competition cases involving postal services
- provisions for dealing with cases within the postal services market and cases that affect both postal services and related markets
- arrangements for the implementation of this MoU and its review

The Role of Postcomm, in Relation to this MoU

A5. Postcomm has been established as a regulator of the postal services market under the PSA 2000. It is a body corporate whose functions are performed on behalf of the Crown. In exercising its functions it has a primary statutory duty to ensure the provision of a universal postal service (which broadly includes, as defined in the PSA 2000, a daily collection and delivery across the UK of postal items, and a registered post service, at affordable and geographically uniform tariffs). Subject to this primary duty, Postcomm must exercise its functions so as to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators. It must also act in a manner best calculated to promote efficiency and economy on the part of postal operators. In performing all its duties, Postcomm must have regard to the need to ensure that licensed operators are able to finance activities authorised or required by their licence.

A6. Having regard to its duty to promote effective competition between postal operators, Postcomm included a condition in the licence it granted under the PSA 2000 to Consignia requiring Consignia not to behave anti-competitively. Condition 11 of Consignia's licence requires that Consignia must not, in the supply of postal services:

- show undue preference to, or undue discrimination against, or seek to impose any undue restriction on, any person or class of persons
- set terms or charges which are excessive, or predatory.

A7. The condition only applies to those services where Postcomm has control, through the licence, over prices Consignia may charge for the provision of postal services and where there is no established competition in the sector of the market in which the relevant postal services are provided. Notwithstanding the requirements of the PSA 2000, the condition provides that, where conduct is prohibited as abusive of a dominant position under the Chapter II prohibition in CA98, questions as to whether such conduct breaches this licence condition must be treated in a manner consistent with the treatment of a corresponding question arising under the Chapter II prohibition.

The Role of the OFT, in Relation to this MoU

A8. The OFT's role, with respect to the UK's competition regime, includes enforcing the Chapter I and Chapter II prohibitions in the CA98. This includes investigating and taking action against:

- cartels and other damaging anti-competitive agreements, and
- abuses of a dominant market position.

A9. The OFT also has a duty under the Fair Trading Act 1973 (FTA73) to keep under review commercial activities in the UK with a view to identifying monopoly situations or uncompetitive practices. In the case of a monopoly situation, the OFT may refer it to the Competition Commission for further investigation as to whether it operates or may be expected to operate against the public interest.

Potential Overlap Between the Functions of Postcomm and the OFT

A10. There exists a potential overlap between the functions of Postcomm and the OFT with respect to competition cases affecting Consignia and potentially other operators and the postal services market in general (and particularly if the conduct involved may affect the provision of a universal postal service).

A11. In a case of anti-competitive behaviour involving Consignia, Postcomm may have a duty (under PSA 2000 and Consignia's licence) and the OFT may have a power (under the CA98) to take appropriate action.

A12. As is the case within other utility sectors which have sector-specific legislation, a decision will need to be taken whether any suspected anti-competitive conduct should be investigated under the PSA 2000 or the CA98. Generally, in sectors where the regulator has concurrent powers under the CA98, the regulator is required to make a decision whether it is more appropriate to proceed under the CA98. If so, his duty to proceed under the sector-specific legislation does not apply. There is no similar procedure in relation to the postal sector because Postcomm does not have concurrent powers under the CA98. Nevertheless, in general, Postcomm will take the view that it is precluded from taking licence enforcement action if it considers, for the purposes of the duties imposed on it, among others under section 3 PSA 2000 (duty to ensure a universal postal service) and section 5 PSA 2000 (duty to promote competition between postal operators, and efficiency and economy on the part of postal operators), that it is more appropriate that the conduct in question is considered by the OFT under the CA98. This decision will be taken in consultation with the OFT. Such decisions will be pragmatic and taken on a case-by-case basis, at least in the early years following the introduction of competition, but where action under the licence or under CA98 would both be equally effective the latter will be the natural choice.

A13. Such a decision would normally be taken upon receipt of a complaint or at or towards the beginning of an own-initiative investigation. However, it may not always be possible to make such a decision in the early stages of an investigation. There may be cases in which the decision on how best to proceed can only be made following significant progress in an investigation. Such a situation will require close cooperation between Postcomm and the OFT until sufficient information is obtained for a decision to be taken.

A14. Where Postcomm and the OFT decide that it is more appropriate to proceed under the PSA 2000 in relation to a competition issue, Postcomm will seek to co-ordinate its approach with that of the UK and European competition authorities and will follow the OFT's analytical approach, so far as this is compatible with fulfilling its statutory duties.

Postcomm's Responsibilities, in Relation to this MoU

A15. Postcomm undertakes to:

- Inform the OFT of formal complaints received which give rise to reasonable grounds to suspect that Consignia may be in breach of Condition 11 of its licence.
- Inform the OFT of any cases of anti-competitive behaviour that Postcomm decides to investigate under Condition 11 of Consignia's licence, and keep the OFT up to date with progress made.
- Inform the OFT prior to any decisions and actions being taken against Consignia, under Condition 11 of its licence.

- Meet with the OFT at an early stage in any investigation under Condition 11 of Consignia's licence, with a view to reaching a decision on the relevant legislation under which to proceed (i.e. PSA 2000 or CA98).
- Consult with the OFT whenever it considers that enforcement action by the OFT under the CA98 is more appropriate than licence enforcement action, bearing in mind Postcomm's duties under section 3 and section 5 of the PSA 2000.
- Inform the OFT of its views when notified of a CA98 or FTA73 investigation that directly involves Consignia, or when a case may have an impact upon the provision of a universal postal service in the UK, or may involve a definition of the universal postal service in the UK.
- Take into account the views of the OFT as to the analytical approach to take concerning any competition issue in respect of which it takes action under PSA 2000. Postcomm will consult with the OFT if it is minded to disagree with any material aspects of its advice.
- Refer to the OFT complaints concerning competition matters to which Postcomm cannot respond under its powers.
- Inform the OFT of cases in the postal services market which it believes may have consequences for related markets.
- Continue to take part, as an 'observer' member, in the regular Concurrency Working Party meetings.

The OFT's Responsibilities, in Relation to this MoU

A16. In relation to the postal services sector and Consignia, the OFT undertakes to:

- Notify Postcomm prior to any investigations of suspected infringements of the Chapter I and/or Chapter II prohibition under the CA98, or any investigations into potential monopoly situations under the FTA73.
- Take account of the any views of Postcomm when an investigation directly involves Consignia, when a case may have an impact upon the provision of a universal postal service in the UK, or may involve a definition of the universal postal service in the UK. The OFT will also further consult Postcomm if minded to disagree with certain aspects of its advice.
- Inform Postcomm of the issue of any written notices that the OFT proposes to make a decision that the Chapter I or Chapter II prohibition has been infringed or requests for information under sections 26, 27 and 28.
- Inform Postcomm prior to taking any decision under the CA98 that the Chapter I or Chapter II prohibition has been infringed, or making any reference to the Competition Commission relating to a suspected monopoly situation under the FTA73.
- Arrange to meet with Postcomm at an early stage in any investigation under the CA98, with a view to reaching a decision on the relevant legislation under which to proceed (i.e. PSA 2000 or CA98)
- Consult Postcomm whenever it considers that licence enforcement action is more appropriate than enforcement action under the CA98.
- Inform Postcomm of cases in other markets which it believes may have consequences for postal services markets.

Disclosure of Confidential Information

A17. Each party will respect the confidentiality and/or secrecy of information exchanged which has been obtained as a result of the other party's statutory powers or other legal obligations and relates to the affairs of any individual, business or undertaking. Each party will comply with any non-disclosure obligations that are binding on the other, in particular those set out in section 133 of the FTA73, sections 55 and 56 CA98, section 119 and Schedule 7 of the PSA 2000, article 20 of Council Regulation (EEC) 17/62 and article 17 of Council Regulation (EEC) No 4064/89.

Review and Implementation

A18. This MoU comes into effect immediately. The MoU and the working practices set out within will be reviewed as the need arises, or by written request of either party. Any changes will be subject to the agreement of both parties.