

Statement of policy in relation to financial penalties

A decision by the Postal Services Commission

April 2008

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Summary

- S1. The Postal Services Act 2000 (the Act) gives the Postal Services Commission (Postcomm) a discretionary power to impose a financial penalty, of a reasonable amount, on a licence holder that has contravened or is contravening one or more of its licence conditions.¹ The Act requires Postcomm to prepare and publish a statement of policy in relation to the imposition of penalties and the determination of their amount. Postcomm must have regard to its statement of policy when imposing a penalty. In February 2002 Postcomm published its first statement of policy in relation to financial penalties.²
- S2. In 2006, in light of its experience gained in applying its original policy, Postcomm decided to review that policy. In August 2007, Postcomm published a consultation paper setting out its proposals for a revised statement of policy. The consultation paper contained a new proposed policy.³ Postcomm received four responses to this consultation.
- S3. This document summarises some of the key issues raised by stakeholders in response to the consultation and our analysis of these issues. The actual responses are available on Postcomm's website. As a result of the consultation, Postcomm has decided to make minor amendments to the proposed policy. The amended policy is attached to this paper at **Annex A**.⁴

¹ On the coming into force of relevant provisions in the Consumers, Estate Agents and Redress Act 2007 (CEAR), the Postal Services Act 2000 will be amended to extend Postcomm's discretionary power to impose a financial penalty, of a reasonable amount, to circumstances where a licence holder has contravened or is contravening an obligation imposed by virtue of section 25(5) of CEAR or the obligation to provide information in the new section 61A of the Postal Services Act 2000 or an obligation imposed under section 43, 46 or 47 of CEAR.

² Throughout this document, we refer to this policy as "the **original policy**".

³ Throughout this document, we refer to this policy as "the **proposed policy**".

⁴ Throughout this document, we refer to this policy as "the **revised policy**".

1. Postcomm's approach and decision

Purpose of this document

- 1.1. This document summarises some of the key issues raised by stakeholders in response to the consultation document published on 8 August 2007, Postcomm's analysis of these issues and the reasoning behind Postcomm's subsequent decision to adopt the revised policy.
- 1.2. Annexed to this document is the revised policy (see **Annex A**). This revised policy takes effect immediately and becomes Postcomm's current statement of policy in relation to financial penalties.

Context

- 1.3. In February 2002, Postcomm published its original policy, which explains the factors Postcomm will have regard to in deciding whether it is appropriate to impose a penalty and the factors it will, or may, consider in deciding the amount of any penalty. Postcomm must have regard to its statement of policy when it imposes a penalty and it is therefore important that the policy is revised from time to time to ensure that it reflects Postcomm's experience and the changing postal market.
- 1.4. Since February 2002, Postcomm has imposed four financial penalties on Royal Mail, three of which were imposed in 2006. One was overturned on appeal. There have also been a number of significant changes in the postal services market over recent years including the full opening of the market in January 2006 and the adoption of a new price control for Royal Mail in May 2006.
- 1.5. In August 2007, Postcomm published a consultation paper setting out its proposals for a revised policy. Postcomm proposed three key revisions:

- highlight the underlying objective or objectives to be achieved by the imposition of a penalty;
- reinforce the need to weigh relevant considerations; and;
- indicate in generic terms the factors that may generally be expected to be relevant when determining the amount of the penalty.

1.6. Both the original policy and the proposed policy refer to Postcomm's power to impose a penalty on a licence holder who has contravened, or is contravening, a condition of its licence, as provided for in section 30 of the Act. Section 30 of the Act will be amended on the coming into force of relevant sections of the Consumers, Estate Agents and Redress Act 2007 (CEAR). Once amended, the Act will provide for the imposition of financial penalties where a licence holder has contravened, or is contravening, a "relevant requirement". A "relevant requirement" includes a condition of a licence holder's licence, an obligation imposed under the new section 61A in the Act, an obligation imposed by virtue of section 25(5) of the CEAR and an obligation imposed under section 43, 46 or 47 of that Act.

1.7. Since the consultation document was published in August 2007, Postcomm has decided that its policy should refer to "relevant requirements", rather than just licence contraventions. Once section 30 of the Act is amended, the policy will apply to all forms of contravention in the definition of "relevant requirement" in the Act. Since this change to the policy occurs by operation of law, i.e. the amendment to section 30 of the Act, and is not as a result of Postcomm exercising its discretion in relation to the content of a policy, Postcomm has concluded that it does not need to re-consult on the amendment of the proposed policy to incorporate references to a "relevant requirement". The revised policy therefore incorporates the necessary amendments.

Responses to the consultation paper

- 1.8. Four responses were received to the consultation from the following organisations:
- Communication Workers' Union (CWU)
 - DX Network Services / Secure Mail Services
 - Postwatch
 - Royal Mail plc
- 1.9. All the responses have been reviewed and fully considered. Some of the significant points made are discussed in the section below. All non-confidential responses are available on our website.

Postcomm's decision

- 1.10. Following consideration of these responses Postcomm has decided to make the following changes to the proposed policy (as reflected in the revised policy):
- the addition of a further factor at paragraph 17 in the proposed policy (paragraph 20 in the revised policy) such that if the contravention was deliberate or premeditated by the licensee the imposition of a penalty by Postcomm will be more likely than not;
 - the removal of public marking and censure as a distinct objective (paragraph 10 in the proposed policy and paragraph 13 in the revised policy);
 - the addition to paragraph 26 (paragraph 29 in the revised policy) that *"if Postcomm considers that a precedent set under equivalent provisions for other utilities and public services is relevant to a decision in a particular case, Postcomm will explain why it thinks the precedent is relevant"*.

- the incorporation of references to contravention of a “relevant requirement”, for the reasons set out in paragraph 1.7 above.

2. Postcomm's analysis of responses from stakeholders

Introduction

2.1. Below we have summarised six key issues raised by stakeholders in response to the consultation document published on 8 August 2007, Postcomm's analysis of these issues and the reasoning behind Postcomm's subsequent decision to adopt the revised policy.

Summary of responses

2.2. The following issues are discussed below:

- *The proposed policy is too flexible;*
- *The proposed policy should consider whether the contravention was deliberate or premeditated;*
- *A more quantitative approach is needed in the proposed policy;*
- *The objective of financial penalties;*
- *The public censoring of contraventions; and*
- *The use of precedents when determining the amount.*

The proposed policy is too flexible

2.3. Royal Mail claims that the proposed policy is too general and that Postcomm is "*failing to fulfil its statutory duty of publishing a policy which gives meaningful guidance*". Royal Mail also states that the degree of flexibility the proposed policy allows, provides Postcomm "unlimited latitude" and does not give clarity to the industry.

2.4. The CWU supports this argument claiming that the proposed policy offers insufficient guidance to licence holders as to the application and

extent of potential financial penalties. It states that “*conferring this degree of flexibility onto the regulator to impose penalties will serve to increase uncertainty for licence holders*”.

Postcomm’s response

- 2.5. Section 31 requires Postcomm to prepare and publish a “*statement of policy in relation to the imposition of penalties and the determination of their amount*”. It does not stipulate what that policy should contain or make any reference to the objective of the policy. Postcomm is of the view that the revised policy does comply with Section 31 of the Act.
- 2.6. Postcomm does not consider that there is unlimited latitude either in relation to imposing a penalty or deciding the amount. There are the restrictions placed on Postcomm by the Act, but Postcomm does have a very broad discretion in relation to the imposition of penalties and the amount. As a result, there is a need to ensure a degree of flexibility in order to cater for all the situations regarding contraventions that may arise and which may not be foreseen at the time the policy is finalised.
- 2.7. We note that the Oxford English Dictionary defines “policy” as “*a course or principle of action adopted or proposed by an organisation or individual.*” Postcomm’s revised policy sets out the *course or principle of action* Postcomm will have regard to in deciding whether to impose a penalty and, if so, determining the amount.
- 2.8. The revised policy aims to give an indication as to what factors may / might not be taken into account if a contravention occurs. Contraventions can relate to matters as diverse as, for example, the provision of information to Postcomm, the provision of the universal service (Royal Mail) and mail integrity so the revised policy attempts to cater for a variety of possible scenarios. It is not possible to set out, in advance of a particular contravention, which factors will be considered, because it will depend on the circumstances of the case. Postcomm

has a very broad discretion in relation to the imposition of a penalty, so its policy must take that into account. The reasoning behind a decision to impose a penalty and the determination of the amount will be set out in the relevant penalty notice.

- 2.9. Emphasis has been placed on the need to ensure flexibility to meet the wide variety of contraventions that may arise. We would hope that the revised policy reduces the likelihood of the possible need to depart from it. If, however, such a situation did arise, Postcomm would consider the relevant case law on the issue of departure and act accordingly and would give a reasoned explanation for any departure.

The proposed policy should consider whether the contravention was deliberate or premeditated

- 2.10. DX Network Services / Secure Mail Services said that they are sure that there are many situations in which a financial penalty is not the most effective means of penalising licence infringements and where the postal market would be better served by other types of action and that financial penalties would appear to be best suited to situations in which the licensee had deliberately sought financial gain by means of the licence infringement.

Postcomm's response

- 2.11. Postcomm recognises that if a licensee has deliberately sought financial gain, this is likely to be a relevant consideration in determining the amount of the penalty. Paragraph 23 of the proposed policy referred to "whether the contravention was accidental or outside the control of the licensee" and paragraph 24 referred to "whether the licensee has made, could make or could have made any gain (financial or otherwise)".
- 2.12. However, on reflection Postcomm accepts that a reference to "a deliberate contravention" would add clarity. Postcomm has therefore

added to the revised policy such that it also states that when a contravention is found to be deliberate or premeditated it is more likely than not that Postcomm will impose a financial penalty (adding to what was paragraph 17 of the proposed policy and is now paragraph 20 of the revised policy).

A more quantitative approach is needed when determining the amount

2.13. Royal Mail questions the approach adopted by Postcomm in the proposed policy, stating that Postcomm's approach will rely almost entirely on qualitative assessment. It believes that the use of generic factors "*represents a backward step from the existing policy and confuses issues which go to the question of appropriateness, to the questions of aggravation and mitigation, and to both factual and behavioural considerations.*" Royal Mail claims that the proposed policy does not explain the intended treatment of duration which it claims other regulators take into consideration at a second clearly defined stage.

Postcomm's response

2.14. The proposed policy set out factors that are likely to be relevant to decisions (depending on the particular circumstances). One such factor (paragraph 24 of the proposed policy – Assessment of the amount of the penalty) is, for example, "whether the licensee had made, could make, or could have made any gain (financial or otherwise)". If this factor is to be considered in a particular case and there is quantitative evidence, Postcomm will consider it. The nature of the information that Postcomm will take into account will however depend on the circumstances of the case.

2.15. Postcomm states (paragraph 13 of the proposed policy) that "*Postcomm will act in accordance with its most recently published Code of Practice insofar as adherence to the Code is consistent with*

this statement of policy'. The current version of the Code provides that one of the general principles Postcomm will apply in the discharge of its functions is to “*seek to establish a firm factual basis for its decisions and advice*” (paragraph 11 of the Code).

- 2.16. When drafting the proposed policy, Postcomm deliberately chose to remove the separate consideration of aggravating and mitigating circumstances in determining the amount of a penalty. Aggravating and mitigating factors are now listed in the proposed policy within the overall list of factors that are likely to be relevant in assessing the amount of a penalty.
- 2.17. The approach in the proposed policy required a consideration of all relevant factors “in the round” and hence factors that might be categorised as aggravating and mitigating factors would also be considered in the round at this stage as they tend to be opposite sides of the same coin. Placing aggravating factors and mitigating factors in separate sections in the policy would be an artificial distinction. It is Postcomm’s view that without a starting amount, there is nothing to add or take away from. It is not possible to consider aggravating factors and mitigating factors (and the resulting increase or decrease in a penalty) separately, when there is no starting amount.
- 2.18. The Office of Rail Regulation (ORR) has consulted on a new Economic Penalties Statement.⁵ In its consultation it is proposing to merge the sections on adjustments for mitigating and aggravating factors. It has found that these factors are two sides of the same coin and that in practice it considers the issues together. This would mean, for example, that it would consider the absence of internal procedures to prevent repeated infringements alongside steps taken by the licence holder to minimise the risk of the breach occurring. It is also proposing to remove the reference to a “starting point” at the beginning of the

⁵ ORR - Consultation on penalties statement: reasons for proposed changes (October 2007)

section on proportionality as in practice it has found this does not reflect the way in which it assesses the level of penalty and any benefits the licence holder has obtained as a result of non-compliance. It considers that it is better to have regard to the various factors in setting the level of penalty than to have a “starting point” figure.

Objective of financial penalties

- 2.19. Royal Mail claims that the proposed policy will not impede Postcomm from imposing a financial penalty under any circumstances. It states that Postcomm should indicate where grounds may exist where a penalty would not be appropriate. Royal Mail however, accepts that incentivising compliance / deterring non-compliance is important, stating that *“incentivising compliance / deterring non-compliance must be a primary, perhaps the primary, objective of a penalties regime”*.
- 2.20. The CWU felt that there should be a limit on the extent to which financial penalties can be used to deter other licence holders. It was concerned by the proposal to detach the size of the financial penalty from the impact of the contravention in terms of the benefit to the contravening licence holder and the burden imposed on others. It argued that financial penalties should be used proportionately in a manner consistent with Postcomm’s statutory duties.

Postcomm’s response

- 2.21. The underlying objective to be achieved by the imposition of a penalty is the furtherance of Postcomm’s statutory duties by providing an incentive to compliance (future general compliance) and a deterrent to non compliance and publicly marking and censuring the contravention.
- 2.22. Paragraph 9 of the proposed policy (paragraph 12 of the revised policy) states that *“Postcomm will not impose a penalty if to do so would result in Postcomm acting inconsistently with any of its statutory duties”*.

Whereas, paragraph 19 (paragraph 22 of the revised policy) states that *“The presence of one or more of the following factors will make the imposition of a penalty by Postcomm less likely than not: (i) the contravention is or was trivial (ii) the contravention resulted from circumstances outside the control of the licensee or (iii) the licensee has been subject to a judicial process by another body in respect of the facts giving rise to the contravention”*. The power set out in section 30 of the Act gives Postcomm discretion whether or not to impose a penalty and Postcomm recognises this in paragraphs 16 to 20 of the proposed policy (paragraphs 19 to 23 of the revised policy).

Public censoring of contraventions

2.23. Royal Mail contends that *“Postcomm tortures the meaning of “penalty” in order to seek to justify, by reference to its statutory functions, the introduction of a concept of public censure that has no related incentive (or any other) purpose”*, and refers to the following quote from Postcomm’s consultation paper (August 2007):

“The emphasis placed in the original policy on seeking to provide incentives to comply with licence conditions can be used to negate the implication of the wording, on the face of the Act, that Parliament intended licence contraventions to be publicly marked and censured by the application of a penal measure”.

Royal Mail claims that Postcomm *“errs in law in purporting to identify an objective of public censure which exists independently of any incentive and deterrence effect.”*

Postcomm’s response

2.24. The Act clearly envisages public censure once Postcomm is satisfied that a licensee has contravened or is contravening a condition of its licence (or relevant requirement once the relevant section of the Act is amended by CEAR) and intends to impose a penalty. Section 32 of the Act requires Postcomm to give notice of the proposed penalty and

to publish it in such manner as Postcomm considers appropriate for the purpose of bringing the matters in it to the attention of persons likely to be affected by them. There is the same publication requirement in relation to the final penalty notice and varying the proposed amount of any penalty. In practice, Postcomm publishes the notices proposing a penalty and confirming a penalty on its website.

- 2.25. As far as the objective in imposing a penalty is concerned, Postcomm is seeking to further its statutory duties, in particular, in relation to furthering the interests of postal users (section 5(1) of the Act) by:
- incentivising future compliance and deterring non-compliance. This will further the interests of postal users by encouraging compliance on the part of licensed operators and, as a result, giving users confidence in the market and/or
 - publicly marking and censuring the contravention in question. This will further the interests of postal users by incentivising future compliance and deterring non compliance and providing users with information about non-compliance by licensed operators. In particular, such information is relevant and useful, in that it enables users are to make informed decisions about which licensed operators to use,.
- 2.26. Postcomm therefore does not agree that there was any error in law in its proposed policy. Nevertheless, Postcomm accepts the point that public censure should be identified as part of the incentive and deterrence objective, and not as a separate issue. If Postcomm were to impose a penalty with a view to punishing conduct, it would in any event also be aiming to incentivise compliance or to deter non-compliance by the offending licensee or other licensees, both at the time of imposition and /or in the future. In other words, there ought to be no circumstances where Postcomm would want to punish a licensee by a penalty whilst not also wanting to incentivise compliance or deter

non-compliance. Postcomm has therefore removed public marking and censure as a distinct objective in the revised policy because it is included in the incentivising and deterring objective.

Use of precedents

2.27. Royal Mail claims that the other regulators, namely Office of Communications (Ofcom), ORR and the Water Services Regulation Authority (Ofwat), refer either to the need for consistency of application, as between cases, or to relevant precedent fines whereas Postcomm does not. Royal Mail states that whilst it “*understands the limitations that apply to such precedents, the fact that other regulators specifically allow for it suggests it has a role in ensuring consistency of treatment and informing the assessment of proportionality*”.

Postcomm's response

2.28. Not all the other regulators refer to consistency of application or relevant precedent fines in their policies. Ofcom and Ofwat are the only regulators who make direct reference to considering precedents. They all, however, state that they will take into account the particular facts and circumstances of the contravention.

2.29. Ofcom states that in general it is likely first to consider the seriousness of the contravention, *any precedents set by previous cases* and the need to ensure that the threat of penalties will act as a sufficient incentive to comply in determining the starting figure of any penalty. It states that certain specific criteria may be relevant to adjust the starting figure of any penalty depending on the type of contravention.

2.30. Ofwat states that in deciding whether to impose a penalty, each enforcement authority will take account of the particular facts and circumstances of the case under consideration. Once it has decided that a penalty should be imposed, it will consider the appropriate level

taking into account a number of factors. It states that “factors relevant to decisions on the broad level of a penalty will include *precedents set under equivalent provisions for other utilities and public services*”.

- 2.31. ORR states that in deciding whether it would be appropriate to impose a penalty or include a reasonable sum it will take full account of the particular facts and circumstances of the contravention. It should be proportionate to the nature and severity of the breach. It does not mention considering precedents.
- 2.32. The Office of Gas and Electricity (Ofgem) also states that in deciding whether it would be appropriate to impose a penalty, the Authority will take full account of the particular facts and circumstances of the contravention under consideration. It does not mention considering precedents.
- 2.33. Postcomm however is of the view that if there is an appropriate precedent Postcomm should consider it, but it will consider each situation on a case by case basis. This additional consideration has therefore been added to the revised policy at paragraph 29.

ANNEX A – THE REVISED POLICY

BACKGROUND

1. The Postal Services Act 2000 (the Act) provides that the Postal Services Commission (Postcomm) may impose financial penalties on holders of licences granted under the Act who are contravening or have contravened the conditions of their licences.
2. On the coming into force of section 25, and Schedule 2, of the Consumers, Estate Agents and Redress Act 2007 (CEAR), the Act will provide that Postcomm may impose financial penalties on holders of licences granted under the Act who are contravening or have contravened a “relevant requirement”.
3. A “relevant requirement“ will be defined in section 22(5) of the Act. It will mean, in relation to a licence holder, (a) a condition of the licence holder’s licence, or (aa) an obligation imposed under section 61A of the Act, or (b) an obligation imposed on the licence holder by virtue of section 25(5) of CEAR, or (c) an obligation imposed under section 43, 46 or 47 of that Act (complaints).
4. References in this Policy to “relevant requirement” mean
 - a licence condition, if section 30 of the Act has not been amended by CEAR, or
 - “relevant requirement” as defined by section 22(5) of the Act if the relevant sections of the Act have been amended by CEAR”.
5. The Act stipulates that the amount of a penalty must be reasonable and that it must not exceed ten per cent of the turnover of the licence holder, determined in accordance with an order made by the Secretary of State⁶.
6. The Act also provides that Postcomm may impose a financial penalty on a licence holder irrespective of whether Postcomm has made a final or provisional order in respect of the same licence contravention. Once the relevant section of the Act has been amended by CEAR this provision will apply irrespective of whether Postcomm has made a final or provisional order in respect of the same relevant requirement contravention. Final and provisional orders are made for the purpose of securing compliance with licence conditions⁷. Once the relevant sections of the Act have been amended by CEAR, such orders will be

⁶ Section 30(2) of the Act. The Postal Services Act 2000 (Determination of Turnover for Penalties) Order 2001 SI 2001 No 1135 as amended by The Postal Services Act 2000 (Determination of Turnover for Penalties) (Amendment) Order 2002 SI 2002 No 125.

⁷ Sections 30(3), 22 and 23 of the Act.

made for the purpose of securing compliance with the relevant requirement.

7. Any penalty received by Postcomm must be paid into the Consolidated Fund⁸.
8. The Act requires Postcomm to prepare and publish a statement of policy in relation to the imposition of penalties and the determination of their amount⁹. In deciding whether to impose a penalty, and in determining the amount of any penalty, Postcomm shall “have regard” to the statement of policy most recently published at the time when the contravention concerned occurred¹⁰.
9. The Act enables Postcomm to revise the statement of policy and provides that, when it does so, it must publish the revised policy¹¹. When revising the statement of policy, Postcomm must consult Postwatch¹² and other people and businesses it considers appropriate to consult¹³. This statement has been revised in accordance with the provisions of the Act on financial penalties and replaces the previously published policy of February 2002 and is effective immediately.
10. The imposition of financial penalties is a function that Postcomm is required to exercise in accordance with its statutory duties. These duties may be summarised as:
to exercise its functions –
 - in the manner which it considers is best calculated –
 - to ensure the provision of a universal postal service¹⁴,
 - to further the interests of users of postal services, wherever appropriate by promoting effective competition¹⁵, and having regard to the interests of specified customer groups¹⁶, and
 - to promote efficiency and economy on the part of postal operators¹⁷, and
 - having regard to the need to ensure that licence holders are able to finance the activities authorised or required by their licences¹⁸.

⁸ Section 124(3) of the Act. The Consolidated Fund is the government's current account, through which most government payments and receipts pass.

⁹ Section 31(1) of the Act.

¹⁰ Section 31(2) of the Act.

¹¹ Section 31(3) of the Act.

¹² The Act also established the Consumer Council for Postal Services (“Postwatch”) as the body to represent the interests of postal users.

¹³ Section 31(5) of the Act.

¹⁴ Section 3 of the Act.

¹⁵ Section 5(1) of the Act.

¹⁶ Section 5(2) of the Act.

¹⁷ Section 5(3) of the Act.

¹⁸ Section 5(4) of the Act.

ABILITY TO IMPOSE A PENALTY

11. Before Postcomm exercises its discretion whether or not to impose a financial penalty, Postcomm will first satisfy itself either:
- that there has been a contravention of a relevant requirement; or
 - that there is a contravention of a relevant requirement.

GENERAL APPROACH

Postcomm's statutory duties

12. Postcomm will not impose a penalty if to do so would result in Postcomm acting inconsistently with any of its statutory duties.

The objective in imposing a penalty

13. The underlying objective Postcomm will seek to achieve by the imposition of a penalty is the furtherance of its statutory duties by:
- providing an incentive for general future compliance and a deterrent to non compliance by the contravening licensee and/or other licensees both in relation to the specific type of contravention and/or other contraventions more generally.

Adherence to Postcomm's Code of Practice

14. In May 2002, Postcomm published its Code of Practice governing the discharge by Postcomm of its functions ("Code of Practice")¹⁹. Postcomm is required under the Act when exercising its functions, to have regard to the provisions of the Code of Practice.
15. The Code of Practice provides that one of the general principles to be applied by Postcomm in the discharge of its functions is to act in accordance with good regulatory practice²⁰.
16. In exercising its functions in relation to financial penalties, Postcomm will act in accordance with its most recently published Code of Practice insofar as adherence to that Code is consistent with this statement of policy.

¹⁹ In accordance with section 50(1) of the Act.

²⁰ Paragraph 11(vii) of the Code of Practice.

Consideration of the facts and circumstances of the contravention

17. Postcomm will seek to ensure that the imposition of a penalty is appropriate and the amount of that penalty is reasonable and proportionate, given the particular facts of the case and the underlying objective in imposing the penalty.
18. In deciding whether it is appropriate to impose a penalty and in determining the amount of that penalty, Postcomm will take full account of the particular facts and circumstances of the contravention and of any representations made to it by interested parties.

ASSESSMENT OF WHETHER TO IMPOSE A PENALTY

19. In deciding whether it would be appropriate to impose a financial penalty Postcomm will have regard to its general approach set out in paragraphs 12 to 18.
20. The presence of one or more of the following factors will make the imposition of a penalty by Postcomm more likely:
 - the contravention is or was serious; or
 - the contravention was deliberate or premeditated by the licensee; or
 - the contravention should have been apparent to a reasonably diligent licensee; or
 - the contravention has damaged, may be damaging or might have been capable of damaging the interests (financial or otherwise) of third parties; or
 - the contravention follows a series of similar contraventions which have not previously resulted in a penalty; or
 - the contravention relates to an issue of public importance, such as (but not limited to) the provision of the universal service, the integrity of mail or the development of competition.
21. If none of the above factors is present it does not necessarily mean that a penalty will not be imposed.
22. The presence of one or more of the following factors will make the imposition of a penalty by Postcomm less likely:
 - the contravention is or was trivial; or

- the contravention resulted from circumstances outside the control of the licensee; or
- the licensee has been subject to a judicial process by another body in respect of the facts giving rise to the contravention.

Other considerations

23. If Postcomm considers that there are other factors, not referred to above, that are relevant to its decision whether it would be appropriate to impose a financial penalty, Postcomm will explain what those are in each case.

ASSESSMENT OF THE AMOUNT OF A PENALTY

24. Once it has been decided that a penalty should be imposed, Postcomm must then consider what would be a reasonable amount, given the particular circumstances of the case. Again, Postcomm will have regard to its general approach, set out in paragraphs 12 to 18.
25. A number of issues are likely to be relevant to the decision as to what would be a reasonable penalty in a particular case. These issues will vary from case to case. One or more of the generic factors which may be relevant in some or all cases, either together with other factors or not, are described below. These factors are not exhaustive.

The Nature of the Contravention

26. How serious the contravention was or is; whether the contravention was part of a series of similar contraventions; whether the contravention was accidental or was outside the control of the licensee; the duration of the contravention, or other similar issues.

The Effect of the Contravention

27. Whether there was, may be or might have been any impact (financial or otherwise) on third parties; whether the licensee has made, could make or could have made any gain (financial or otherwise); any actual or potential impact on the market as a result of the contravention, or other similar issues.

Behavioural issues

28. What procedures the licensee had in place to avoid the contravention (for example, the robustness of the licensee's compliance regime or other monitoring mechanisms); what steps, if any, have been taken to avoid the contravention; what the role of senior managers has been; what steps, if any, the licensee has taken once it became aware of the contravention (for example, concealing it, reporting it, or not taking proactive action once Postcomm had identified a breach); what

compensation, if any, has been provided to those affected; whether there has been any lack of co-operation or deliberate frustration during the course of the investigation, or other similar issues.

Other considerations

29. If Postcomm considers that a precedent set under equivalent provisions for other utilities and public services is relevant to a decision in a particular case, Postcomm will explain why it thinks the precedent is relevant.
30. If Postcomm considers there are other factors, not referred to above, that are relevant to its determination of the amount of the penalty, Postcomm will explain what those are in each case.
31. Having considered the relevant factors in relation to the particular facts and circumstances of the contravention under consideration, Postcomm will determine a reasonable level for the financial penalty.

REVIEW OF THE PENALTY

32. After assessing the proposed amount of the penalty, Postcomm will take the following steps:
 - review its decision to impose a penalty generally, with a view to considering whether it is appropriate in the circumstances of the case;
 - review the amount of the penalty generally, with a view to considering whether it is a reasonable and proportionate means of achieving the objective or objectives which Postcomm seeks to achieve by its imposition;
 - ensure that the penalty is within the ten percent of turnover limit²¹; and
 - ensure that Postcomm is not, by imposing a financial penalty, acting inconsistently with any of its statutory duties.

PAYMENT OF THE PENALTY

33. Postcomm will then determine the manner in which, and place at which, the penalty should be paid.

²¹ Section 30(2) of the Act. The Postal Services Act 2000 (Determination of Turnover for Penalties) Order 2001 SI 2001 No 1135 as amended by The Postal Services Act 2000 (Determination of Turnover for Penalties) (Amendment) Order 2002 SI 2002 No 125.

REVISION OF THE STATEMENT OF POLICY

34. Postcomm will consider revising this statement of policy in the way provided in the Act in the light of experience of its application and/or on receipt of a request from Postwatch or any other person having an interest in it that it should be reviewed.

INTERPRETATION

35. In this statement of policy –
- (i) words and expressions that are defined in Parts I and II of the Act shall have the same meanings as in those Parts, notwithstanding that a definition in either of those Parts may be framed so as to apply only for the purposes of certain sections of those Parts, and
 - (ii) “Postwatch” means the Consumer Council for Postal Services established under section 2 of the Act and any body which succeeds Postwatch as having responsibility for the discharge of the functions exercisable by Postwatch under the Act or under any licence granted under the Act.